



D.C. Criminal Code Reform Commission
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MINUTES OF PUBLIC MEETING

WEDNESDAY, OCTOBER 2, 2019, at 10:00 AM
CITYWIDE CONFERENCE CENTER, 11th FLOOR OF 441 4th STREET NW
WASHINGTON, D.C. 20001

On Wednesday, October 2, 2019, at 10:00 am, the D.C. Criminal Code Reform Commission (CCRC) held a meeting of its Criminal Code Reform Advisory Group (Advisory Group). The meeting was held in Room 1112 at 441 Fourth St., N.W., Washington, D.C. The meeting minutes are below. For further information, contact Richard Schmechel, Executive Director, at (202) 442-8715 or richard.schmechel@dc.gov.

Commission Staff in Attendance:

Richard Schmechel (Executive Director)

Rachel Redfern (Senior Attorney Advisor)

Jinwoo Park (Senior Attorney Advisor)

Patrice Sulton (Senior Attorney Advisor)

Nathaniel Wenstrup (Attorney Advisor)

Advisory Group Members and Guests in Attendance:

Laura Hankins (Designee of the Director of the Public Defender Service for the District of Columbia)

Katarina Semyonova (Visiting Attendee of the Public Defender Service for the District of Columbia) (until 11:25 a.m.)

Elana Suttentberg (Visiting Attendee of Office of the United States Attorney for the District Columbia)

Stephen Rickard (Visiting Attendee of Office of the United States Attorney for the District of Columbia) (until 11:15 a.m.)

Dave Rosenthal (Designee of the D.C. Attorney General)

Don Braman (Council Appointee) (by phone) (until 11:30 a.m.)

Kevin Whitfield (Designee of the Chair of the D.C. Council Committee on the Judiciary and Public Safety) (by phone, from 10:20 a.m. to 11:30 a.m.)

I. Welcome and Announcements.

- a. The Executive Director noted that the next meeting will be held on November 6, 2019.
- b. Tomorrow, the Commission will release the First Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.

- i. The Commission seeks comments on the ordinal rankings (what should be graded up or down). At this time, CCRC is seeking input on the relative distribution and spread, not on the maximum penalties for each class. Members may, but are not required to, comment on the penalty models listed at the top of the page.
- ii. CCRC will provide a PDF and Excel format, which will enable CRAG members to submit a revised spreadsheet, if they so choose. The files will include a second worksheet, organized by penalty.
- iii. PDS noted that the Sentencing Commission took a similar approach, requiring members to sort felony offenses into 10 boxes, without making recommendations about imprisonment time.
- iv. The Executive Directed noted that the Report is based on the current RCC offenses, although there may be future changes to offense elements and gradations. Members may, but are not required to, offer additional comments on the penalties assigned to hypothetical offenses and offense gradations
- v. CCRC also seeks comments on jury demandability recommendations as specified in the document.
- vi. CCRC notes that the Report includes nine felony classes, in contrast to the eight classes in a prior draft of the RCC’s general part.
- vii. OAG asked whether other jurisdictions that have comprehensively revised their criminal codes have adopted a similar classification scheme.
 1. The Executive Director noted that the reform jurisdictions vary. Most have offense classifications. The models included in the Report align with many of the maximum penalties in current law. The CCRC’s initial report on classification of penalties, issued two or three years ago, addresses these matters more.
- viii. USAO asked whether it may comment on whether an offense should be classified as a felony or a misdemeanor.
 1. The Executive Director confirmed that those comments are welcome, as well as more specific comments on which felony or misdemeanor class.
- ix. USAO asked whether the felony classifications are intended to correspond to the Master Group assignments in the Sentencing Guidelines.
 1. The Executive Director explained the penalty classes in the report do not correspond to Master Group assignments. The Sentencing Commission is tasked with developing the Guidelines. The CCRC will not make any recommendations about Guidelines.
- x. The Executive Director noted that the report recommends dollar value thresholds for the property offenses double (e.g., \$250 to \$500, \$2,500 to \$5,000).
 1. OAG asked whether CCRC is inviting comments on the dollar value thresholds themselves.

2. The Executive Director confirmed that comments on both the property value thresholds and the classification of those gradations are welcome.
 - xi. CCRC will also provide, as background, a sortable spreadsheet of statutory maxima for current D.C. Code offenses, denoting which offenses have been revised and will be revised.
 - xii. CCRC will also provide, as background, a sortable version of Appendix C from the Voluntary Sentencing Guidelines Manual.
 - xiii. CCRC will also provide, via email to Advisory Group members, non-public court data about sentences imposed in recent years. The CCRC hopes to be able to send out a copy of the data that can be discussed in the Advisory Group meeting soon, but first needs to check with the Court.
- c. Tomorrow, CCRC will also release an updated compilation of RCC statutes, including the drug and weapon offenses, the updated property offense dollar value thresholds, jury demandability, and other formatting/typographical corrections.
- d. Next week, CCRC will provide the results of a series of surveys of D.C. voters, concerning public opinion of the relative severity of various types of conduct.
- e. The Executive Director noted recent correspondence from a District resident upset about certain criminal penalties and her experience with the criminal justice system. He said that, as the agency begins discussion of penalties, it is to be expected that there may be sharp disagreement, as there is among some members of the public. He expressed his hope that the agency's discussions would remain civil and respectful of the fact that reasonable people may strongly disagree about such matters.
- f. OAG asked when comments will be due.
 - i. The Executive Director noted that comments will be due in six weeks, or roughly in mid-November.
- g. OAG asked whether the report will be discussing minima.
 - i. The Executive Director noted that minima and absolute numbers for maxima will be discussed at a later time. First, the agency wants to establish a basic ordinal ranking of maxima.

