Retribution or Rehabilitation - The Addict Exception and Mandatory Sentencing after Grant v. United States and the District of Columbia Controlled Substances Amendment Act of 1986

Benjamin J. Lambiotte
RETRIBUTION OR REHABILITATION? THE ADDICT EXCEPTION AND MANDATORY SENTENCING AFTER GRANT v. UNITED STATES AND THE DISTRICT OF COLUMBIA CONTROLLED SUBSTANCES AMENDMENT ACT OF 1986

"The mood and temper of the public with regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country."1 When courts sentence criminal offenders, sanctions imposed on behalf of the community generally express a combination of public safety priorities: exaction of retribution for criminal conduct, deterrence of future criminal acts, removal of the offender from society for the period of incarceration, and rehabilitation of the individual willing to commit crime.2 Until recently, the dominant criminal sentencing model emphasized the last concern, reflecting a view that the ideal solution to crime was to "cure" defects which led offenders to commit prohibited acts.3 Judges sentenced convicts to wholly indeterminate prison terms, with the understanding that release would occur when corrections officials determined that the offender exhibited signs of successful "rehabilitation."4

But when crime burgeons, public perceptions of a criminal element seemingly beyond control, coupled with tangible fear in the community, "pro-

duce an unbeatable combination for statutory change" in favor of sentencing those who commit egregious crimes to mandatory minimum prison terms. Sentencing of drug traffickers in the District of Columbia, in part, reflects the more punitive philosophy.

Since the early 1980s, a steady increase in drug crime has gripped the District of Columbia, severely straining the resources of enforcement, judicial, and correctional institutions. Yet, until very recently, the city labored

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5. See Glick, Mandatory Sentencing: The Politics of the New Criminal Justice, 43 FED. PROBATION 3, 5 (1979). In mandatory minimum sentencing, the legislature prescribes a sentence without possibility of parole until the convict serves the minimum term. The statute divests judges and probation officials of discretion to forego incarceration or suspend sentences in cases falling under the provision. See Petersilia & Greenwood, Mandatory Prison Sentences: Their Projected Effects on Crime and Prison Populations, 69 J. CRIM. L. & CRIMINOLOGY 604, 605 (1978). The District of Columbia's predominantly indeterminate sentencing scheme imposes a maximum sentence, terminable by parole authorities any time after the convict serves a specified minimum amount of time. See Story v. Rives, 97 F.2d 182, 187 (D.C. Cir. 1938); see also supra note 4. Statutes may specify the minimum period outright, as with mandatory minimum drug distribution penalties discussed in this Comment, see, e.g., D.C. CODE ANN. § 33-541(c)(1) (Supp. 1987), or as a portion of the maximum sentence imposed. See id. § 24-203(2). In either instance, mandatory minimum sentencing provisions do not constrain the judge's discretion to impose the statutory maximum term, nor the probation official's capacity to release the offender after he serves the minimum term.

District of Columbia mandatory minimum sentencing also incorporates some features of determinate sentencing, by requiring an offender convicted of crimes punishable by a mandatory minimum sentence to serve a fixed prison term. Under the mandatory minimum statutes, e.g., id. § 33-541(c)(1), judges and probation officials have no authority to waive incarceration before the statutory minimum sentence has been served. Compare id. §§ 24-428 to -429 (institutional and educational "good time" credits can reduce the overall sentence length) with id. § 24-434 ("good time" credits not available to convicts serving mandatory minimum sentences).

6. See D.C. CODE ANN. § 33-541(c)(1) (Supp. 1987); see also Glick, supra note 5, at 3.


The District of Columbia Superior Court presided over approximately 500 felony criminal jury trials in 1980. DISTRICT OF COLUMBIA COURTS, ANNUAL REPORT 59 (1986) [hereinafter D.C.C. ANNUAL REPORT]. In 1985, there were 910. Id. The criminal court accepted pleas in 1,970 felony cases in 1980, compared with 4,377 in 1985. Id. In its analysis of major case load trends, the D.C.C. ANNUAL REPORT noted that, despite best efforts and maximum allocation of resources, the District of Columbia court system could not accommodate all felony case filings in 1986. Id. at 42. The D.C.C. ANNUAL REPORT primarily attributed the huge case volume to law enforcement's efforts to combat drug trafficking through such enforcement techniques as "Operation Clean Sweep." Id. Felony drug convictions increased nearly sixfold, from 502 in 1982 to 3,309 in 1986. DRUG ABUSE AND CRIME, supra at 13.

Prison overcrowding has reached critical proportions, raising doubts as to whether the public has the political and fiscal will to fully implement mandatory incarceration. See Inmates of Occoquan v. Barry, 650 F. Supp. 619, 632-35 (D.D.C. 1986) (court imposed mandatory prison
under obsolete and ineffective criminal drug statutes, which, for example, provided identical penalties for trafficking and simple possession. Actual sentences served in the District of Columbia reflected wide disparity and inconsistency among similarly situated defendants. Against this backdrop, influential commentators announced the failure of the rehabilitative ideal as a principled basis for sentencing, provoking a firestorm of criticism of the wholly indeterminate sentencing scheme. In 1982, District of Columbia voters adopted a ballot initiative providing mandatory minimum sentences for certain drug distribution offenses. Pursuant to this initiative, it is a felony in the District of Columbia to distribute or possess with intent to distribute any quantity of a schedule I, II, or III controlled substance, or a quantity exceeding $15,000 in value of a schedule IV or population caps) order vacated, Nos. 87-5055, -5295, slip op., 34 (D.C. Cir. Apr. 12, 1988). The District of Columbia Government explains that "[m]uch of the rise in prison population stems from increased drug use, arrests and prosecutions." Brief for the District of Columbia at 13, Twelve John Does v. District of Columbia, No. 87-5254, slip op. (D.C. Cir. Mar. 11, 1988); see also id. at 12 (noting a 189% increase in prison population between 1981 and 1985).


11. See M. Frankel, supra note 2, at 88 (Despite its superficial appeal, indeterminate sentencing, with its inherent uncertainty, "has produced more cruelty and injustice than the benefit its supporters envisage.").


13. D.C. CODE ANN. §§ 33-513 to -514 (Supp. 1987). Under the District’s drug laws, the Mayor may place a substance on schedule I if it has a high potential for abuse and no safe accepted medical use. Examples of schedule I drugs include heroin, and nonnarcotic hallucinogens such as lysergic acid diethylamide (LSD) and peyote. Id.

14. Id. §§ 33-515 to -516. Schedule II controlled substances include those with a high potential for abuse, a currently accepted medical use (although with severe restrictions), abuse of which may lead to severe psychological or physical dependence. The statute places cocaine, amphetamine, phenmetrazine (preludin), certain barbiturates, methaqualone (quaalude), and phencyclidine (PCP) on schedule II. Id.

15. Id. §§ 33-517 to -518. Schedule III controlled substances have less potential for abuse than those in schedule I and II, a currently accepted medical use, and a moderate or low potential for physical or high psychological dependence. Examples include pharmaceutical preparations and compounds containing the narcotic drug codeine. Id.

16. Id. §§ 33-519 to -520. Schedule IV covers certain prescription drugs with a recognized potential for abuse, such as diazepam (valium). These drugs are regarded as those with a
A single count of any of these felonies carries a mandatory minimum sentence.

Although mandatory minimum sentencing seeks to punish and deter drug traffickers willing to accept the risk of incarceration for the certainty of profits, its harshness may be inappropriate for certain offenders. Recognizing this fact, the District of Columbia sentencing initiative provided an "addict exemption," which granted judges discretion to waive prison terms for offenders who were addicts at the time of the offense, had no prior distribution convictions, and sold drugs primarily to support their addiction. This initiative recognized that many drug dealers accept the risk of incarceration to support their addictions, rather than to attain profits. The addict exemption granted limited judicial discretion to forego incarceration within a sentencing scheme evincing a societal desire for certain imprisonment of convicted drug dealers. However, the voter-adopted exemption lacked legislative guidance on key matters. Judges faced an inadequate operative definition of "addict," a lack of procedures for determining eligibility, and uncertainty surrounding the proper disposition of an offender once the court reached a finding of eligibility. In sum, substantial ambiguity as to the extent of a judge's authority to circumvent public demand for mandatory sentencing by means of the addict exemption existed. The past two years have marked significant developments toward resolution of these inherent difficulties in implementation by the courts. In 1986, the District of Columbia Council expressly expanded eligibility under the addict exception to habitual users of cocaine, phencyclidine (PCP), and phenmetrazine (preludin).

This Comment first will explore the unique history and origin of the District of Columbia addict exemption, beginning with comprehensive drug law reform in 1981. The adoption of mandatory minimum sentences by voter initiative over the objections of a majority of the District of Columbia Council and prosecutorial officials will be surveyed, as will problems in construction and application arising due to a lack of formal legislative history. The Comment will then examine the efforts of District of Columbia courts to determine the extent of their ability to circumvent the mandate of mandatory sentencing within the addict exemption's limited grant of discre-

medical use, a relatively low potential for abuse, but which may lead to limited physical or psychological dependence relative to the drugs on higher schedules. Id.

17. Id. §§ 33-522 to -523. Schedule V identifies those drugs with a low potential for abuse, a currently accepted medical use and a limited potential for dependence relative to drugs on other schedules. Schedule V includes cannabis and preparations containing low active doses of opium, morphine, and codeine. Id.

18. Id. § 33-541.

19. See id. § 33-541(c)(1)(A), (B), (C).

20. See id. § 33-541(c)(2).
tion, and to resolve procedural and constitutional issues raised by ambiguities in the original initiative. The Comment will next analyze the 1986 council amendment, and the potential impact of its expansion of eligibility on mandatory sentencing. While the council's message as to the purpose of felony drug sentencing is still far from clear, the courts have adopted intra-judicial measures to rectify imprecision in eligibility criteria, reduce arbitrary sentencing, and implement a public mandate for punishment of drug traffickers within the confines of the addict exemption's limited grant of judicial discretion to waive incarceration. The Comment will conclude, however, that neither the strict punitive sentencing model exemplified by mandatory minimum sentencing, nor a model emphasizing rehabilitation, well represented by the addict exception, nor any combination thereof, will effectively reduce drug crime absent a political and fiscal commitment of resources needed to provide sufficient facilities to keep pace with the volume of drug cases in the District of Columbia courts.

