CONCERNS AND FREQUENTLY ASKED QUESTIONS ABOUT A NEW PAROLE AUTHORITY IN THE DISTRICT OF COLUMBIA:

REVOCATION OF PAROLE AND SUPERVISED RELEASE

May 10, 2021

The United States Parole Commission (USPC) is scheduled to close on November 1, 2022. Legislation introduced by Congresswoman Eleanor Holmes Norton will give the people and the government of the District of Columbia the opportunity to design, from the ground up, an entirely new, locally-controlled parole and supervised release decision-making authority. This new parole authority will need to be in place, staffed and organized, sufficiently in advance of November 1, 2022 to enable a smooth handoff to it from the USPC of hundreds of cases of parole, violations of conditions of release, parole termination and medical parole.

But what will this new parole authority look like, and how it might benefit District of Columbia residents? What would be its guiding principles? How would it operate? Who would be on its staff?

Over the past two years, members of the D. C. Reentry Task Force and of the ReThink Justice DC coalition have deliberated over these and other questions. We have contributed to the "robust stakeholder and community engagement process" urged upon the District by the D. C. Task Force on Jails and Justice[1] with our research, a statement of principles, and our evolving recommendations. Our collective works may be found on the ReThink Justice DC's website.[2]

On April 7, 2021, we published a concept paper, *New Parole Authority for the District of Columbia*, in which we describe a District of Columbia Parole and Supervised Release Authority. This new parole authority would be capable of contributing to the District's goals of reducing incarceration, increasing public safety, and ensuring local control, transparency, and accountability.[3]

We are now publishing papers that address some of the concerns and specific questions that have been raised regarding the new parole authority in more detail than was possible in the short concept paper. The first in our series dealt with the release decision for parole-eligible individuals. **This second paper addresses concerns about decision-making when an individual is alleged to have violated conditions of parole release or supervised release, either by failing to abide by rules and conditions of release or by committing a new misdemeanor or felony offense.**

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[1] District Task Force on Jails and Justice report, *Jails and Justice: Our Transformation Starts Today* – Phase II Findings and Implementation Plan (February 2021), Recommendation 9-10 at p. 72. (Hereafter, *Jails and Justice: Our Transformation Starts Today*.)

[2] https://rethinkjusticedc.org/category/local-control-of-parole

[3] *Jails and Justice: Our Transformation Starts Today - Phase II Findings and Implementation Plan*, op. cit.

Concern # 1 Current legal proceedings to revoke parole or supervised release are unfair to the individual on supervision and do not afford due process to the individual who may lose his or her liberty.

This is an important and frequently-expressed concern. To address this concern, we believe it essential that enabling legislation be written to guarantee specific due process rights for all individuals before the parole authority accused of violating conditions of parole or supervised release. Rights which should be enumerated include but are not limited to:

1. A timely written notice of revocation that details the alleged violations in plain language. Usually this is provided by the Community Service Officer in the Alleged Violations Report (AVR). The parole authority can decline to issue a warrant or summons if an AVR fails to provide sufficient details to provide fair notice to the individual.
2. A right to the assistance of an attorney or non-attorney advocate of the returning citizen's selection.
3. A probable cause hearing within 72 hours for individuals in custody following an arrest on a warrant and within 10 business days for individuals who are issued a summons. The returning citizen can waive his or her right to a hearing on probable cause only on advice of counsel.
    - It could be appropriate for an individual to waive the right to a probable cause hearing (or to a full hearing) in situations in which counsel or the individual's advocate are negotiating an agreed modification to the supervision plan with CSOSA by the time of the probable cause hearing, particularly if the individual has been detained. Settlement negotiations leading to release and modification of supervision in the community are to be encouraged by the new parole authority. However, no individual should be put in the position of waiving a probable cause hearing except on the advice of counsel or the individual's advocate.
4. The burden of proof required to sustain probable cause is a preponderance of the evidence presented. Hearsay evidence may be admitted or relied upon to support a finding of probable cause only if the Hearing Officer finds that there is an independent indicium of reliability for the evidence.
5. A presumption of innocence prior to a conviction entered in a criminal court or before the full revocation hearing.
    - Enabling legislation should clearly state the practical implications of the presumption of innocence. New criminal charges should not be the sole basis for violating an individual unless and until the individual has been convicted of those charges in a competent criminal court.[4] Similarly, the parole authority should not take an individual into custody solely on the basis of a new criminal charge, but instead defer to the pre-trial detention decision of the trial court, where the individual has full due process protections including right to counsel. The parole authority may issue a detainer bringing the individual before the parole authority when the criminal case is completed.
6. Disclosure of all evidence to be presented against the returning citizen prior to the full revocation hearing. The parole authority shall develop guidelines according to which information that is privileged or confidential may not be disclosed to the applicant or to outside parties.
7. The right to present supporting witnesses and to cross-examine the moving party's witnesses at the revocation hearing.
8. The right to obtain and present documentary evidence at the revocation hearing.

[4] Recommended by the Jails and Justice Task Force; see, *Jails and Justice: Our Transformation Starts Today*, Recommendation 9-7 at p. 70.

