

**ORAL STATEMENT OF WILLIAM J. MERTENS, CHAIR  
CRIMINAL LAW AND INDIVIDUAL RIGHTS SECTION  
OF THE DISTRICT OF COLUMBIA BAR<sup>1</sup>**

**Before the District of Columbia  
Truth-In-Sentencing Commission**

**December 9, 1997**

**Steering Committee Members:**

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Stevan E. Bunnell  
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Richard D. Heideman  
Niki Kuckes  
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<sup>1</sup> The views expressed herein, <sup>are</sup> only those of the Criminal Law and Individual Rights Section of the District of Columbia Bar and not those of the D.C. Bar or of its Board of Governors.

**SUMMARY OF PROPOSED PUBLIC STATEMENT  
BY CRIMINAL LAW AND INDIVIDUAL RIGHTS SECTION  
TO D.C. TRUTH IN SENTENCING COMMISSION**

**(Proposed oral statement for delivery at  
Commission hearing on December 9, 1997)**

Attached is proposed statement that the Criminal Law and Individual Rights Section seeks to deliver as oral testimony at a public hearing of the D.C. Truth in Sentencing Commission on December 9, 1997. The statement comments on the proposed plan recently issued by the Commission that would implement certain changes in D.C. criminal sentencing law required by the D.C. Revitalization Act. Because this proposal would make significant changes affecting the administration of the D.C. criminal justice system, we believe that comments by the Section are appropriate and important.

The Commission's proposal would change the basis of criminal sentencing for most (and possibly all) District felonies. At present, the District operates under an indeterminate sentencing system, in which the judge announces a range of prison time to be served by an offender, and the Parole Board determines the release date within that range. The draft plan would substitute a determinate sentencing system, under which the judge instead announces a specific prison term, and the offender must serve at least eighty-five percent of that term. The Parole Board is abolished. The Commission has solicited comment, among other things, on how to address problems created by its draft proposal to implement these changes, which presently creates the possibility for an increase in the level of criminal sentences and exacerbation of sentencing disparities.

The Section's proposed oral comments are limited to three points. First, we urge the Commission to expressly state in its plan that there is no intent to make an increase in prison terms for D.C. offenders, which are already significantly above national averages. We urge the Commission as well to take concrete steps to resolve this problem, while recognizing the short time remaining for action. Second, we address the Commission's proposal for a possible sentencing guidelines system. Without taking a position on whether sentencing guidelines are the best solution, we explain the types of standards and procedures that should be included to implement any such proposal. Third, we emphasize the importance of improving the data available on criminal sentencing in the District, and making such data available to the public.

This proposed statement is submitted with a request for expedited consideration. The Commission's plan was only publicly released this week, and the public hearing is on Tuesday, December 9, 1997. Thus, there was not sufficient time to follow standard procedures. Thank you for your consideration.

**ORAL STATEMENT OF WILLIAM J. MERTENS, CHAIR  
CRIMINAL LAW AND INDIVIDUAL RIGHTS SECTION  
OF THE DISTRICT OF COLUMBIA BAR<sup>1</sup>**

**Before the District of Columbia  
Truth-In-Sentencing Commission**

**December 9, 1997**

Good evening. My name is Bill Mertens and I am speaking as Chair of the Criminal Law and Individual Rights Section of the D.C. Bar. Thank you for the opportunity to provide our Section's views on the draft plans to amend the District's criminal sentencing laws. The membership of our Section includes many criminal law practitioners in the District, who are vitally interested in the changes this Commission will be proposing.

Because the time is short, I will limit my oral statement to addressing three issues:

First, the question of potential effects on length of sentences and sentencing disparities;

Second, the possibility of promulgating sentencing guidelines; and

Third, the importance of public information and data about District sentencing.

Our Section will be submitting written comments that will address the draft plans in greater detail, which we were not able to present to you today under the very short schedule. We will get those to you as soon as we possibly can.

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### Sentence Length and Sentencing Disparities

We strongly urge the Commission to adopt explicitly the principle that its recommendations should produce no increase in the sentences that D.C. prisoners actually serve. Whatever the failings of the D.C. criminal justice system, sentences actually served by D.C. prisoners already are nearly twice the national average for comparable offenses. No justification has been offered to make D. C. sentences longer still. In many cases, increasing sentences would be only a needless (and expensive) cruelty. The principle of "truth-in-sentencing" serves the laudable goal of making sentences more candid, but that does not mean making them longer for no good purpose.

We are aware that most or all of the Commission members have expressed the view, at public meetings, that it is not the Commission's intent either to increase the length of sentences or to exacerbate sentencing disparities. We urge the Commission, as a first step, to put this in writing. It is essential that this intent be spelled out in the text of the proposed amendments the Commission submits to the D.C. Council.