I. ORIGINS OF MANDATORY MINIMUMS AND THE ADDICT EXEMPTION IN THE DISTRICT OF COLUMBIA

A. The Uniform Controlled Substances Act

Until 1979, when Congress transferred primary legislative jurisdiction over criminal statutes to the Council of the District of Columbia,21 that body lacked legislative authority to enact sorely-needed criminal law revisions. Cognizant of the need for reform, in 1978, a congressionally created commission developed a comprehensive criminal code reform proposal.22 Between 1978 and 1980, the District of Columbia Committee on the Judiciary considered and rejected the commission's proposal.23 Ultimately, the Committee focused on areas of utmost community concern. Revision of the District's drug laws ranked high among the Judiciary Committee's priorities.24

The District of Columbia Uniform Controlled Substances Act of 1981 (UCSA)25 represented the Judiciary Committee's comprehensive overhaul of drug laws in the District of Columbia. The Committee intended to bring criminal statutes relating to drug offenses into conformity with federal law and the laws of other states modeled on the proposal of the National Confer-

22. Id.
23. Id. at 28.
24. Id; see also UCSA REPORT, supra note 8.
ence of Commissioners on Uniform State Laws. The UCSA classified controlled substances into five schedules according to relative potential danger.

In response to the leniency of previous drug laws, the Act established a range of offenses and penalties for drug crimes involving the various categories of controlled substances. The UCSA punished simple possession as a misdemeanor, regardless of the nature of the drug involved. The UCSA provided felony sanctions for even a single act of distribution, manufacture, or possession with intent to distribute, of substances in schedules I, II, and III, and for quantities of schedules IV and V substances exceeding $15,000 in value. Generally, the UCSA attempted to grade prescribed penalties according to the nature of the offense and the schedule of the substance involved. Its sentencing provisions set only the maximum allowable term.

During full council consideration of the UCSA, Councilmember John Ray, an advocate of mandatory minimum sentencing for serious drug offenses, strongly criticized the discretionary approach as unresponsive to the pressing drug crisis facing the community. In May, 1981, during the first reading of the measure in full council, he presented amendments designed to restrict judicial discretion in sentencing drug dealers. Councilmember Ray argued that the penalties provided in the UCSA did not represent a mean-

26. UCSA REPORT, supra note 8, at 3. Former statutes classified controlled substances either as "narcotic drugs," see D.C. CODE ANN. §§ 33-401 to -425 (1973), or "dangerous drugs," defined as substances which have habit forming, excessively stimulating, or dangerously toxic effects. See id. § 33-701(1). This cumbersome classification system excluded substances which had a high potential for abuse, but which did not readily fit into either major category. UCSA REPORT, supra note 8, at 3-4. For example, under this system, LSD, PCP, and quaalude were not brought under the control of District drug statutes until late 1974. Id. at 2.

27. UCSA REPORT, supra note 8, at 4. The Act gave the Mayor administrative authority to place emergent dangerous drugs on a controlled substance schedule. Id; see also supra notes 13-17 (describing scheduling criteria).


29. UCSA REPORT, supra note 8, at 6; Clarke & Meister, supra note 21, at 29.


31. UCSA REPORT, supra note 8, at 6.


34. Id. at 66.
ingful deterrent to calculating dealers responsible for hazardous drug crime.\textsuperscript{35} He emphasized that his proposed minimums would deter major suppliers motivated by profit rather than addicts who supported their habits by selling drugs.\textsuperscript{36}

Many influential officials, however, opposed the mandatory minimum sentencing model. In particular, those familiar with the day-to-day realities of administering criminal justice hoped to avoid inroads on judicial discretion.\textsuperscript{37} During council hearings on that issue, Charles F.C. Ruff, then United States Attorney for the District of Columbia, spoke against mandatory minimum sentences for armed offenders.\textsuperscript{38} Mr. Ruff expressed concern over the value of divesting those in the justice system of the ability to tailor punishment to the circumstances of special cases where the possibility of rehabilitation existed.\textsuperscript{39} Council Chairman Arrington Dixon echoed these concerns in debate on the proposed amendments to the Controlled Substances Act. Focusing on the legislation's relatively severe maximum penalties, he emphasized that the judiciary had flexibility to mete out harsh

\textsuperscript{35} Id. at 70-71. Chief of Police Burtell Jefferson joined Councilmember Ray in his criticism of the bill: He considered “mandatory minimums for distributing and/or selling controlled substances . . . a necessary part” of “get tough” measures to combat drug crime, an approach which the Committee bill purported to espouse, but in the Chief’s opinion, did not deliver. Letter from Burtell M. Jefferson, Chief of Police, to Councilmember John Ray (May 14, 1981).


\textsuperscript{37} See Clarke & Meister, \textit{supra} note 21, at 31-32. In the Spring of 1981, The council conducted public hearings on comprehensive criminal law reform, including mandatory sentencing measures for armed felony offenders, generating many critical comments. \textit{Id.} at 28; see also, e.g., Statement of the Citizen's Advisory Committee of the District of Columbia Bar on Public Hearings of the Council on Criminal Code Reform, at 2-3 (Apr. 17, 1981) (mandatory armed offender sentencing bills dangerous and ill-conceived: District of Columbia incarceration rate already highest in nation; in places where it exists, mandatory sentencing failed to deter violent crime); Statement of District of Columbia Executive Branch Agencies on the Bills to Expand and Amend the D.C. Criminal Code, Comments on Bill 4-120, District of Columbia Sentencing Improvements Act of 1981, at 3 (Mar. 12, 1981) (favoring broad judicial discretion to render a sentence appropriate for circumstances of the offender); Statement of the National Conference of Black Lawyers on Mandatory Minimum Sentences for Armed Offenders: Bill Nos. 4-109 and 4-111, at 2-3 (sentencing function best served by trained judges, not mandatory penalties, eliminates incentive to plea bargain, promotes litigation which would break the back of the judicial system); Statement of Jane Seigler of Behalf of the American Civil Liberties Union of the National Capital Area on Proposed Sentencing Statutes, at 7-10 (expressing disfavor with mandatory sentencing: judges stripped of discretion to consider mitigating circumstances, approach does not demonstrably reduce crime, and limits prosecutorial flexibility).


\textsuperscript{39} Id. at 28.
punishment to those most deserving it.\footnote{PROCEEDINGS OF MAY 19, 1981, supra note 36, at 39-42.}

Judiciary Committee Chairman David Clarke, who crafted the UCSA, emphasized that, just as the offenses defined in the legislation encompassed a range of conduct, the penalties provided a range of punishment.\footnote{Id. at 45.} He asserted that the UCSA’s prescribed maximum penalties logically targeted egregious conduct.\footnote{Id. at 45-47.} In contrast, Councilmember Ray’s statutory minimum penalties would necessarily affect less serious offenders, to whom the maximum sentences should not apply.\footnote{Id. at 45.} Mr. Clarke noted that this feature of the mandatory penalties ultimately would affect disproportionately the small-time courier, often an addict, who “held” drugs on behalf of a larger scale distributor, rather than achieving the desired effect of eliminating major source dealers.\footnote{Id. at 45-47.} Finally, Mr. Clarke observed, the District already incarcerated more individuals per capita than any state in the nation, casting serious doubt upon the need for mandatory prison sentences.\footnote{Mr. Clarke posited a hypothetical situation in which one person gratuitously handed a controlled substance to another, such as a husband giving a wife a sleeping pill, in illustrating the need to focus on the “other end of the spectrum of conduct.” PROCEEDINGS OF MAY 5, 1981, supra note 33, at 74-75. The Council’s General Counsel opined that Councilmember Ray’s proposed amendments were technically broad enough to encompass this innocuous scenario, exposing the husband to a mandatory prison term. See Clarke & Meister, supra note 21, at 32. But see J. Ray, MEMORANDUM TO THE DISTRICT OF COLUMBIA COUNSEL ON PROPOSED MANDATORY SENTENCING AMENDMENTS TO THE UNIFORM CONTROLLED SUBSTANCES ACT 2 (May 18, 1981) (offense of administering or dispensing controlled substance not “distribution” within the meaning of the statute).}

After lengthy debate, the council rejected the Ray amendments.\footnote{PROCEEDINGS OF MAY 5, 1981, supra note 33, at 79.}

Councilmember Ray again offered a package of mandatory minimum sentencing amendments at the May 19 final reading.\footnote{Id. at 77. In 1979, the District of Columbia’s rate of imprisonment was 672.7 per 100,000, the highest in the nation. See Statement of the Citizen’s Advisory Committee of the District of Columbia Bar on Public Hearings of the Council on Criminal Code Reform, supra note 37, at 2.} This time, he tempered the punitive sentencing proposal with special provisions under which narcotics addicts could avoid mandatory prison sentences.\footnote{PROCEEDINGS OF MAY 5, 1981, supra note 33, at 113-14.} Amendment nine expressly granted discretion to judges to waive the proposed mandatory penalties in cases where offenders convicted of distribution could prove, by a preponderance of the evidence, that they had an addiction to narcotics at the
time of the violation. Once again, the council rejected the Ray amendments, and adopted the UCSA with its original penalty structure intact.

II. THE DISTRICT OF COLUMBIA MANDATORY-MINIMUM SENTENCING INITIATIVE OF 1981

Rebuffed in the council, Councilmember Ray took his case for mandatory sentencing directly to the people. On June 22, 1981, he formed the Citizens for Safer Streets Committee for the purpose of promoting a voter initiative to impose mandatory minimum prison terms for drug traffickers and other offenders using a firearm in the commission of a felony. Eventually, Ray filed sufficient signatures with the Board of Elections and Ethics to place before the voters a ballot initiative to require judges to impose prison sentences without parole to convicted drug dealers and armed felons.