II. The Advisory Group discussed the written comments on the First Draft of Report #37, Controlled Substance Offenses and Related Provisions:

- a. Staff asked for clarification of USAO's comment about adding "quantity or mixture" for third degree trafficking.
 - i. USAO explained that it sometimes has to dismiss heroin, synthetic marijuana and, perhaps, other cases, based on DCCA precedent. USAO noted that the current controlled substance schedules specifically include mixtures or compounds containing cocaine, ecognine, methamphetamine, phenmetrazine, and phencyclidine. However, the schedules do not explicitly include mixtures or compounds containing opium poppy, poppy straw, or opium. Therefore, under current DCCA case law, a measurable amount of a mixture containing any amount of cocaine, ecognine, etc. constitutes a controlled substance. However, a measurable amount of a mixture containing trace amounts of opium is *not* sufficient for controlled substance offenses.

- ii. USAO noted that adding the “compound or mixture” language with respect to opium, opium poppy, or poppy straw would change current District law.
- b. Staff asked for clarification of USAO’s comment about striking “in furtherance of” from the while armed enhancement. Staff asked whether there would be any situations in which a person carried or had readily available a firearm that had no relationship at all to trafficking of a controlled substance, in which the penalty enhancement should not apply.
 - i. USAO explained that the presence of the gun during a drug crime adds a risk of danger and raised concerns about the government’s ability to prove that the gun was used in furtherance of a crime.
 - ii. Staff noted that the government is required to prove the gun was used “in furtherance of” a crime under federal law.
 - iii. USAO responded that federal law alternatively allows the government to prove that the gun was used or carried.
 - iv. PDS asked USAO whether it would oppose requiring that the person use or carry the weapon (excluding mere possession).
 - v. USAO stated that it prefers the government only have to prove that the weapon is readily available.
- c. The Advisory Group discussed the defense to trafficking of a controlled substance when a person gives away without receiving payment in return, or without any expectation of future financial gain.
 - i. OAG noted that, in some instances, there may be no observable exchange of drugs for remuneration but, nevertheless, there is an understanding that there will be an exchange later.
 - 1. USAO provided an example in which an officer occupying an observation post sees one dealer provide a large quantity of drugs from a car to a lower-level dealer on the street.
 - ii. Staff asked about OAG’s proposal to limit the defense. OAG had proposed that the defense only apply to distributions of quantities sufficient for a “single use.” Staff asked what would constitute a “single use.”
 - iii. OAG distinguished between an amount that is suitable for personal use (including by many people or by one person over an extended period of time) and an amount that is suitable for a “single use” by one person. OAG noted that it did not have a specific quantity in mind, but said that there should be some reasonable limit to the quantity of controlled substance subject to the defense.
 - iv. PDS said that it would augment its written comments with a recommendation that the offense include as an element (not as a defense) that person *expects* to receive financial gain.
 - v. USAO noted that its objections are based on the challenges they would face proving cases at trial and not to the theoretical underpinnings of the defense definition. For example, allowing a defense for someone who gives drugs to a friend at a party may enable every defendant in a

- trafficking case to disingenuously claim that they were planning to give away their stockpile of drugs to friends for free.
1. PDS responded that, although it is important to consider how cases will be proved at trial, that should not be the foremost consideration when determining what conduct should constitute a crime.
 2. The Executive Director noted that, in such a case, the mere possession of a stockpile of drugs is criminal under the RCC, even in cases where trafficking cannot be proven.
 3. A USAO representative stated that giving someone a line of cocaine at a party is substantively more serious than possessing it for yourself only.
- vi. PDS offered a hypothetical in which a person provides many doses of a drug for attendees of a party to personally use and enjoy together.
 - vii. OAG stated that such a person should not have the benefit of the defense that the distribution was not for monetary remuneration. That defense should be reserved for scenarios in which a person shares a single use with another individual.
 - viii. Staff invited the group to share any case law or other legal authority that succinctly articulates the “single use” quantity as defined by OAG.
- d. Staff noted that USAO’s written comments objecting to decriminalizing possession of paraphernalia for purposes other than manufacturing specifically addressed paraphernalia for distribution, but not for personal use. Staff asked USAO whether it opposes decriminalizing possession of pipes and other items used for the ingestion of drugs.
- i. USAO did not take an official position with respect to decriminalization, but did note that possession of a pipe is much less serious than possession of zips and a scale.
 - ii. USAO also noted that its opposition to decriminalization of paraphernalia is not ranked as highly in its hierarchy of comments.
- e. Staff asked OAG about its recommendation to define first degree possession of a controlled substance as possession of any schedule I or II substance. Staff asked whether there are any specific substances that would be improperly penalized under the RCC draft recommendation.
- i. OAG explained that, given that Schedule I drugs have been determined to be (and defined to be) the most dangerous, it is illogical to exclude some of them from first degree liability solely because they are not also defined to be abusive and narcotic. OAG recommends a change in District law.
 - ii. Staff noted that grading the offense could lead to unexpected results. For example, psilocybin is a Schedule I drug, whereas methamphetamine is in Schedule II. Under OAG’s proposal, possession of both substances would be subject to the same penalties. Staff asked for a more detailed recommendation about which specific substances should be graded as first degree.
 - iii. OAG noted that it is reviewing changes to how each schedule is defined.