If the Commission's proposals are perceived as imposing a new and harsher sentencing regime on the District of Columbia, we are concerned that there will be an erosion in public support for the criminal justice system. Among other ways, loss of public support may be manifested in an increase in instances of jury nullification.

It would be particularly harmful to community acceptance if the Commission process were to go into default, and the Justice Department directly imposed new criminal sentencing rules upon the District. This is an outcome to be avoided if at all possible. We are aware that Congress structured the Commission to be heavily oriented toward federal control, and we urge the Commission to be sensitive to the perception that these changes are

being forced upon the District from above, and to listen carefully and respond to community concerns about these changes.

In addition to explicitly stating its intent in the proposed legislation, we urge the Commission to go back to consider a concrete proposal to address the problems of sentence length and sentencing disparity. Everyone, including the Commission, acknowledges that this draft plan will cause these problems. We are mindful that you are on a very short deadline, but we urge the Commission not to issue recommendations that are incomplete and will need substantial cleaning up by some other body later.

In particular, we urge the Commission to directly address in a concrete way the problems that are created by changing to a determinate sentencing system without adjusting any of the very high statutory maximums that apply under the present system. Whether the "minority" plan put forward by Mr. Wilkins would work, or another approach would be appropriate, the Commission should make every effort to develop a complete proposal that includes not simply an identification of the problem, but also a proposed solution.

We appreciate that time is short, but this is one of the most important issues this Commission must confront, if not the most important issue. We urge the Commission to devote some of its remaining time to a serious reexamination of this issue, and to attempting to reach consensus on a workable approach.

#### Sentencing Guidelines

We take no position on the merits of the "majority" recommendation that the District should adopt a form of sentencing guidelines. However, in our view if a sentencing guidelines system is recommended, it is important that it be in the form of concrete enabling

legislation that would allow the District immediately to put this process in place. Equally important, such legislation should include specific standards and procedures to govern the process.

It is our intent to submit, as soon as possible, a draft of the type of enabling legislation that we believe would be appropriate, based on the ABA Criminal Justice Standards on Sentencing and similar legislation adopted in other states. But we believe that the terms should include at least the following:

First, and foremost, we believe that the development of any guidelines should be a local process, with direct participation of the many different groups whose work and lives are affected by the District's criminal sentencing laws. There should be a permanent body to develop and monitor any sentencing guidelines, and the make-up of that body that should be carefully balanced and controlled by local officials and representatives.

Second, any sentencing guideline system imposed on the District should be the product of free and open public debate. The body's procedures should provide for regular open meetings and public hearings.

Third, the enabling legislation should set forth explicit goals and standards to spell out what the guidelines should be designed to achieve. These should, of course, include the goals to avoid unintended increases in criminal sentences and unwarranted sentencing disparities. In light of the very high rate of incarceration of District citizens — nearly five times the national average — we believe that the guidelines should also strive for a neutral effect on the size of the District's prison population.

Fourth, sentencing guidelines should not replicate the federal model, which is not appropriate for the District's high volume and wide variety of criminal cases. The

enabling legislation should make clear that the guidelines should allow Superior Court judges greater flexibility in making departures than federal judges are allowed under the federal system, and should avoid the complexity for which federal guidelines have been criticized. The body that develops guidelines should not look exclusively to the federal model but should consider guideline systems in the states, some of which have successfully avoided problems that persist in the federal system.

Fifth, the body should base its recommendations on thorough and accurate analysis of the current situation in District sentencing. We support the suggestion in the majority report that funds be allocated to support the collection and rigorous analysis of felony sentencing data (including data on length of time served before release) under the current system.

Sixth, if the District adopts guidelines, it should establish and adequately fund a permanent body, staffed with professionals who will continue to gather data and monitor the effects of implementing guidelines, so that problems can be identified and corrected on an on-going basis. Studies and reports should be released publicly on a regular basis.

Seventh, and finally, the body should consider the interaction of sentencing guidelines for the District with D.C.'s existing mandatory minimum sentences, and should report to the D.C. Council if adjustments in those provisions are advisable to enhance the effectiveness of the sentencing guidelines system.

#### Information

Finally, I would like to address as a separate point the issue of gathering and releasing sentencing data because this is so vitally important to public and governmental

oversight. The changes in the District's criminal sentencing system will be enormous. The effects will be difficult to predict, and critical to monitor.

At present, it is difficult to obtain any detailed information about the actual sentences imposed on and served by District offenders. We urge the Commission to include in its legislative proposal a specific provision to require the collection of detailed sentencing data from the Courts, the Corrections Department, the Bureau of Prisons, and other involved agencies. That provision should establish an annual reporting process, and should specifically provide for public access to sentencing data.

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Thank you again for the opportunity to address this Commission. We will be submitting a written statement shortly.