Charles F.C. Ruff, United States Attorney for the District of Columbia, publicly disapproved of the mandatory sentencing scheme, and, in particular the provisions of the initiative directed toward drug offenders. He objected to the initiative's foreclosure of both judicial and prosecutorial discretion. Flexibility in sentencing gave prosecutors considerable bargaining power in obtaining guilty pleas from offenders, which accounted for the disposition of most criminal cases. If the felony drug defendant knew that the judge could not offer leniency, and that he could expect a lengthy prison term, Mr. Ruff argued, the defendant had nothing to lose by proceeding to a full-blown jury trial. If this became standard practice in the huge number of felony drug cases before the court, "the result, without exaggeration, would be chaos," because the superior court is incapable of trying many more cases

49. See J. Ray, Memorandum to the Members of the District of Columbia Council on Bill 4-123, attachment B, amendment 9 (May 18, 1981). Amendment 10 defined "addicts" as persons whose normal functions were so altered by the continued use of an undefined controlled substance as to necessitate "the continued presence of said substance in order to prevent withdrawal or abstinence syndrome." Id. at attachment C. This amendment obviously sought to exempt from mandatory sentencing those eligible offenders who displayed physical signs of addiction. Id.


52. News Release from the Citizens for Safer Streets Committee (Mar. 4, 1982).


54. Ruff, Mandatory Minimums, supra note 53, at 28.

55. Id.

56. Id.
than it does now.\textsuperscript{57}

The voters adopted the mandatory minimum sentencing initiative during the 1982 primary election.\textsuperscript{58} Because the measure circumvented the council, the policy debate over its predecessor never reached complex issues associated with the substantive mechanics of administering mandatory sentencing. While the council explored at length the relative merits of mandatory sentencing,\textsuperscript{59} it discussed and debated the addict exemption only in passing and in general terms during consideration of Councilmember Ray's mandatory sentencing amendments.\textsuperscript{60}

\textbf{A. The "Addict Exemption" Codified and Criticized}

The addict exemption, part of the mandatory sentencing initiative,\textsuperscript{61} expressly granted judicial discretion within the limited confines of mandatory minimum sentencing.\textsuperscript{62} If the judge concluded that an individual, convicted of manufacture, distribution, or possession with intent to distribute certain controlled substances; had no prior convictions for distributing a schedule I, II, or III controlled substance; was an "addict" at the time of the violation; and committed the offense for the primary purpose of obtaining a "narcotic drug" to support his addiction, the judge could waive the mandatory minimum sentence.\textsuperscript{63} Significantly, the initiative mandated no alternative pun-

\textsuperscript{57}Id.
\textsuperscript{58}Initiative Measure No. 9, District of Columbia Mandatory-Minimum Sentences Initiative of 1981, 30 D.C. Reg. 1082 (1982).
\textsuperscript{59}In debate on the Uniform Controlled Substances Act, David Clarke had referred to studies indicating that New York's prototypical mandatory drug sentencing law was a failure, placing increased strain on judicial resources with no measurable reduction in drug crime. \textit{Proceedings of May 5, 1981, supra} note 33, at 77; \textit{Proceedings of May 19, 1981, supra} note 36, at 47-48. On August 8, 1982, the research division of the U.S. Department of Justice, the National Institute of Justice, issued a study concluding that New York's drug sentencing law had resulted in a three-fold increase in trials, a commensurate rise in associated delays and inconclusive effects on reducing drug abuse. \textit{Mandatory Sentencing Doesn't Work: Justice Dept. Study}, Los Angeles Daily J., Aug. 10, 1982, at 7, col 1. The study warned that in light of ambiguous statistics, mandatory sentencing's promise of deterrence and incapacitation was based more on faith than fact. \textit{Id.; see also} ACLU News Release, ACLU Charges Mandatory Sentencing Initiative Ineffective, Unjust and Costly (Mar. 31, 1982).
\textsuperscript{60}See \textit{Proceedings of May 19, 1981, supra} note 36, at 37-38.
\textsuperscript{62}Finney v. United States, 527 A.2d 733, 735 (D.C. 1987) (The addict exemption only "opens the discretionary door very slightly to permit the judge, in sentencing an addict, to waive the mandatory minimum in certain circumstances"); accord Grant v. United States, 509 A.2d 1147, 1153 (D.C. 1986).
ishment. The provision left disposition of an offender who met the statutory qualifications to the judge’s discretion.

When Councilmember Ray proposed the addict exemption during consideration of the Uniform Controlled Substances Act, the rejected amendments defined “addict” as a person whose continuous use of a drug so altered his normal functions that he required further use to avoid withdrawal or abstinence syndrome. The definition clearly limited the availability of the sentencing exemption to physically addicted narcotics users. The successful measure’s definition of addict differed markedly, involving two distinct prongs. The first prong defined an “addict” as a person who habitually used a narcotic drug so as to endanger the public morals, health, safety, or welfare. The second prong identified a person addicted to a narcotic drug to the point that he lost the power of self control over the addiction. The initiative adopted definitional language identical to that of the Dangerous Drug Act (DDA), a District of Columbia statute establishing a program of rehabilitative civil commitment for drug users. The reference in the DDA to drug users expressed Congress’ intent to extend rehabilitative treatment to drug abusers who had not advanced to the stage of physical narcotics addiction.

Councilmember Ray consulted several organizations within the criminal justice system, seeking their views and cooperation in incorporating mandatory sentencing into the District’s criminal jurisprudence. The addict exemption provisions drew critical comments, which isolated a need for clarification of eligibility criteria. The United States Attorney for the District of Columbia noted ambiguities in the provision’s definition of “addict.” The first prong equated habitual use with addiction, thus


66. Id. As originally adopted, the definition of “narcotics addict” for purposes of the addict exemption read:

“Addict” means any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety or welfare, or who is or has been so far addicted to the use of such narcotic drug as to have lost the power of self-control with reference to his addiction.


69. See infra notes 70-81 and accompanying text.

"telegraph[ing] to the public that the mere use of narcotic drugs is sufficient to exempt the user from taking full responsibility for criminal conduct." United States Attorney Stanley Harris recommended amending the exemption to limit its applicability to those physically addicted to narcotics. He further objected to the expense and difficulty of administration of the addict exception. In his opinion, the exemption would virtually assure that any first offender would be able to escape mandatory sentencing. In a late hour appeal for broader discretion, Mr. Harris noted that because the exemption appeared to permit first offenders to escape mandatory prison terms, retention of judicial discretion in all first offense cases would simplify administration. He advised the council to reserve mandatory minimum sentences for offenders with prior convictions.

United States Attorney Harris identified procedural difficulties as well. First, allocation of the burden of proof was unclear. Mr. Harris recom-
mended a "clear and convincing" evidentiary standard, with the burden on the defendant. He also suggested a clarifying amendment requiring judicial eligibility findings on the record, with a right for the government to appeal such findings. Second, because the provision inadequately set forth the manner of determining whether the defendant was a first offender, Mr. Harris recommended application of the provisions of section 23-111 of the District of Columbia Code to determine whether a disqualifying prior conviction existed.

An ad hoc committee of The District of Columbia Bar also found the definition of "addict" overbroad. On its face, it could encompass a variety of behavior short of physical addiction, making it impossible for the prosecution to rebut defense testimony as to the defendant's addiction. The Committee asserted that "[e]quating drug 'addicts' with drug 'users' makes the exception the rule, and undermines the intent of the Initiative." The addict exemption became law with the fundamental contradiction presented by the two prongs of the definition of addict unresolved. It set forth no procedures or standards by which the sentencing judge would determine a particular offender's addict status. Protestations that the language of the provision made it unclear whether the measure applied to "addicts" physically addicted to narcotic drugs or mere "users" essentially went unheeded.

76. Id. at 3.
77. Id.
78. Id. In order to impose an enhanced sentence upon a repeat offender in the District, the prosecutor must formally bring to the judge's attention any prior convictions by filing a recidivist information. D.C. CODE ANN. § 23-111(a)(1) (1981 & Supp. 1985). This provision is intended to ensure adequate notice to both the court and the defendant of potential exposure to punishment beyond that provided by the statute. See Arnold v. United States, 443 A.2d 1318, 1326 (D.C. 1982).
80. Id. at 11. The Ad Hoc Subcommittee also recommended striking the first part of the definition of "addict." Id.; cf. supra notes 71-72 and accompanying text.
The absence of legislative direction as to the type of offender covered by the exemption and the criteria and procedure for determining eligibility raised significant issues. These questions centered upon the uncertain extent of judicial and prosecutorial latitude to circumvent the dictates of mandatory sentencing requirements through the exemption's limited grant of discretion. The District of Columbia courts grappled with these questions in a series of 1986 and 1987 cases. These cases gave considerable shape to the skeletal language of the waiver provision, but ultimately, the District of Columbia Court of Appeals encountered certain fundamental uncertainties in legislative intent and reasoning, necessitating further action by the council.

III. FILLING THE VOID: THE ADDICT EXEMPTION IN THE DISTRICT OF COLUMBIA COURTS

A. Giving Shape and Scope to the Addict Exemption: Development of Procedural Requirements

1. Determining Prior Convictions: Limits on Prosecutorial Discretion

The “addict exemption” provision failed to set forth a procedure for the judge to use in determining whether the defendant had any prior disqualifying convictions.82 United States Attorney Harris, the District’s chief prosecutor, recommended incorporating a procedure used when the government sought enhanced penalties for crimes such as repeat offenses.83 Under the enhanced penalty procedure, the prosecution files a recidivist information with the court setting forth prior convictions.84

In United States v. Mitchell,85 the defendant pleaded guilty to distribution of heroin.86 Although the defendant had an extensive history of drug crime,87 the prosecutor did not file a recidivist information advising the court of a prior conviction for possession of heroin with intent to distribute.88 The prosecutor argued, and the defendant agreed, that the government had discretion under section 23-111 of the District of Columbia Code

82. See supra note 78 and accompanying text.
83. See Letter from Stanley S. Harris, United States Attorney for the District of Columbia to Councilmember John Ray, supra note 71, at 4.
84. See supra note 78 and accompanying text.
86. Id.
87. Id.
88. Id.
not to make the defendant's prior convictions an issue at sentencing.  

