

THE  
PUBLIC  
DEFENDER  
SERVICE

*for the District of Columbia*



CHAMPIONS OF LIBERTY

**Testimony of**

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before the

**Charles Colson Task Force on Federal Corrections**

on

Issues and Challenges with the Federal Corrections System

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Thank you for the opportunity to submit testimony on issues and challenges with the federal corrections system. I am Jamie Argento Rodriguez, Chief of the Community Defender Division of the Public Defender Service for the District of Columbia (PDS).

PDS is a federally funded, independent organization governed by an eleven-member Board of Trustees. PDS was created by a federal statute<sup>1</sup> enacted to comply with a constitutional mandate to provide defense counsel to indigent individuals.<sup>2</sup> The mission of PDS is to provide and promote quality legal representation for indigent adults and children facing a loss of liberty in the District of Columbia justice system and thereby protect society's interest in the fair administration of justice.

The National Capital Revitalization and Self-Government Improvement Act of 1997 (the Revitalization Act) separated from the District of Columbia government certain local criminal justice and judicial institutions that, in the judgment of Congress, would function better if made independent of the Mayor, other District of Columbia officials, and the District of Columbia budget process. One result of the Revitalization Act was the closure of the local District-run prison facilities and the transfer of the legal and physical custody of prisoners serving sentences for D.C. Code felony convictions to U.S. Bureau of Prisons (BOP).<sup>3</sup> D.C. prisoners serving felony sentences now serve those sentences at BOP facilities and BOP contract facilities throughout the country. In addition, the Revitalization Act abolished the D.C. Board of Parole and transferred to the U.S. Parole Commission (USPC) the authority to grant and deny parole and to revoke parole or supervised release.<sup>4</sup> Thus, two aspects of PDS's legal services are most relevant to the focus of this Task Force. One, through its Adult Services Program,<sup>5</sup> PDS provides sentence-related legal services to those individuals serving their D.C. Code felony sentences in the federal corrections system – often hundreds of miles from the District. After

any appellate matters have been resolved, PDS is likely the only source of legal assistance to these inmates. PDS receives hundreds of assistance requests every year from these individuals. Two, PDS represents over 90% of the individuals sentenced under the D.C. Code facing parole or supervised release revocation by the USPC, approximately 1300 individuals each year. If their status is revoked, they will be incarcerated in the federal corrections system.<sup>6</sup>

PDS would like to see this Task Force examine and address three significant issues: (1) the need for clear and accessible sentencing calculations; (2) the need for early intervention medical care and proper medication and (3) the need to fix the flawed guidelines system used by the USPC to determine supervision revocation prison sentence lengths.

First, not at all surprisingly, our clients' primary concern while they are in prison is when they are going to be released. We get scores of assistance requests from clients concerned that their sentences have been calculated incorrectly. In fact, it is our experience that the sentences are often correctly calculated and for that we commend BOP. However, the Sentence Monitoring Computation Data Sheet, also known as a "face sheet," that BOP provides to clients is incomprehensible, making it difficult for our clients to determine for themselves whether their release date has been calculated correctly. That is a source of tremendous anxiety for them. Because mistakes do happen and because none of us wants someone to spend longer in prison than his legal sentence, it is incumbent upon us as defense attorneys and upon BOP to make sure the sentence is calculated correctly. Thus, we spend hours trying to understand the face sheet, checking dates and doing our own calculations. But, more relevant for this Task Force, we also make numerous phone calls to BOP asking questions, asking for documentation, and taking staff away from work they would otherwise be doing. The face sheet looks like a computer-generated document that was designed to memorialize all of the data that went into the calculation. It is

more of a memo of notes for the sentence calculation unit than it is a document designed for an inmate or a family member, or even an attorney, to understand the source of the data or how it was used to generate a certain release date. Not only does it not explain the calculation, it does not even attempt to. PDS recommends that BOP redesign the Sentence Computation Data Sheet so that it accurately and clearly explains how the inmate's sentence was calculated. With a clear format, instead of spending hours deciphering the face sheet just to discover there was no sentence calculation mistake, PDS and BOP could spend time fixing the actual mistakes that do sometimes occur.