- f. PDS highlighted a significant racial disparity in prosecutions of drug crimes. PDS stated that it is fair and important to think about writing drug offenses in a way that limits the opportunity for racist enforcement of the law. PDS cited to the Council hearings concerning decriminalization of marijuana and noted that the same racial justice arguments apply to other drug offenses.
 - i. The Executive Director noted that when court data is shared with the Advisory Group, it will include demographic data such as the race of the defendants.
- g. Staff asked OAG whether it would oppose amending the trafficking of drug paraphernalia offense to only apply to paraphernalia for manufacturing controlled substances.
 - i. OAG said that the recommendation should be consistent. If selling paraphernalia used for distributing or ingesting controlled substances should be criminalized, possession of such paraphernalia should also be criminalized.
 - ii. OAG explained that, foremost, the commentary should explain the discrepancy between sales and possession. Secondly, OAG's recommendation is to make the two types of conduct equally legal.
 - iii. PDS asked why ingestion paraphernalia is regarded as dangerous, absent the presence of drugs. PDS noted that many objects, such as syringes and bowls, have other legitimate uses.
 - iv. Staff noted that criminalizing ingestion paraphernalia enables a law enforcement officer to arrest a person they observed using drugs. For example, if a person injects themselves with a syringe, they have consumed the evidence of drug possession.
- h. Staff asked OAG about its recommendation to criminalize knowingly using a building, vehicle, or watercraft with the intent to manufacture methamphetamine therein. Staff asked whether the proposed offense would include using a building with the intent to manufacture methamphetamine there in the future.
 - i. OAG explained that running a meth lab poses dangers such as a risk of explosion and gases affecting neighbors.
 - ii. OAG said that its intent was to criminalize use of buildings where methamphetamine is actually being, or has been, manufactured.
- i. Staff asked PDS to clarify its recommendation about expanding D.C. Code § 48-904.01(e)(1) probation.
 - i. PDS said that, in addition to proposing that this disposition be available to people who have already been sentenced under it previously, it should also be available to people who were convicted of previous possessory offenses who did *not* receive a 904.01(e) sentence.
- j. Staff asked PDS to clarify whether its recommendation to change "public youth center" to "public recreation center" in the drug and weapon offenses was intended to be a substantive change or drafting point only.
 - i. PDS said that this recommendation is not intended to be a substantive change.
 - ii. USAO proposed also adding any "community center."

III. The Advisory Group discussed the written comments on the First Draft of Report #39, Weapon Offenses and Related Provisions:

- a. Staff noted an error in the commentary to RCC § 7-2502.01. It does not fully replace 7-2507.06 (Penalties). As reflected on page 5 of Memo #24, paragraph (a)(1) of the current statute, concerning firearm sales, is retained.
- b. Staff noted an error in the statutory language for RCC § 22E-4105(b)(2)(C)(i). This provision should include the word “and” at the end.
 - i. OAG indicated it will ask the Council representative about why having a firearm in violation of an Extreme Risk Protection Order was assigned its own penalty instead of added as a predicate for unlawful possession of a firearm under D.C. Code § 22-4503(a)(5).
 - ii. USAO noted that the current law does not include stay away/no contact orders.
 1. Staff noted that there is no clear indication from the legislative history as to why these orders were not included.
- c. Staff asked for clarification of OAG’s comment: “OAG notes that giving a jury trial right when it is not constitutionally required does not improve the consistency and proportionality of the revised code. Rather, depending on the penalty which is established, this paragraph would give a jury right when a person is charged with the attempt version of this offense and would not give a jury right to a person who is charged with a different offense that has the same incarceration exposure.”
 - i. OAG said it opposes expanding the right to jury trial where it is not required by the penalty or some clearly articulated legal or policy grounds.
 - ii. Staff encouraged Advisory Group members to include in comments on the First Draft of Report #41 any legal or policy principles that should be considered when deciding whether an offense should be jury demandable.

IV. Adjournment.

- a. The meeting was adjourned at 12:00 p.m.