Section 23-111 forbade sentencing a convicted criminal to increased punishment by reason of prior convictions absent filing of a prosecutor's information setting forth those convictions.

The court held that a prosecutor's attempt to forgive a prior disqualifying conviction, and a court's willingness to ignore it, exceeded the scope of their discretion under the mandatory minimum sentencing initiative. The court distinguished mandatory minimums from enhanced sentences. Mandatory minimums establish fixed penalties instead of increasing existing ones, and express different policies than penalty enhancement provisions.

The District of Columbia Court of Appeals recently validated the trial court’s reasoning in Mitchell in another similar case. In Finney v. United States, the prosecutor obtained a conviction for a sale of heroin to an undercover officer. The trial court refused sentencing under the addict exemption and sentenced the defendant to a mandatory four-to-twelve year term because he had a prior conviction that disqualified him for alternative sentencing. The trial judge learned of the prior disqualifying distribution conviction through a presentence report. On appeal, the defendant argued that the prosecution's failure to inform the court of the defendant's recidivist status allowed the judge to consider sentencing him under the addict exemption. The Court of Appeals affirmed the trial court's conclusion that the defendant lacked eligibility due to the 1982 distribution conviction.

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89. Id.
90. Id. at 1262; see also supra note 78 and accompanying text.
91. Mitchell, 114 Daily Wash. L. Rep. at 1263. The judge found that the mandatory minimum penalty provision does not enhance penalties for drug offenses prescribed elsewhere, but rather establishes fixed penalties itself. Id.
92. Id. at 1262. The judge considered immaterial the source of his knowledge of Mitchell's prior disqualifying conviction, stating, “[a]ccuracy matters, not pedigree.” Id; see also supra note 91 and accompanying text.
93. Mitchell, 114 Daily Wash. L. Rep. at 1263. This resolution of a procedural ambiguity which existed since the voters adopted the initiative apparently foreclosed a coveted opportunity for the United States Attorney to exercise broad prosecutorial discretion at the sentencing stage, as well as its traditional latitude in charging. Joseph E. DiGenova, United States Attorney for the District of Columbia called recognition of the prosecutor's control over prior conviction information a legitimate exercise of discretion in light of the Council's failure to clarify the issue in 1983. “When there is inartful wording in the law, the people who have the responsibility for enforcing it have to give it meaning.” See Plea Bargains Erode Drug Law's Intent, Wash. Post, May 12, 1986, at A22, col. 2.
95. Id. at 734.
96. Id.
97. Id.; see also infra note 202 and accompanying text.
98. Id. at 735.
99. Id. Judge Terry, writing for a unanimous panel in Finney held the prosecutor's failure
ing the same reasoning as Mitchell, the court noted that the mandatory mini-
mum sentencing provision did not authorize or require the court to increase
the sentence imposed, but rather mandated a fixed penalty.\textsuperscript{100} The court
held that its “duty to impose the mandatory minimum cannot be affected
by the government's failure to file or not to file such an information.”\textsuperscript{101}

2. Grant v. United States: \textit{Burdens of Proof: Determining Eligibility}

Perhaps the most significant case decided by the District of Columbia
Court of Appeals concerning the addict exemption is \textit{Grant v. United
States}.\textsuperscript{102} In \textit{Grant}, the court addressed procedural uncertainties left by the
voters and Council. \textit{Grant} established the prevailing procedure by which
judges now determine eligibility for sentencing under the addict exemption,
setting forth the burdens of proof and prima facie case required to invoke the
waiver.\textsuperscript{103} In \textit{Grant}, the defendant pleaded guilty to distribution of
preludin.\textsuperscript{104} At sentencing, he asked the court for permission to enter a drug
rehabilitation program in lieu of a mandatory sentence.\textsuperscript{105} The presentence
report indicated three prior convictions for possession of marijuana, but no
disqualifying distribution offenses.\textsuperscript{106} The defendant sought to introduce ev-
idence of an addiction to narcotics at the time of the instant violation.\textsuperscript{107}
The trial judge concluded that the defendant failed to meet his burden of
proving addiction, and refused to hear testimony from him.\textsuperscript{108} The judge
commented that the mandatory penalties sought to get drug dealers, like
Grant, off the street, not to “keep throwing good money after bad” on
rehabilitation.\textsuperscript{109} The court sentenced Grant to a mandatory minimum

\textsuperscript{100} Finney, 527 A.2d at 735.
\textsuperscript{101} Id.
\textsuperscript{102} 509 A.2d 1147 (D.C. 1986).
\textsuperscript{103} Id. at 1151-56. The procedures set forth in \textit{Grant} have been cited with approval in:
\textit{Finney}, 527 A.2d at 734; \textit{Banks v. United States}, 516 A.2d 524, 531 (D.C. 1986);
\textsuperscript{104} \textit{Grant}, 509 A.2d at 1149.
\textsuperscript{105} Id. at 1149-50.
\textsuperscript{106} Id. Grant had been sentenced to supervised probation three times for the three prior
offenses. His pre-sentence report indicated that his probation was completed with “poor ad-
justment.” \textit{Id.}
\textsuperscript{107} Id. at 1150-51. The defense was prepared to produce the defendant's common law
spouse and other witnesses to present information as to his drug problem. \textit{Id.} at 1150.
\textsuperscript{108} Id. at 1150. The trial judge barred any testimony from the defendant, saying that he
“wouldn’t believe him.” \textit{Id.}
\textsuperscript{109} Id.
term.\footnote{110} On appeal, the court set forth the three statutory elements of eligibility for sentencing under the addict exemption: that the defendant was an addict, who had no prior disqualifying convictions, and that the commission of the distribution offense was for the primary purpose of supporting the defendant's habit.\footnote{111} It further noted that neither the underlying controlled substances legislation nor the mandatory minimum sentencing initiative gave any direction to the judge in making these essential findings.\footnote{112} The court then looked to the federal Narcotic Addict Rehabilitation Act (NARA),\footnote{113} which permitted sentencing of an addict offender to addiction treatment as an alternative to incarceration.\footnote{114} The court held that the NARA eligibility standards applied "in the absence of any legislative directive," to determine eligibility for the District of Columbia addict exemption.\footnote{115} The court then set forth the burden of proof for a defendant seeking to establish prima facie eligibility.\footnote{116} First, prior to the imposition of a sentence, the defendant must request the trial judge to consider eligibility under the exemption.\footnote{117} Failure to do so would constitute a waiver.\footnote{118} Second, the defendant must offer evidence that he satisfies all three eligibility criteria.\footnote{119} This proffer, the court stated, must contain more than conclusions, and provide solid information

\footnote{110} Id. The court below imposed the mandatory minimum term of imprisonment of not less than 20 months and not more than five years. \textit{Id.}
\footnote{111} Id. at 1151.
\footnote{112} Id. at 1151 & n.3.
\footnote{115} Grant, 509 A.2d at 1153.
\footnote{116} Id. at 1154-55. The defendant carries the burden of proving eligibility. \textit{Id.} at 1155.
\footnote{117} Id. at 1154.
\footnote{118} Id.
\footnote{119} Id.
linking the defendant's drug habit to the offense.\textsuperscript{120}

Significantly, the \textit{Grant} court held that proof of habitual use of a narcotic drug at the time of commission of the offense would suffice to satisfy the requirement of "addiction."\textsuperscript{121} The court noted that the NARA definition of "addict," and the definition in the addict exemption, which both derived from the District of Columbia Dangerous Drug Act, included the "habitual use" prong.\textsuperscript{122} While neither definition required a showing of physical addiction, the court held that under the addict exemption, the burden of proving eligibility was more stringent than under the NARA.\textsuperscript{123} In contrast to the NARA and the Dangerous Drug Act, which both evinced intent to expand eligibility for rehabilitative treatment, the addict exemption narrowly excepted defendants from a punitive mandatory sentencing scheme intended to limit, not increase, judicial discretion.\textsuperscript{124}

The court therefore concluded that the NARA and the addict exception applied only to offenders who represented good prospects for rehabilitation.\textsuperscript{125} However, unlike the NARA, the addict exception placed the burden of affirmatively proving likelihood of successful rehabilitation entirely upon the defendant.\textsuperscript{126} In setting forth the prima facie showing required, the

\textsuperscript{120} \textit{Id.} A recent reported Superior Court case provides an illustration of the manner in which the defendant must demonstrate this "linkage," as well as the general type of evidence which may be used to reach a finding of eligibility. In United States v. Peterkin, 115 Daily Wash. L. Rep. 2133 (D.C. Super. Ct. Aug. 18, 1987), the court, on remand from the Court of Appeals, found that the defendant was an addict at the time of the offense, but an absence of any evidence specifically linking the defendant's addiction to the offense for which he was being sentenced. The court took into account such factors as the defendant's income from legitimate sources, his drug history, the extent of his drug use, and the daily cost of his drug habit at the time of the offense. \textit{Peterkin}, 115 Daily Wash. L. Rep. at 2137 & n.3. The \textit{Peterkin} court applied a preponderance of the evidence standard in determining whether the defendant met the eligibility burden set forth in \textit{Grant}. \textit{Id.} at 2137 n.2.

\textsuperscript{121} \textit{Grant}, 509 A.2d at 1152; \textit{see also} United States v. Hart, 488 F.2d 970, 971 n.3. (5th Cir. 1974); United States v. Kelley, 476 F.2d 211, 212 (1st Cir.), \textit{cert. denied}, 414 U.S. 913 (1973).

\textsuperscript{122} \textit{Id.} \textit{Grant}, 509 A.2d at 1153.

\textsuperscript{123} \textit{See D.C. CODE ANN. § 24-602 (1981).}

\textsuperscript{124} \textit{Id.} The \textit{Grant} court, however, noted that the requirement that the offender prove addiction to narcotics at the time of the offense could be satisfied "even if he is not able to show physical addiction." \textit{Id.} at 1152. This represents judicial validation of the "habitual use" prong of the "addict" definition. \textit{See supra} notes 81, 64-66, and accompanying text.

\textsuperscript{125} \textit{Grant}, 509 A.2d at 1153.