9. The burden of proof to demonstrate an actionable revocation violation should be a "clear and convincing" standard.[5]
10. A written summary of facts and rulings after completion of the full revocation hearing, with a notice detailing appeal rights and deadlines.
11. The right to appeal decisions of the parole authority that result in incarceration of the individual in certain circumstances.

    Specifically, the District of Columbia Parole and Supervised Release Authority provides that individuals who are found to have violated conditions of parole or supervised release by a three-member Release Review Panel have the right to a review or rehearing before the (proposed) five member Release Review Panel. In specific circumstances, an individual who is dissatisfied by the findings of the full Release Review Panel may appeal to the D.C. Court of Appeals.

    - To address concerns about a speculative influx of "automatic appeals" in every case in which the individual is dissatisfied with the outcome, we suggest that appeals from revocations of parole or supervised release be limited to critical issues affecting fairness or incarceration. Examples include: an allegation of a denial of due process protections specified in the enabling legislation; or, that the parole authority's findings were against the manifest weight of the evidence. We would limit appeals to cases in which the challenged decision resulted in additional incarceration. Thus, decisions modifying supervision requirements but do not increase incarceration, and which are likely to be the majority of the parole authority's decisions, would not ordinarily be appealable.[6]

Concern #2 Individuals charged with violating conditions of parole or supervised release are too often detained unnecessarily, and for too long, before their cases are resolved.

In FY 2018, the USPC revoked 635 individuals to reincarceration in the BOP. Detention during the pendency of hearings averaged 91 days and accounted for approximately 300-320 beds, or 15% of the jail's bed space.

To reduce jail incarceration, we propose:

1. That enabling legislation require that the paroling authority issue non-custodial summonses rather than arrest warrants for individuals who are alleged to have committed technical violations or who have been charged or convicted of a misdemeanor criminal offense. The parole authority may issue warrants only when the individual has a history of unexplained failures to appear, when the CSOSA Community Supervision Officers (CSO's) are unable to locate an individual, when an individual fails to respond to a summons, or where there are significant public safety concerns.[7]
2. That enabling legislation authorize the paroling authority to issue non-custodial summonses rather than arrest warrants for individuals who are alleged to have committed personal or felony crimes except when the individual has a history of unexplained failures to appear, when the CSO's are unable to locate an individual, when an individual fails to respond to a summons, or where there are significant public safety concerns.

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[5] Recommended by the Jails and Justice Task Force see, *Jails and Justice: Our Transformation Starts Today,* Recommendation 9-6 at p. 69.

[6] The United States Supreme Court recognized different fact-finding processes and due process protections in the initial or first step of a violation hearing and the second, "dispositional" step, *Morrissey v. Brewer* 408 U. S. 471, 486-487.

[7] Consistent with *Jails and Justice: Our Transformation Starts Today,* Recommendation 9-9 p. 71, but applies to misdemeanor cases and does not exclude any category of rule-breaking or offense. The exception for instances when there may be "significant public safety concerns" allows the parole authority to issue a warrant in any case where there is an indication of a risk to anyone's safety. Also, consistent with Principle for the Establishment of a Local Paroling Authority #8, p. 4

3. Enabling legislation should require that, in any case in which an alleged violation is based on an arrest or prosecution for a new crime, the parole authority will defer to the pre-trial detention decision of the criminal court having jurisdiction over the alleged criminal case.
    - In essence, if a court in which an individual under supervision is charged with commission of a new crime admits the individual to pretrial release, the parole authority should not independently order detention. The parole authority should only be authorized to issue a "hold" which would return the individual to the parole authority after a disposition in the criminal case.
4. That enabling legislation require that the paroling authority schedule a revocation hearing within 75 days of the entry of a finding of probable cause for individuals not in custody and 30 days for individuals in custody. The parole authority should be authorized to grant one 15 day extension for cause or when by agreement of the parties.
5. Enabling legislation should authorize the parole authority to hold the equivalent of a pretrial settlement conference, either at the mutual request of CSOSA and the individual or the individual's counsel or advocate, or at the request of the individual or the individual's advocate upon the representation that they have prepared a plan or made arrangements which, if approved, would result in release from incarceration. The paroling authority should be authorized to hold such conferences at its discretion, to release detained individuals from jail custody following such a conference, and to conclude or continue the full revocation hearing for a status hearing.
    - This provision is intended to encourage proactive advocacy on behalf of detained individuals for modifications of conditions of release which the parties and parole authority could agree to such as increased supportive services or residential or treatment options.

Concern #3 Findings of a violation of conditions of parole or supervised release too often result in unnecessary, or unnecessarily long, periods of prison incarceration in the BOP.

