

Statement of
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and
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of the Council for Court Excellence
before the
Committee on the Judiciary,
Council of the District of Columbia

Bill 15-711
Advisory Commission on Sentencing Structured Sentencing System
Pilot Program Amendment Act of 2004

March 1, 2004

Good morning, Madam Chair and members of the Committee, and ladies and gentlemen. My name is Theodore Whitehouse. With me is June B. Kress, the Executive Director of the Council for Court Excellence. Mr. Gordon could not be here today. We testify today on behalf of the Council for Court Excellence. Founded in 1982, the Council for Court Excellence is a nonpartisan, civic organization based in the District of Columbia. Our organizational purposes include promoting public education about the judicial system, promoting improvement in the federal and D.C. courts, and supporting the courts. Our membership includes attorneys, judges, and members of the public. We have worked closely with the D.C. Council and its Judiciary Committee on many issues, including the 1994 Probate Reform Act, the Office of Administrative Hearings Establishment Act of 2001 and subsequent amendments, as well as on a number of sentencing related matters, including the Advisory Commission on Sentencing Establishment Act of 1998, the Truth in Sentencing Amendment Act of 1998, and the Sentencing Reform Act of 2000. No judicial member of the Council for Court Excellence participated in the formulation of these comments.

The Council for Court Excellence supports the proposed legislation and commends the work performed by the Advisory Commission on Sentencing. We believe that the Commission has addressed an important and complex set of issues in a responsible, thoughtful manner, and has put forth a recommendation that should be implemented. The proposed legislation would enable that process.

As you know, the District of Columbia already has adopted a determinate sentencing system which eliminates parole and ensures that any term of imprisonment imposed by the court

will actually be served by the defendant. As the next step in revamping sentencing in the District of Columbia, the Advisory Commission on Sentencing has concluded that the District should move toward a comprehensive structured sentencing system. Toward that end, the Commission has developed a set of voluntary sentencing guidelines. It recommends that these guidelines be implemented initially as a pilot program by order of the Chief Judge of the Superior Court for a period of at least 18 months, starting in May 2004. This pilot program would allow the guidelines to be evaluated by the public, the bench, and the bar, and to be adjusted or fine tuned as appropriate. Then, if the structured sentencing system is found to be achieving its goal, the Commission notes that it can be implemented on a more permanent basis with appropriate enabling legislation. The Council for Court Excellence supports each of these conclusions, which I now address in turn.

The Commission's first and most fundamental conclusion is that the District of Columbia should move toward a comprehensive structured sentencing system. There are sound reasons for this conclusion. The Commission found that the existing, unstructured sentencing system in the District produces unwarranted disparities in criminal sentences in almost every crime category. Structured sentencing promotes greater fairness in sentencing by reducing unwarranted disparities so that similar offenses and offenders are treated similarly. At the same time structured sentencing promotes justified disparities by identifying the factors that should result in different sentences. By setting recommended sentences to guide judicial discretion, structured sentencing fosters uniformity and predictability in sentencing in most cases, leaving room for

departure in exceptional ones. It also provides a framework within which policy makers and the general public can better assess the fairness of a sentence in a particular case.

The Commission has developed a set of voluntary sentencing guidelines to effectuate structured sentencing. The two most important factors, appropriately, are the severity of the offense and the prior criminal record of the offender. The guidelines set sentence length ranges for the varying combinations of offenses and criminal history. The sentence length range increases as the level of seriousness of an offense increases and as the extent of the offender's criminal history increases. In ranking the severity of the offenses and establishing the sentencing ranges, the Commission made a conscious attempt to replicate current sentencing practices. At the same time, it sought to reduce disparity by eliminating sentences at both the low and high ends of the historical spectrum. Thus, the recommended sentencing ranges capture approximately the middle 50 percent of historical sentences for a given offense and criminal history, while eliminating the 25 percent at the low and high ends. This approach wisely builds on the accumulated wisdom and judgment of our bench as reflected in historical sentencing practices. It results in recommended sentencing ranges that, by design, still are fairly broad and preserve a considerable amount of discretion for the court in determining precisely what sentence is appropriate for an offender in a particular case. The Council for Court Excellence approves of this approach, especially at the outset of implementing a new and untested system.

The Commission has also established standards for departing from the guideline sentence ranges in extraordinary cases. It identified a limited number of aggravating and mitigating factors that would permit a court to impose a sentence above or below the guideline

range, including "safety valve" provisions that a court may invoke if, in a particular case, it finds another factor of comparable importance to the listed factors. In addition, the Commission has identified a short list of prohibited factors, such as race and gender, that shall never be considered in determining the sentence. We believe that this is a sound approach and that the Commission has appropriately identified the factors that ought to aggravate, mitigate, or play no role in determining a just sentence.