\textsuperscript{126} \textit{Id.} The court charged the defendant with the burden of proving eligibility, and admonished the trial court for denying \textit{Grant} a fair opportunity to demonstrate it. \textit{Id.} at 1155. However, whether to hold a full-scale, pre-sentence evidentiary hearing on eligibility was left to the sound discretion of the trial judge, and it was recognized that information on a pre-sentence report may disqualify the defendant ab initio. \textit{Id.} \textit{see also} D.C. CODE ANN. § 33-553 (Supp. 1987) (prosecution need not negate availability of exception, burden of proof upon person claiming it).
court went beyond the face of the addict exemption statute, demanding a specific proposal for “an alternative sentence which contemplates rehabilitative treatment and [a showing that] the defendant is likely to successfully complete that treatment.” Thus, the *Grant* court, in defining the circumstances under which judges should impose rehabilitative substitutes for incarceration, incorporated from the NARA another level of inquiry not present in the text of the addict exemption. The incorporated components include a showing by the defendant of an available place in a reputable drug rehabilitation program, and of indications in the defendant’s prior history and character that he will successfully complete the program.

*Bank v. United States* demonstrates the rational consistency of these latter components, which focus on the defendant’s prospects for successful rehabilitation, with the spirit of the addict exemption. At sentencing, the trial judge barred the defendant’s attempt to proffer evidence of eligibility under the addict exemption. Although convicted of three counts of distributing cocaine and one count of selling heroin to an undercover officer, the defendant denied, in the course of trial testimony, selling heroin. The judge reasoned that, because the defendant stated under oath that he did not sell heroin, he could not meet his addict exemption burden of proving that he sold drugs for the primary purpose of supporting his own addiction.

The Court of Appeals found error for two reasons. First, in addition to the heroin count, the trial judge convicted on three counts of cocaine distribution, which the defendant did not deny at trial. The addict waiver is available to those convicted of distribution of cocaine, a schedule II controlled substance. Secondly, the trial court erroneously concluded that the fundamental inconsistency between Bank’s trial testimony and his addict waiver showing automatically rendered the defendant ineligible. The court held that the trial judge should have allowed introduction of eligibility evidence and considered the defendant’s predilection for perjury as only one factor in assessing his prospects for rehabilitation. The court found this

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127. *Grant*, 509 A.2d at 1154.
128. *Id*. The defendant in *Grant* was prepared to show that he had located a place in an inpatient rehabilitation program primarily to refute the basis for the presentence report’s recommendation of incarceration, and its conclusions as to his motives in seeking treatment. *Id*.
130. *Id*. at 531.
131. *Id*. at 525.
132. *Id*. at 530.
133. *Id*.
134. *Id*.
135. *Id*.
136. *Id*. The court cited United States v. Grayson, 438 U.S. 41 (1978), in which the Supreme Court approved the practice of considering a defendant’s willingness to give false
determination particularly critical in light of the emphasis placed on an assessment of the probability of the defendant's future law-abiding behavior in the controlling *Grant* case.\(^{137}\) Following *Grant*’s approach of importing NARA precedent, the *Banks* court cited cases decided under the NARA in which a defendant’s previous denials of addiction did not preclude a separate finding of addiction at sentencing.\(^{138}\)

Following *Banks*, in *Muldrow v. United States*,\(^{139}\) the District of Columbia Court of Appeals similarly found error in the trial judge’s refusal to consider the defendant’s addict exception eligibility because the defendant had stated, in answer to a routine booking question, that he did not use drugs.\(^{140}\) The court of appeals concluded that the trial court should have accepted the defendant’s addict exception proffer and considered the inconsistency raised by his prior statement as one factor in assessing his prospects for rehabilitation.\(^{141}\) Citing *Banks*, the court remanded the case for resentencing, a result which the prosecution conceded was necessary.\(^{142}\)

**B. Constitutional Dimensions of the Addict Exception**

The addict exception establishes classifications, sparing some offenders from a mandatory prison term required of others convicted of the same crime.\(^{143}\) For this reason, the exception has provoked numerous constitutional equal protection challenges. These claims have generally focused on two classifications inherent in the exception. First, the exception distinguishes addicts from nonaddicts. Second, it distinguishes between persons addicted to narcotic drugs and those addicted to other substances.
1. Tuzon: The Addict/Nonaddict Classification

In *United States v. Tuzon*,¹⁴⁴ the District of Columbia Superior Court considered an equal protection challenge to the legitimacy of the distinction made between drug dealers who are addicts and dealers who are not. The trial court convicted Tuzon of possession of phencyclidine (PCP) with intent to distribute.¹⁴⁵ The defendant's substance abuse problem involved PCP, not a “narcotic” drug, making him ineligible for the addict exception.¹⁴⁶ The judge first found no fundamental constitutional entitlement on the part of the defendant to choose what system of penalties the court would apply in sentencing him.¹⁴⁷ This precluded invocation of a strict scrutiny standard of review.¹⁴⁸ Thus, the judge framed the equal protection issue as whether the differential treatment established by the addict waiver provision bore a rational relationship to a legitimate state interest.¹⁴⁹

In identifying the District of Columbia's interest, the judge stated that the addict exception reflected a societal judgment “that the actions of a drug addict are less a product of free will than the actions of others” and that an addict was therefore less culpable and in greater need of treatment than his nonaddict counterpart.¹⁵⁰ As such, the statutory distinction had a rational basis, and did not deny the unaddicted dealer equal protection under the law.¹⁵¹

2. Backman: The Court of Appeals Responds to the Initiative's Conflicting Signals on Eligibility

The exception also distinguished between offenders based upon the nature of the drug used. The addict exception's language limited its applicability to

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¹⁴⁵. Id.
¹⁴⁶. Id. "Defendant made no attempt to bring himself within th[e] [addict] exception to the mandatory minimum provisions of the statute...the effort would have been fruitless in any event, since the defendant's drug usage was limited to PCP—a non-narcotic substance." Id. at 2025 n.4. Tuzon did not base the equal protection challenge on the distinction made between PCP users and narcotics addicts, but on the grounds that "an addict is not required to go to jail, while others are." Id. at 2025.
¹⁴⁷. Id. at 2028 (quoting United States v. Batchelder, 442 U.S. 114, 125 (1979)).
¹⁵¹. Id.
offenders who used a narcotic drug.\textsuperscript{152} The Uniform Controlled Substances Act defined “narcotic” as opium or a derivative or chemical analogue thereof.\textsuperscript{153} The District's multi-dimensional drug problem involves a number of destructive and habit-forming drugs which do not fall within the narrow definition ascribed to “narcotic” under the UCSA.\textsuperscript{154} This gave rise to persistent questions as to the ability of nonnarcotic drug abusers to invoke the addict exception to escape mandatory prison terms.

At sentencing in \textit{United States v. Tolbert},\textsuperscript{155} the District of Columbia Superior Court judge explored whether a rational basis existed to distinguish between cocaine addicts and opiate-derivative addicts for purposes of sentencing under the addict exception.\textsuperscript{156} Although cocaine is not defined as a “narcotic,” the District of Columbia Council classified it as a schedule II controlled substance under the UCSA because cocaine had a high potential for abuse which could lead to severe psychological or physical dependence.\textsuperscript{157}

The court perceived a fundamental inconsistency between the District of Columbia Council's recognition of cocaine's addictive properties for purposes of classifying the drug and its disregard of those attributes for purposes of addict exception eligibility.\textsuperscript{158} The necessary corollary of the principle that courts should construe criminal statutes narrowly, he said, was that

\begin{itemize}
\item \textsuperscript{152} D.C. CODE ANN. § 33-501(24) (1981); see also supra note 65 and accompanying text.
\item \textsuperscript{153} D.C. CODE ANN. § 33-501(15) (1981). The Uniform Controlled Substances Act defines “narcotic” as follows:
\begin{itemize}
\item “Narcotic drug” means any of the following substances, whether produced directly or indirectly by extraction from substances of vegetable origin or independently by means of chemical synthesis, or by a combination of extraction or chemical synthesis:
\begin{itemize}
\item (A) Opium, its phenanthrene alkaloids, and their derivatives (except isoquiniline alkaloids of opium).
\item (B) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in subparagraph (A) of this paragraph or;
\item (C) Opium poppy or poppy straw.
\end{itemize}
\end{itemize}
\item \textsuperscript{154} Id.
\item \textsuperscript{156} Gondelman, supra note 114, at 35. See generally Judges Find Loopholes to Defuse District Sentencing Law’s Effect, Wash. Post, May 13, 1986 at A8, col. 1 (case study of James Tolbert).
\item \textsuperscript{157} See UCSA REPORT, supra note 8, at 18 (cocaine placed on schedule II because “it is a dangerous substance in the nature of a stimulant”). For the criteria for placement of a substance on schedule II, see D.C. CODE ANN. § 33-515 (Supp. 1987) and supra note 14.
\end{itemize}
Sentencing the Addict Offender

courts construe broadly exemptions or exclusions therefrom.\textsuperscript{159} Thus, "to treat cocaine as [an addictive] narcotic in one part of the statutory scheme and to fail to include it in another, where an exemption is concerned, would \ldots result in unequal treatment of the defendants and a denial of equal protection."\textsuperscript{160}

In the absence of clear legislative guidance, the court would have construed the addict exception's definition of "narcotic" to include cocaine, essentially disregarding the statute as drafted so that it would survive constitutional scrutiny.\textsuperscript{161} Despite this far-ranging discussion of the addict exemption's constitutionality, however, the judge ultimately avoided deciding the issue by sentencing the defendant under the NARA.\textsuperscript{162}

The District of Columbia Court of Appeals eventually reached the constitutional issue which the \textit{Tolbert} court addressed in dicta. However, this court adopted a more restrained approach. In \textit{Backman v. United States},\textsuperscript{163}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{159} \textit{Id.} at 39.
\item \textsuperscript{160} \textit{Id.} at 39-40.
\item \textsuperscript{161} \textit{Id.} at 40. A recent commentator argued that the \textit{Tolbert} court lacked power to create a definitional ambiguity where none existed, or to rewrite the statute to avoid constitutional infirmity. The article suggested that the entire statutory scheme should have been struck down. Gondelman, \textit{supra} note 114 (Gondelman represented Tolbert at trial). Anticipating the 1986 amendment, discussed \textit{infra} at notes 174-79 and accompanying text, he suggested that the Council reexamine the statute, in order to avoid further "legislation" by the court. \textit{Id.} at 36.