The new parole authority will no longer impose long additional sentences on individuals who violate conditions of release. When a Hearing Officer finds that an individual has violated one or more conditions of release, the goal for the next step in the hearing is to adjust the individual's supervision plans to better address supervision compliance problems rather than to exact additional punishment. Individuals convicted of new crimes will be presumed to have been sufficiently punished by the trial court which will have considered prior convictions when imposing sentence. To implement this approach, we offer a set of proposals:

1. That the D. C. Code be amended to limit terms of supervised release to a maximum of two years,[8] thus reducing the period of time in which individuals are subject to violations for infractions which are not prosecuted as new crimes.
2. That enabling legislation prohibit the parole authority from ordering prison incarceration for technical violations of conditions of release.[9]
3. That enabling legislation prohibit revocations of parole or supervised release based solely upon new criminal charges that do not result in a conviction.[10]
4. In a sharp departure from current practices,[11] enabling legislation should require that in cases in which an individual under supervision is convicted and sentenced to prison for a new felony

[8] Duplicating Jails and Justice: Our Transformation Starts Today, Recommendation 9-2, p. 67

[9] Cross-reference: Jails and Justice: Our Transformation Starts Today, Recommendation 9-8, p. 70

[10] Directly taken from Jails and Justice: Our Transformation Starts Today, Recommendation 9-7, p. 70

[11] The USC currently holds revocation hearings based on new felony convictions toward the conclusion of the sentence imposed in the newer case. Individuals are demoralized to learn that they must serve additional time in

offense, the parole authority shall hold a revocation hearing prior to the expiration of the new felony sentence, rather than after the new sentence is completed. The focus of this hearing will be on the development of enhanced supervision requirements after the person's release from the felony sentence. The enabling legislation should also establish a presumption against adding additional incarceration to the sentence imposed by the trial court[12] which can be overcome only by clear and convincing evidence that the individual is unlikely to comply with reasonable conditions of parole or supervised release and that no reasonable option other than additional incarceration is adequate to insure the individual's future compliance with supervision terms.

5. Enabling legislation should eliminate forfeiture of street time credit following a parole revocation or a revocation of supervised release by striking relevant provisions of the Equitable Street Time Credit Amendment.[13]

Concern # 4 Revocation proceedings do not reflect the values or concerns of affected communities.

Among other steps which can be taken to ensure that the District of Columbia Parole and Supervised Release Authority reflects the values and concerns of affected communities:

1. Enabling legislation should set the qualifications and method of appointment of the five-member Release Review Panel. All members must be District of Columbia residents. No more than two Release Review Panel members are to be lawyers. (Two attorneys are to serve as legal counsel.) Panel members should be drawn from social and human services professionals, community advocates, reentry program administrators and community leaders with a demonstrated commitment to the fair and equitable administration of criminal justice.
2. Hearing Officers should include residents of Wards 5, 7 and 8 (those most heavily represented in the criminal system) and a mix of individuals with corrections experience, social and community service backgrounds, justice involved individuals and at least one experienced restorative justice facilitator.
3. Field Investigators who assist in revocation proceedings should be individuals who have counseled or mentored returning citizens, have worked with reentry organizations including faith-based programs, have knowledge of, and been advocates for individuals before, the District's social service and public assistance agencies, and who have strong ties to and lived experience in communities which are most heavily represented in the criminal system
4. The parole authority should encourage participation in the run-up to revocation hearings and in the dispositional portion of revocation hearings by staff from reentry service organizations and providers, CSOSA, MORCA and other relevant government agencies, community-based programs, relevant mental health, treatment and substance abuse experts, victims and those affected by crime, and community representatives.
5. Enabling legislation should create an independent, part-time six person Community Advisory Council to provide independent oversight over the whole parole process. The Community Advisory Council will have the authority to review records and decisions and to make recommendations to the parole authority, City Council, the Mayor and the public.

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prison for the parole violation after completing the criminal sentence imposed for the same underlying conduct. Jessica K. Steinberg and Kathryn V. Ramsey, 2018 Parole Practice Manual for the District of Columbia, George Washington University Law School (2018) at p. 20.

[12] Consistent with Principle for the Establishment of a Local Paroling Authority #15 p. 5

[13] See, Principle for the Establishment of a Local Paroling Authority #17, p. 5

Concern #5 The public and policymakers are uninformed about revocations of parole and supervised release and their impact on incarceration.

The District of Columbia Parole and Supervised Release Authority will be designed and resourced to provide elected leaders, government officials and the public straightforward qualitative and quantitative information about its operations and decisions:

1. The new parole authority should publish a monthly and annual tabulation of Alleged Violation Reports (AVR's) submitted by CSOSA showing underlying charges, the basis for the alleged violations, and the number of warrants and summonses issued.
2. The new parole authority should publish a monthly and annual tabulation of decisions in response to AVRs, to include: number and rate of return on summonses number of individuals who appeared after having been arrested on a warrant; number of individuals the parole authority released from detention prior to disposition of the case; number and outcomes of probable cause hearings, number of settled or negotiated outcomes; number and outcomes of the first portion of the revocation hearing; and, number and outcomes (by category) of the dispositional portion of revocation hearings, including the total amount of additional jail or prison incarceration ordered by the parole authority; and number of appeals and outcomes.
3. Enabling legislation should mandate that the parole authority collect and publish data and information about parole and supervised release revocations.

Comments are invited. This paper is a work in progress and may be revised.

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