Although the Commission sought to constrain departures from the guidelines by adopting a list of approved reasons for departure and a policy stating that they are to be utilized only in extraordinary cases, it did not impose any actual limit on departures. This decision was the subject of much discussion within the Commission. It entails obvious risks that certain judges may ignore the guidelines when they call for a sentence at odds with the judge's own notions of justice. Ultimately, the Commission concluded that imposition of strict limits would unreasonably constrain judicial discretion in truly extraordinary cases and would inevitably produce a system of unauthorized "departures from departures." This is a reasonable judgment, particularly at the outset of what is supposed to be a pilot program for application of the guidelines. However, this is clearly an issue that will require close scrutiny during the course of the pilot program.

Another important sentencing issue is identifying those situations in which it may be appropriate for the court to impose probation rather than imprisonment, or else to impose a "split sentence" in which the defendant is required to serve a brief period of incarceration followed by probation. The Commission wanted to give the judge a great deal of flexibility in this regard.

Accordingly, the guidelines provide that probation or a split sentence is an option in situations where, historically, they have been imposed in 25 percent or more of the cases. This appears to be a reasonable dividing line, at least at this juncture.

Finally, the Commission decided to opt for a system of voluntary guidelines, rather than mandatory guidelines such as those used in the federal court system. The Commission expressed its belief that voluntary guidelines will be followed by the Superior Court yet will not produce the additional, burdensome litigation that a mandatory guideline system would engender. We agree that a mandatory guideline system would spawn additional litigation both before the Superior Court and the Court of Appeals. If an effective guideline system can be implemented on a voluntary basis, then that system has much to recommend it. The proposed pilot program will provide the opportunity to test the effectiveness of a voluntary system. Further, the Commission noted that voluntary guidelines will be easier to adjust in the future based on experience developed during the pilot program. We agree that the need to adjust the guidelines is another sound reason for experimenting with a voluntary, rather than a mandatory, guideline system.

Because of the complexities involved, the proposed sentencing guidelines are still very much a "work in progress," even after all of the fine work performed by the Commission. The Commission wisely recommends that the guidelines be implemented initially as a pilot program so that they can be evaluated by the public, the bench, and the bar, and can be adjusted as appropriate. It makes good sense to take an extended "shakedown cruise" with the sentencing

guidelines before the Council of the District of Columbia considers enabling legislation to implement the guidelines on a more permanent basis.

The proposed pilot program affords an excellent opportunity for all interested parties to consider a number of fair questions that can be raised about various specific provisions of the guidelines. Some of these questions are fundamental to the structure of the guidelines. For example, are the sentencing ranges too broad to sufficiently reduce unwarranted disparities in the sentences imposed on similar offenders for similar offenses? Other questions are narrower and more specific. For example, does armed carjacking deserve a sentence more than twice as severe as other types of armed robberies? Should juvenile adjudications always be scored at only half the value of comparable adult convictions for purposes of computing a criminal history score, even if they are part of a continuing pattern of serious criminal behavior that began when the offender was a juvenile? But the fact that various aspects of the proposed guidelines are open to legitimate question or debate does not constitute a good reason for delaying their implementation as a pilot project. These issues can be sorted out during the course of the pilot project and resolved before a more permanent guidelines system is put in place. Furthermore, some of these issues cannot really be resolved until enough experience is gained under the guidelines to assess how they work in practice.

I now want to discuss the role of the Commission in the months and years ahead. The Commission notes that it has several significant items of unfinished business to address. One is to assist in implementation of the guidelines by training and educating others about them. The Commission expects to provide technical assistance for practitioners and the public, especially

those persons who will be using the guidelines on a daily basis. Another task is to conduct further work on certain design issues relevant to structured sentencing, including the imposition of intermediate sanctions and refining the guidelines to better distinguish between certain crimes that can be committed in very different ways. The Commission also intends to monitor sentences during the pilot project to determine compliance with the guidelines and with the rules for departure, with an eye to identifying areas in need of improvement and proposing appropriate modifications. All of these are tasks of vital importance that the Commission should undertake and for which the necessary funding should be furnished.

Once the pilot project is completed, the Council of the District of Columbia can and should consider implementation of a more permanent structured sentencing system. Even at that point, however, the need for a Sentencing Commission will not disappear. Every state with a fully-functional structured sentencing system has retained a Sentencing Commission to collect and analyze data on sentencing and to make recommendations for future improvements. A Sentencing Commission is an essential component of a system of structured sentencing and serves an "intermediate function" between the legislative branch and the court system. Thus, the Council should anticipate the need not only to preserve and fund the Advisory Commission on Sentencing during the pilot project but, at an appropriate point, to transform it into a permanent Sentencing Commission. This will be money well spent in improving the quality of criminal justice for the citizens of the District of Columbia.

Thank you for your attention.