Gondelman also pointed out another potential constitutional infirmity. Because the mandatory minimum sentencing statute impinged on the drug offender's fundamental interest in personal liberty, he argued, any classification it established should have been evaluated according to a strict scrutiny standard of review, under which the distinction would be doomed to failure. \textit{Id.} at 34 (citing \textit{Bolling v. Manson}, 345 F. Supp. 48 (D. Conn. 1972)) (statute denying "good time" credits to inmate serving indefinite sentence unconstitutional under strict scrutiny "compelling state interest" test).

Although District of Columbia courts have not squarely confronted the strict scrutiny argument, dicta suggests that it would not succeed. \textit{See, e.g., United States v. Brown}, 115 Daily Wash. L. Rep. 1821, 1825 n.1 (D.C. Super. Ct. July 16, 1987) ("Defendant does not contend, nor does the Court believe that the right to an individualized sentence is one of the recognized fundamental rights which would require the Government to show a compelling state interest to uphold the statute."); \textit{accord Backman v. United States}, 516 A.2d 923, 926 (D.C. 1986) ("[S]ince appellant does not claim that the statute's sentencing provision impinges upon a fundamental right or involves a suspect class, we can validly presume the statute's constitutionality.").

\textit{See supra} note 114 and accompanying text. Sentencing under the NARA had essentially the same effect as the addict waiver, allowing a judge to substitute drug treatment for mandatory sentencing. \textit{See Gondelman, supra} note 114, at 35-36. The power of a Superior Court judge to sentence under the NARA, derived from an act of Congress, did not change after the enactment of mandatory minimums by the District of Columbia. \textit{Id.; see also 1986 CRIMINAL PRACTICE INSTITUTE TRIAL MANUAL, supra} note 114, § 10.41. The NARA applied a definition of "narcotic" which included cocaine. Gondelman, \textit{supra} note 114, at 36 n.24; \textit{see also} 18 U.S.C. §§ 820(16), 4251(a) (1982).

\end{itemize}
\end{footnotesize}
the court denied alternative sentencing under the addict exception to an offender who claimed an addiction to cocaine. On appeal, Backman challenged the appropriateness of the technical statutory definition of "narcotic." The defendant argued that because the voters adopted the addict exception measure through the initiative process, the dictionary definition of narcotic which encompassed cocaine better reflected the general public's understanding of the term "narcotic." Backman also advanced a constitutional equal protection challenge to the distinction made between cocaine abusers and heroin addicts.

The court held that the voter-approved amendment to the UCSA incorporated that Act's definition of "narcotic." In interpreting the statutory language, the court held the voters who adopted the initiative to the same standards of definitional construction as it applied to enactments of the legislature. Because they were instructed that the initiative measure amended the preexisting UCSA, the court assumed that the voters relied on the UCSA definition as a reference point in amending penalties for drug crime to provide mandatory minimum sentences. Thus, the original language of that statute controlled. The court refused to hypothesize voter intent to adopt a generic definition of "narcotic," encompassing cocaine, in place of the UCSA's plain meaning definition.

Turning to the equal protection challenge, the court applied a minimal scrutiny standard of review and concluded that the voters had a rational basis for excluding cocaine addicts from the sentencing waiver's scope. Noting a significant debate among medical researchers as to the similarity of cocaine's addictive properties to those of narcotics, the court

164. Id. at 925-26. The issue was whether District voters who had adopted the addict exception by initiative, would be charged with constructive knowledge of the Uniform Controlled Substances Act's definition of "narcotic drug," which excluded cocaine. See supra note 153 and accompanying text.

165. Backman, 516 A.2d at 925-26. The court characterized the defense's argument that the voters intended a generic definition of "narcotic" instead of the UCSA statutory definition as "speculation." Id. at 925.

166. Id. at 926. Backman argued that there was no rational basis for distinguishing a cocaine "addict" from a heroin addict. No attempt to invoke a higher constitutional standard of review was made. Cf. supra note 161.

167. Backman, 516 A.2d at 926.

168. Id.; see also Convention Center Referendum Comm. v. Board of Elections and Ethics, 441 A.2d 889, 896-97 (D.C. 1981) (en banc) (power of electorate to act by initiative coextensive with the power of the legislature to enact statutes).

169. Id. at 927; cf. supra notes 158-61 and accompanying text.

170. Id. at 927.
observed that the scientific uncertainty provided some rational basis for the distinctions.172


The court of appeals in Backman declined to expand the definition of “narcotic” and continued to read the addict exception narrowly, restricting its benefits to those claiming addiction to narcotic drugs. However, subsequent scientific research revealed the cocaine user’s potential for dependency and compulsive use.173 Against this backdrop, and the Backman court’s reluctance to “legislate” the issue, the District of Columbia Council considered whether to expand eligibility under the addict exception to encompass cocaine users.

On January 8, 1987, the council enacted legislation extending eligibility under the addict exception to offenders addicted to “abusive drugs,” defined exclusively as cocaine, phencyclidine (PCP), and phenmetrazine (preludin).174 Thus, the council amended the statutory definition of “addict” to include users of the “abusive drugs” as well as “narcotic drugs.”175

172. Id. Perhaps the Court felt constrained by its own observation in Grant which represented a reminder of the one clear message of legislative intent in the statute. “[T]he addict exception ... was enacted as part of a sentencing scheme designed to restrict a judge’s sentencing discretion for certain ... drug offenses. Nothing in the Act suggests that the addict exception was intended as a loophole for drug users who are also sellers.” Grant v. United States, 509 A.2d 1147, 1153 (D.C. 1986).


175. D.C. Act 6-260, § 2(a), (c), 34 D.C. Reg. 524, 525. By adding a new category of substances to the addict exemption provisions, the Council avoided disturbing existing classifications of drugs, or the statutory definition of “narcotic drug” to accomplish the objective of expanding eligibility. Id. § 2(b), 34 D.C. Reg. at 524-25.
In its statement of purpose and need accompanying the amendment, the council found many more people addicted to drugs not included under the current definition of narcotic drug.\textsuperscript{176} It observed, “in the District of Columbia, the drug of choice is Phencyclidine.”\textsuperscript{177} The council also recognized the powerful psychologically addictive qualities of cocaine.\textsuperscript{178} The measure, the council concluded, addressed the hardship faced by those addicted to the drugs named in the amendment by extending eligibility for drug treatment instead of mandatory incarceration to those offenders.\textsuperscript{179}

\textsuperscript{176.} Memorandum on Bill 6-455, supra note 174, at 2.

\textsuperscript{177.} Id. It is highly significant that the Council related prevalence of use of this drug with eligibility under the addict exemption. It raises the question of whether the offender's degree of control and the drug's potential for dependency are factors which are significant in determining whether the offender is an “addict.” The United States Alcohol, Drug Abuse and Mental Health Administration recognizes five classes of addicting drugs: narcotic analgesic opioids (e.g., heroin, morphine, etc.), depressants (e.g., alcohol and barbiturates), stimulants (e.g., amphetamines and cocaine), hallucinogens (e.g., LSD, PCP, and marijuana), and anti-anxiety drugs (e.g., meprobamate, diazepam, etc.). All react physiologically in different ways, but elements of identifiable addictive behavior common to all “are compulsive drug-seeking behavior... and a decreased anxiety and enhanced feeling of well-being.” Letter to the author from Doris H. Clouet, Ph.D., Neurosciences Research Branch, Division of Preclinical Research, National Institute on Drug Abuse (Sept. 26, 1987).

Of the 11 “addictive” drugs listed above, only narcotics, PCP, and cocaine are encompassed by the addict waiver. Notably, the UCSA classifies all three drugs addressed in the 1986 amendment as schedule II controlled substances, see D.C. CODE ANN. § 33-516 (Supp. 1987), partially in recognition of their high addictive or abusive potential. Id. § 33-515. Unless the Council's judgments concerning prevalency of abuse of these specific drugs, and associated public health or safety threats associated with such widespread abuse, see infra note 182, form the rational basis for the 1986 eligibility expansion amendment, the newly-expanded addict exception appears vulnerable to an equal protection challenge by a habitual user of another schedule II drug, such as amphetamine or methaqualone. See supra note 14. Aside from the immediacy of the public safety and health threat posed by widespread use of cocaine, PCP, and preludin, there is little to distinguish these drugs from other schedule II substances in terms of relative potential for abuse and addictive qualities.

\textsuperscript{178.} Memorandum on Bill 6-455, supra note 174, at 2. See generally Siegel, Changing Patterns of Cocaine Use: Longitudinal Observations, Consequences and Treatment, NIDA Cocaine Monograph, supra note 173, at 108 (escalating patterns of use, including “free base” cocaine smoking, increase risks of dependency and toxicity; all cocaine smokers in study reported toxic physical and psychological reactions and compulsive abuse); Van Dyke, Cocaine, 246 SCI. AM. 128, 140-41 (1982) (“free-basing,” smoking cocaine, likely to lead to compulsive drug-seeking behavior). Mentions of cocaine use in emergency room visits in the District have increased 293% since 1982. The District averages six cocaine overdose fatalities a year. Drug Abuse and Crime, supra note 7, at 4; Wise, Neural Mechanisms of the Reinforcing Action of Cocaine, NIDA Cocaine Monograph, supra note 173 at 15 (cocaine does not impose reasonable limits on its own intake, has a dangerous tendency to be self-administered to the user's detriment).