Second, PDS receives a number of requests for assistance from DC Code offenders in the federal corrections system who have serious complaints about medical care. There are three main issues. One, it is our experience that minor medical issues are inadequately addressed until they become significant and emergent medical crises. For example, instead of providing adequate wound care to a gunshot wound, treatment is not administered until a severe infection develops. This increases the risk of a poor healthcare outcome for the inmate but also increases the financial cost of treatment to BOP. The second issue regards accessing treatment for chronic medical conditions, including medications and procedures. Inmates are diagnosed but frequently have to wait long periods of time or indefinitely for follow up care or treatment after having spent an inordinate amount of time explaining their conditions only to have BOP deny or significantly delay granting their requests. Third, inmates are often denied the ability to access medical specialists outside of the BOP. PDS requests that the Task Force examine BOP's program statements related to patient care to ensure access to adequate and appropriate medical services ranging from non-emergent to chronic and emergency medical needs in accordance with its mandate to provide services in compliance with proven standards of care.

One of the issues the Task Force is to examine is the drivers of increasing corrections costs. In PDS's experience, the U.S. Parole Commission's parole and supervised release revocation process is a driver of federal corrections costs. If the USPC finds that DC Code offender on parole or supervised release has violated the terms of their supervision, it must then decide the appropriate consequence. The USPC uses a two-step ranking and scoring system to determine a parolee's likelihood of committing new crimes if allowed to remain in the community and to determine the penalty to be imposed for parole violations. The first step is calculating what is known as the salient factor score; the second is matching the scores on a guidelines grid with the offense severity rating. The intersection on the grid provides the recommended range of prison time for the violation. The first step, the salient factor tool, however, is deeply flawed and results in the over-incarceration of our clients, with associated costs to the federal corrections system.

The salient factor score system has two main flaws. First, it does not account for factors and behaviors that have been shown to affect and/or predict recidivism, such as history of substance abuse or participation in programs. Second, because the system was designed for another purpose, namely use in initial parole grant matters, it fails to adjust for some of the obvious differences between inmates seeking parole and parolees facing revocation. The purpose and the consequent design make it impossible for D.C. parolees to get a "perfect" score and, thus, earn a recommendation for the lowest possible revocation sentence.<sup>7</sup> For example, one of the salient factors assesses points based on whether the person was on probation, parole, confinement, or escape status at the time of the current offense. The focus for an inmate requesting an initial parole grant is on what status the person held at the time he committed the offense that led to the sentence for which he now seeks initial parole. For a parolee, however, the "current offense" is the alleged parole violation. Thus, the answer for this factor is always that

the parole violation occurred at the time the person was on parole. With a tool that makes 11 points a perfect score, the parolee always gets zero points added for this factor, instead of the one point possible for a person who was not on parole at the time of his “current offense.” This incorrect calibration consistently results in a more severe score and a recommendation for a longer revocation prison sentence – with direct consequences to the federal corrections system of adding to overcrowding and increasing costs. The USPC is aware of the flaws of its assessment tool. In 2007, in conjunction with the District’s Criminal Justice Coordinating Council (CJCC), the USPC hired experts to evaluate their guidelines risk assessment tools.<sup>8</sup> The JFA Institute evaluated the USPC’s risk assessment and made a number of recommendations in a report entitled “Evaluation and Re-Validation of the US Parole Guidelines Risk Instrument.” Despite voting to adopt these recommendations, the USPC continues to use this flawed system. The result is USPC imposes longer prison sentences with no corresponding connection to reduction in recidivism, which contributes to overcrowding and increased costs in the federal corrections system.

PDS recommends, in line with the Task Force’s mandate to develop data-driven policies, that the USPC implement the recommendations of the JFA Institute report that it voted to adopt and develop a new guideline instrument to assess risk for the D.C. Code parole/supervised release population in order to separate the low from the high risk offenders.

Thank you for the opportunity to present these recommendations to the Task Force on behalf of our clients in the District.

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<sup>1</sup> Pub. L. No. 91-358, Title III, § 301 (1970); *see also* D.C. Code § 2-1601, *et seq.*, 2001 ed.