\textsuperscript{179.} Memorandum on Bill 6-455, supra note 174, at 3.
V. DEALING WITH DRUG DEALERS: THE HIGH PRICE OF INCONSISTENCY AND LACK OF FORTITUDE IN DISTRICT OF COLUMBIA SENTENCING PHILOSOPHIES

The public's will to punish, deter, and incapacitate drug dealers remains as strong today as ever. But in a sense, the addict exception itself, and particularly the 1986 council amendment extending eligibility to habitual users of cocaine, PCP, and preludin, vindicates the rehabilitative model of sentencing as an effective means of combatting drug crime in appropriate cases. The amendment may reflect the council's perception that rehabilitation of a habitual user convicted for a first-time distribution offense can break the cycle of drug crime. Effective rehabilitative treatment of an offender who sold drugs to support his habit reforms both a drug supplier and consumer, addressing both the supply and demand sides of the drug problem. When an individual who presents this possibility comes before the


The conditions that led to enactment of the initiative have, if anything, become substantially worse since the measure was adopted. A recent Rand Corporation study commissioned by a private-sector task force indicated rampant drug use in the Washington area in all segments of society. Duke, Suburban Drug Use Here Worst in U.S., Wash. Post, Feb. 26, 1988, at A1, col. 5. Between 1981 and 1986, drug distribution arrests in the District have increased thirteenfold, and prosecutions, convictions, prison commitments, and average minimum sentences have at least tripled. Id. at A14, col. 1. Police have linked 35 to 54 homicides in the District of Columbia in the first three months of 1988 to drug trafficking. Harvey, U.S. Bureau Beefs Up Ranks to Fight Jamaican Racketeers, Wash. Times, Mar. 3, 1988, at B8, col. 5. In addition, the loss of prominent young athletes, such as Len Bias, to the ravages of cocaine, and shockingly heinous crimes committed by those under the influence of PCP, indicate that these problems persist. See Rogers, 115 Daily Wash. L. Rep. at 226. Many officials still view more effective punishment, including mandatory minimum sentences, as part of the solution. See Washington, Area's Justice System Teeters Under Weight of Drug Cases, Wash. Times, Mar. 3, 1988, at A1, col. 1.

181. See supra notes 3-4 and accompanying text.

182. In defining eligible "addicts," the UCSA refers to individuals "who habitually use[] any narcotic or abusive drug so as to endanger the public morals, health, safety, or welfare." D.C. CODE ANN. § 33-501(24) (Supp. 1987) (emphasis added). The "abusive drugs" identified in the 1986 Council amendment expanding eligibility include cocaine and PCP, drugs which pose serious and immediate threats to public health and safety as a function of both their high level of prevalent abuse, and their inherent physiological dangers. On the public health hazards of cocaine use, see supra notes 174 and 178. With respect to PCP, authorities report that PCP overdoses can cause violent reactions, and apparently can cause the user to disregard pain, making it extremely difficult to subdue users who pose a risk to themselves and others. DRUG ABUSE AND CRIME, supra note 7, at 26. Significantly, Pretrial Services Agency data
court for sentencing, insistence on a punitive sentencing model, such as a mandatory minimum, does not represent an efficient use of society's resources. Evaluating whether a given case affords this opportunity provides the most appropriate place for judicial discretion within the otherwise incongruous mandatory minimum sentencing scheme.

Notably, this process embodies an individualized evaluation of offender circumstances and characteristics identical to that which guides the exercise of judicial discretion under the rehabilitative sentencing model.183 Mandatory minimum sentences, geared toward making the punishment fit the crime, not the criminal, mechanically fix prison terms and consciously avoid consideration of offender characteristics.184 As such, they represent an extreme reaction to individualized sentencing practices. Yet clearly, when a judge takes the measure of a guilty defendant seeking rehabilitative treatment under the addict exception, he engages in a searching scrutiny of individual characteristics.185

In exercising sentencing discretion under the addict exception, the District of Columbia courts have consistently followed the lodestar that the exception must be interpreted in light of the restrictive sentencing scheme which underlies it. It only "opens the discretionary door very slightly to permit the

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183. See Coffee, supra note 3, at 1362. Coffee notes that the process of tailoring individualized sentences to particular offenders primarily occurs through an extensive presentence investigation culminating in a presentence report. Id. at 1370-71. The addict exception eligibility determination process also emphasizes evaluation of particularized offender characteristics reflected in a presentence report. See infra notes 201-06 and accompanying text.

184. See Glick, supra note 5, at 5; see also Krup, A Retributive-Justice Model of Sentencing, 45 FED. PROBATION 24, 24-26 (1981).

185. Grant v. United States, 509 A.2d 1147, 1155 (D.C. 1986) (sentencing judge possesses wide discretion in sources and types of evidence used to decide the type and extent of punishment imposed); see also United States v. Tucker, 404 U.S. 443, 446 (1972) (sentencing judge may conduct inquiry virtually unlimited in scope, nature, and source of information).
judge, in sentencing an addict, to waive the mandatory minimums in certain circumstances."\textsuperscript{186} The 1986 addict exception amendment extends eligibility to users of several of the most prevalently abused drugs in the District of Columbia.\textsuperscript{187} Logically, the class of prima facie eligible offenders will expand, affording sentencing judges many more opportunities to exercise their discretion under the addict exception than ever before.

At first blush, it appears that the 1986 council amendment leaves this discretionary door wide open, enhancing the utility of the addict exception as a device allowing more convicted drug dealers to circumvent the mandate of the voters for certain incarceration of these offenders. In this connection, the recent repeal of the NARA, another formerly available\textsuperscript{188} alternative sentencing device, makes it likely that defendants will more frequently invoke its second cousin, the District of Columbia addict exception. But even extension of eligibility will not improve the addict exception's function as a mandatory minimum sentence escape hatch, or, less fortunately, as an effective means of rehabilitating addict/dealers. The reasons for this expose some fundamental defects in the administration of criminal justice in the District of Columbia which have contributed to persistent growth in the blight of drug crime, despite concerted efforts by the courts, council and enforcement authorities to combat it. Principally, the District of Columbia lacks the resources and a firm political will to effectively implement either a punitive sentencing approach to drug crime, represented by mandatory minimum sentences, or a rehabilitative one, aptly exemplified by the District of Columbia addict exception.

The addict exception's usefulness as a means of escaping a mandatory prison term pales in comparison with that of plea bargaining at the charging phase. The potent threat of a mandatory minimum prison term significantly enhances the prosecutor's bargaining power in these encounters with defendants.\textsuperscript{189} In the District, the United States Attorney may offer any of a range

\begin{itemize}
  \item \textsuperscript{186} Finney v. United States, 527 A.2d 733, 735 (D.C. 1987); Grant, 509 A.2d at 1153.
  \item \textsuperscript{187} See supra note 174 and accompanying text.
  \item \textsuperscript{188} See supra note 114; see also 1986 CRIMINAL PRACTICE INSTITUTE TRIAL MANUAL, supra note 114, § 10.66-69. The 1987 Trial Manual indicates that the NARA sentencing will continue to be available for offenders arrested before November 1, 1987, the effective date of the NARA repeal. PUBLIC DEFENDER SERVICE, UNITED STATES ATTORNEY'S OFFICE FOR THE DISTRICT OF COLUMBIA, CRIMINAL PRACTICE INSTITUTE TRIAL MANUAL § 10.69 (1987) [hereinafter 1987 CRIMINAL PRACTICE INSTITUTE TRIAL MANUAL]. It suggests that defendants unable to meet the difficult burden under the addict exception should attempt to invoke the NARA. Id.
\end{itemize}
of lesser offenses which do not carry mandatory minimums to obtain a con-
cession of guilt. The UCJA itself contains a provision permitting the prose-
cutor, 'if the interests of justice so require,' to charge distribution or
possession with intent to distribute, which may carry mandatory minimums,
as simple possession, a misdemeanor.\(^{190}\) In addition, the prosecutor may
allow a defendant charged with distribution or possession with intent to dis-
tribute to plead guilty to an attempt or conspiracy to commit those offenses,
felons which do not carry a mandatory minimum.\(^{191}\) Moreover, extremely
pressing case management demands create a powerful incentive for prosecu-
tors to exercise charging discretion in this manner. As pointed out during
initial debate on mandatory minimum sentencing, if the prosecutor sought
the mandatory penalty in every case, defendants would have nothing to lose
by proceeding to trial. Coupled with drug case volume generated by en-
forcement techniques such as "Operation Clean Sweep,"\(^{192}\) such a result
quickly would dissipate the resources of Superior Court. A critical shortage
of prison capacity\(^ {193}\) provides further incentive for judicial and prosecutorial
officials to actively plea bargain. Thus, it best behooves the defendant to
concentrate efforts to avoid mandatory sentences upon the prosecutor, not
the judge.

Reduced reliance on plea bargaining in favor of effectuation of the voters’
mandate for strict mandatory minimum sentencing would require a far
greater outlay of public resources for courts and prisons than the public ap-

\(^{191}\) 1987 Criminal Practice Institute Trial Manual, supra note 188, at § 10.50-
.51. District of Columbia judges have displayed mixed reactions to these devices. See Rogers,
115 Daily Wash. L. Rep. at 226. Judge Schwelb, in Rogers, engaged in an insightful and
probing analysis of the propriety of allowing prosecutors to circumvent the mandate for fixed
sentences by charging distribution as an attempt or conspiracy, reluctantly concluding that he
was:

[O]bliged to accept the tendered pleas. The prosecutor traditionally has the preroga-
tive to select the charge for which a defendant is to be prosecuted and to determine
the offense to which he will be permitted to plead guilty. The Court's authority to
second guess him in areas confided to prosecutorial discretion is quite limited and
must be exercised with restraint. For the Court to rule that the prosecutor's negotia-
tion of an attempted distribution plea constitutes so grave an abuse of discretion that
the Court should intervene would be strong medicine indeed, and the circumstances
do not warrant such action here. . . . Nevertheless, the Court apprehends that the
strategem which it here deems itself constrained to approve tends to thwart the ex-
pressed will of the electorate.

Id.