<sup>2</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>3</sup> See D.C. Code § 24-101.

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<sup>4</sup> See D.C. Code § 24-131. The Revitalization Act also ended the practice of imposing indeterminate sentences (sentences with a range of years and a period of parole) and mandated the use of determinate sentences followed by a period of supervised release. Thus, PDS represents clients who have older, indeterminate sentences and are on parole and PDS represents clients who have more recent determinate sentences and are on supervised release. The Parole Commission is the authority supervising both persons on parole and those on supervised release.

<sup>5</sup> The Community Defender Division's Adult Services Program was formerly two separate programs, the Institutional Services Program and the Community Reentry Program. Both ISP and CRP were created to address unique legal needs of DC Code offenders in or returning from the federal system.

<sup>6</sup> Importantly, the Parole Commission's workload will increasingly consist of local District of Columbia matters rather than federal ones. Federal parole was abolished, and only persons who committed federal offenses before November 1, 1987 receive a sentence that includes federal parole. As in the District, when federal parole was abolished, it was replaced with supervised release. However, in the federal system, *judges* have the authority over individuals on supervised release. Unlike its D.C. workload, the Parole Commission's *federal* workload is not shifting from parolees to supervisees; it is simply disappearing. Thus, the number of federal offenders under the authority of the Commission shrinks every year and will one day necessarily reach zero. When the USPC exercises its discretion to revoke someone's parole or supervised release, sending that person to serve time in a BOP facility or contract facility, it is increasingly exercising that discretion only over D.C. Code offenders.

<sup>7</sup> The salient factor score ranges from zero, which is supposed to indicate that the person poses a high risk of recidivism, to ten, which is supposed to indicate that the person poses a low risk of recidivism. The x-axis on the guidelines grid is not specific points ranging from ten to zero, but rather categories of "very good," "good," "fair," and "poor." These categories are actually ranges of salient factor scores. A salient factor score of 10 – 8 points is "very good;" a salient factor score of 7 – 6 points is "good;" 5-4 points is "fair;" and 3 – 0 is "poor." Technically, using the component parts of the rating system, a perfect offender could actually receive as many as eleven points, but the guidelines grid is calibrated to have ten points as the best score. The y-axis on the guidelines grid is categories of the severity of the offense or violation. The intersection of the two axes is the recommended sanction or revocation time. According to the USPC's guidelines, a person who earns a perfect salient factor score of ten and is charged only with technical violations faces a sentence range of from zero to four months. The salient factors are divided into six "items," listed as A through F. A few of these items make sense for parole grant hearings but uniformly disadvantage parolees facing revocation. For example, Item A assesses points based on the person's prior record. If the person has no prior record, he receives three points; one prior adult conviction (or juvenile adjudication) results two points; two or three prior convictions result in one point; four or more prior convictions receive zero points. The focus for a prison inmate seeking an initial parole grant is whether, other than the offense for which the person is serving a sentence, the person has a prior record. In contrast, for the parolee at a revocation hearing, the "offense" the Commission is considering at the revocation hearing (the new crime or the technical violation) is the current offense and all other "offenses" or convictions are the "prior record" for this item. No parolee can receive the full three points because he, by definition, has a prior conviction; he will *always* necessarily have the conviction for which he is on parole. Even if a D.C. parolee is otherwise "perfect," the salient factors are designed in such a way that the parolee can only hope to earn eight points, rather than the eleven points that an inmate seeking an initial grant of parole could earn and to which the guideline ranges are keyed. The USPC's revocation process makes no allowances for the fact that D.C. parolees can never achieve a perfect salient factor score.

<sup>8</sup> The Commission and the CJCC contracted with The JFA Institute to study factors that influence recidivism. The report, "Evaluation and Re-Validation of the U.S. Parole Guidelines Risk Instrument," concluded that the Commission's risk assessment tool included items that have either a weak or non-existent correlation with recidivism and failed to include items, such as gender, history of substance abuse, and program participation, that have been shown to have a strong positive correlation with

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recidivism. The report recommended that the Commission review its parole revocation grid, allow for much shorter periods of incarceration, and consider not re-incarcerating low risk parolees for low severity violations.