\(^{192}\) See District of Columbia Courts, Annual Report 42 (1986) (aggressive drug
enforcement techniques, such as "Clean Sweep" responsible for increased caseload); Washin-
gton, supra note 180, at A10, col. 2 ("[I]n 1982, drug-related cases accounted for 21% of felony
indictments. In 1987, that number jumped to 61.3%.").
\(^{193}\) See supra note 7 and accompanying text.
pears willing to provide.\textsuperscript{194} Similarly, the exception's purpose of providing opportunities for rehabilitation to deserving offenders cannot be implemented without a large increase in capacity of public drug treatment facilities.\textsuperscript{195} \textit{Grant} requires that the defendant seeking sentencing under the addict exception locate and obtain a placement in a suitable rehabilitation program, by the time of sentencing. A suitable rehabilitation program generally is understood to mean one at a residential facility. Significantly, the courts refer 58\% of the District of Columbia Alcohol and Drug Abuse Services Administration's (ADASA) clients for drug treatment.\textsuperscript{196} In February 1988, there were 1,304 people waiting to enter District of Columbia public drug treatment facilities, far outstripping their capacity.\textsuperscript{197} Those seeking ADASA treatment must wait up to six weeks for an initial screening appointment.\textsuperscript{198} The indigent defendant seeking a slot in a drug rehabilitation program by the time of sentencing faces a formidable challenge in the District.

Finally, the courts themselves have restricted the utility of the addict exception by requiring the defendant to carry a heavy and detailed burden, making the exception applicable to a narrow class of defendants. To summarize, the statute requires that the defendant have no prior convictions for distribution, manufacture, or possession with intent to manufacture or distribute drugs included in schedule I, II, or III in any jurisdiction, that he habitually used a narcotic or abusive drug at the time of the offense, and that he sold drugs primarily to support that habit.\textsuperscript{199} Upon this foundation, \textit{Grant} requires that the defendant further show that nothing in his prior history suggests that he will not successfully complete rehabilitative treatment, and that he has located a place in a suitable rehabilitation program.\textsuperscript{200}

The importation by the \textit{Grant} court of key aspects of the NARA, a well-
established alternative sentencing statute, provided judges with a substantial body of case law to guide eligibility determinations under the District of Columbia addict exception.\textsuperscript{201} This prevents unfettered exercises of judicial discretion in this area and to some extent assures consistency in procedures and results. In reaching the findings identified in the statute, as interpreted by \textit{Grant}, the presentence report, prepared by the probation officer assigned to the case, supplies the trial judge with an important source of objective evidence.\textsuperscript{202} It may conclusively establish ineligibility and foreclose a judge from exercising his discretion to use the addict exception. The report contains the results of post-arrest drug testing, which may reveal the use of narcotic or commonly abused drugs, satisfying an essential eligibility criterion.\textsuperscript{203} The presentence report also contains information on prior convictions, and may thus establish the existence of a prior disqualifying offense, as well as a pattern of criminal behavior showing that the defendant is an unlikely candidate for successful rehabilitation. The report reveals background details on the offender’s domestic life, evidence also probative on the issue of likelihood of successful rehabilitation, and includes recommendations for sentencing.\textsuperscript{204} Judges rely heavily on presentence reports in sentencing. For example, whether the defendant is entitled to an opportunity to rebut matters set forth in the presentence report lies essentially within the sentencing

\textsuperscript{201} Id. at 1152-53. The \textit{Grant} court analogized federal cases interpreting the NARA in setting forth the defendant’s initial burden of showing eligibility under the addict exception. \textit{Id.} at 1152; \textit{e.g.}, United States v. Stalnaker, 544 F.2d 725, 729 (4th Cir. 1976) \textit{cited in Grant}, 509 A.2d at 1152 n.6 (defendant must show that a substantial motivation for drug trafficking was his own habit); United States v. Hart, 488 F.2d 970, 971 n.3 (5th cir. 1974), \textit{cited in Grant}, 509 A.2d at 1152-53 n.8 (defendant need not show actual physical addiction, proof of habitual use sufficient); \textit{accord} United States v. Kelley, 476 F.2d 211, 212 (1st Cir.), \textit{cert. denied}, 414 U.S. 913 (1973); United States v. Johnson, 373 F. Supp. 1057, 1059 (D. Del. 1974), \textit{cited in Grant}, 509 A.2d at 1152 n.5 (the defendant must advise the court that he seeks alternative rehabilitative treatment in lieu of incarceration).

\textsuperscript{202} Unless waived by the defendant, or precluded by the judge upon a finding that sufficient information exists to sentence the defendant, in every criminal case prosecuted in the District of Columbia for which a finding or plea of guilty has been entered, except traffic offenses, the probation service conducts an investigation and prepares a presentence report to assist the judge in exercising sentencing discretion. \textit{D.C. SUPER. CT. R. CRIM. P.} 32(b). The presentence report contains the “prior criminal record of the defendant, and such information about his characteristics, financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court.” \textit{Id.} at 32(b)(2).


\textsuperscript{204} \textit{See, e.g.}, \textit{Grant}, 509 A.2d at 1154-55.
judge's discretion.\textsuperscript{205} Even if the presentence report contradicts the defendant's prima facie proffer of eligibility proof made in the proposal advising the judge of a desire to seek sentencing under the addict exception,\textsuperscript{206} the judge may deny the defendant an opportunity to present further evidence, and resolve the conflict by ordering a supplemental presentence report.\textsuperscript{207}

VI. CONCLUSION

The defendant seeking to establish addict exception eligibility must run a difficult procedural and substantive gauntlet. The courts have clearly expressed an intention to pay heed to the voters' call for fixed sentencing of drug dealers, and this consideration permeates addict exception case law. This attitude of self-restraint obviates the possibility that expanded eligibility will improve the utility of the addict exception as a mandatory minimum sentence loophole. But the eligibility ordeal also stems from inadequate fiscal emphasis on public rehabilitative treatment facilities. The current restrictively finite number of spaces in such facilities represents the outer limit of the addict exception's utility as a device to combat drug crime. In sum, the Council's gesture in extending eligibility means little unless it also increases its fiscal commitment to rehabilitation. In the same vein, a strategy combining vigorous enforcement with mandatory sentencing cannot work without an increase in the capacity of judicial and corrections resources to accommodate those subject to fixed terms of incarceration. While courts and politicians indecisively experiment with two conflicting statutory sentencing philosophies, firmly committed to neither, the community suffers at the hands of drug dealers. The city desperately needs movement on a comprehensive reevaluation of the unique dynamics of felony drug sentencing, including a fundamental decision as to its purpose, by officials willing to stand by their decision.\textsuperscript{208}

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\textsuperscript{205} Id. at 1154. In Grant, the court remanded the case to afford the defendant an opportunity to rebut the presentence report's recommendation of incarceration, which seems to suggest that the defendant making an addict exception showing may present rebuttal evidence as of right. Id. However, the court stated that whether to allow a hearing for presentation of such evidence lies within the discretion of the trial judge. Id. The court noted: "a hearing may be unnecessary where the trial judge finds reliable information in the presentence report of a defendant's ineligibility or his unlikely prospects for rehabilitation, not withstanding any of the defendant's challenges to the report." Id. at 1155.

\textsuperscript{206} Id.

\textsuperscript{207} Id. at 1156.

\textsuperscript{208} Movement on sentencing reform has occurred through the initiative of a commission composed of judges and District of Columbia legislators. As a means of assuring greater order in sentencing offenders not subject to mandatory minimums, the Sentencing Guidelines Com-
mission formulated and is currently studying a system of fixed terms of incarceration for certain drug offenses. See Superior Court Sentencing Guidelines Commission, Initial Report: The Development of Felony Sentencing Guidelines for the Superior Court of the District of Columbia, (Feb. 1987). In accordance with the Commission's general guidelines-based approach, a drug "sentencing matrix," or grid identifies presumptive sentences. Id. at 16-23. The horizontal axis defines certain defendant characteristics and circumstances surrounding the violation. The vertical axis groups drugs involved into three categories, "narcotic drugs, PCP and all other drugs." Depending on the drug involved, the nature of the offense and defendant characteristics, "cells" on the grid identify a prescribed sentencing range. Id. Nonaddict dealers subject to the mandatory minimum prison terms are not covered by the guidelines. Under guideline sentencing, the judge must adhere to the guideline sentence range provided in the appropriate grid cell, unless there are substantial and compelling reasons for departure. Id. at 27-29. This is intended to be a strict standard, but the list of aggravating/mitigating factors justifying deviation is extensive. Id. at 88. In such cases, the judge must set forth reasons for departure on the record. Id. at 29.

Significantly, the grid prescribes sentences for addict sellers, according to the offender's prospects for rehabilitation, extent of criminal record, and potential threats of violent or threatening behavior. Id. at 82. Cell A provides probation with mandatory drug treatment for those with a minor prior record showing no violent crimes adjudged amenable to rehabilitation, regardless of the drug involved. Id. Cell B prescribes incarceration for an addict seller who either presents a poor prospect for treatment, or presents an unacceptable risk to the safety of persons or property. Id. The grid prescribes a 24 month presumptive term for dealers of narcotics of PCP in this category, and 20 months when other drugs are involved. Id. Finally, cell C provides 36 months for an addict with an extensive criminal history or a prior violent crime conviction, when convicted of selling narcotics or PCP, and 20 months for other drugs. Id. Addict offenders ineligible for drug treatment with less serious records are subject to prison terms less than the mandatory minimum, and would be eligible for "good time" credits. D.C. Code Ann. §§ 24-428 to -429 (Supp. 1987); Superior Court Sentencing Guidelines Commission, supra, at 82; see also id. at x (Council Bill 6-505 deducts "good time" credits from both minimum and maximum terms of indeterminate sentence, changes Commission's assumption that offender will serve full guideline sentence imposed).

The Guidelines Commission's work is now undergoing a period of comment and review leading to adoption on a trial basis. Id. at xi. The future is, however, clouded by a strong minority view that the majority has inadequately considered the potential impact of proposed guidelines upon prison population and expenses. See Sentencing Guidelines Commission Minority Report 2-7 (Feb. 6, 1987) (printed in same volume as the majority report). Notably, both Council Chairman David Clarke, opponent of mandatory minimums during Council deliberations, and Chairperson of the Committee on the Judiciary Wilhelmina Rolark, sponsor of the addict exemption expansion amendment, joined in this dissent. Id. at 8. Ironically, mandatory minimum sentencing, a much more inflexible sentencing scheme than guidelines, was thrust upon the criminal justice system without the benefit of careful deliberation on these critical matters.