



D.C. Criminal Code Reform Commission
441 Fourth Street, NW, Suite 1C001S, Washington, DC 20001
(202) 442-8715 www.ccrc.dc.gov

MINUTES OF PUBLIC MEETING

WEDNESDAY, NOVEMBER 6, 2019, at 10:00 AM
CITYWIDE CONFERENCE CENTER, 11th FLOOR OF 441 4th STREET NW
WASHINGTON, D.C. 20001

On Wednesday, November 6, 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) (from 10:15 am)

Katerina Semyonova (Visiting Attendee of The Public Defender Service for the District of Columbia) (by phone)

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

Stephen Rickard (Visiting Attendee of The Office of the United States Attorney for the District of Columbia)

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

Don Braman (Council Appointee) (by phone until 11:00 am)

Kevin Whitfield (Designee of the D.C. Council Committee on the Judiciary and Public Safety)

- I. Welcome and Announcements.**
 - a. The Executive Director thanked Attorney Advisor Nathaniel Wenstrup for his contributions to the Commission's work.
 - b. The agency currently hiring a new attorney advisor and is actively looking for applicants.
 - c. Comments on the First Draft of Report #41 are due November 15, 2019.
 - d. The week of November 18, 2019, the Commission will issue another batch of reports with recommendations related to privacy, obscenity, pornography, and property. Comments will be due six or seven weeks thereafter, in early January (deadlines may be extended in the event of a lengthy government shutdown).
 - e. The next meeting will be held on December 4, 2019. It will discuss comments on Report #41 and the forthcoming batch of reports.
- II. The Advisory Group discussed the written comments on the First Draft of Report #39, Weapon Offenses and Related Provisions and the First Draft of Report #40, Self-Defense Sprays:**
 - a. The Executive Director noted that the agency is continuing to reexamine the Home Rule issues that were in the Advisory Group comments, particularly in light of a recent DCCA opinion.
 - b. The group did not have any further comments on the weapons reports at this time.
- III. The Advisory Group discussed the First Draft of Report #41, Ordinal Ranking of Maximum Imprisonment Penalties:**
 - a. The Executive Director noted the penalty recommendations are subject to change, as the offense elements are updated. At this time, the Commission aims to identify areas of agreement and concern with respect to the relative ordinal rankings before finalizing recommendations for statutory maxima. The Commission invites questions about how to understand the charts, court data, and survey data that were provided.
 - b. USAO asked for clarification about Columns BD-BZ in Appendix D to Memo #28.
 - i. The Executive Director explained that Column BD represents the median length of prison sentences for adult convictions in the Superior Court of the District of Columbia. Column BH (the .975 quantile) is intended to roughly represent the high end of the prison sentences imposed. The highest quantile (1.0) appears to include a significant number of data entry errors. Many of the entries would amount to illegal sentences and may be the result of inputting years instead of months or entering enhancements incorrectly.
 - c. USAO asked whether the maxima proposed in Report #41 correspond to the high end of the prison sentences imposed in the current court data.
 - i. The Executive Director said that court data is just one consideration that staff reviewed in developing the maxima proposed in Report #41.
 - ii. The Executive Director also explained that the RCC offenses, the basis of Report #41, typically do not have a one-to-one correspondence to offenses under current District law. Enhancements and offense elements differ. Moreover, there is a complex nest of other factors to consider, such as whether other offenses were also charged or dismissed, whether the sentence was run consecutive or concurrent to other sentences, and whether any mandatory minima applied.

- iii. The Executive Director encouraged Advisory Group members, in their review of Report #41, to consider particular fact patterns and how such patterns would be charged under the revised code, and what the seriousness the various charges carried. For example, depending on the fact pattern, what might be charged as a single count of burglary under current law and appear in court data may be charged as multiple, separate offenses under the RCC, together imposing liability equal to or greater than burglary under current law.
- d. USAO asked whether the court data reflects only the most serious charge in each case.
 - i. The Executive Director explained that the data reflects the sentence imposed for each individual charge.
 - ii. The Sentencing Commission has published other data, such as criminal history score, but only for felony offenses.
 - iii. Advisory Group members are encouraged to notify the CCRC of any apparent errors in the data. Notably, there may be multiple entries for the same offense. (Column C includes a macro-citation that may be helpful.)
- e. USAO asked whether the Commission is committed to having only a one-class increase between each grade of an individual offense.
 - i. The Executive Director explained that the Commission welcomes recommendations that include larger spans between the degrees of an offense, and noted that some of the ordinal rankings in Report #41 do this.
 - ii. OAG noted that it may also recommend that some offenses include a different number of degrees, to make them more proportionate with other offenses.
- f. The Executive Director encouraged Advisory Group members to include in their comments the concern or policy rationale that underlies each comment, so that it is easier to fashion a remedy that addresses all members' concerns at once.
 - i. The Council representative noted that it will be most helpful for the Council to see positions on ordinal rankings before seeing positions as to absolute numbers.
- g. USAO noted that some of the current sentencing data may be artificially inflated by plea negotiations. It offered an example in which a person who is eligible for a repeat enhancement in a burglary case is permitted to plead guilty without the enhancement or to plead to an attempt. In such a case, the sentence may be higher than usual, to account for the defendant's criminal history.
 - i. The Executive Director noted that there appears to be very little use of the repeat offender enhancement per the court data, or of the senior/minor victim enhancement, and virtually no use of other enhancements that are available under current District law. It may be that enhancements are charged more frequently under the revised code.
 - ii. The Executive Director anticipates differing policy positions as to whether the use of enhancements (of a single class, multiple classes, or a fixed term of years) is appropriate. In some cases, enhancements may "double-count" a person's culpability and exacerbate disparities.
- h. OAG asked for more clarification on the design of the public surveys. For example, how were the milestone offenses (e.g., intentional killing, serious injury) selected?

- i. The Executive Director explained the District worked with a group at George Washington University to design the survey, and it follows the basic model used in some other jurisdictions. The vendor, YouGov, uses a panel system controlling for D.C. demographics, as opposed to cold calling and soliciting input. For web-based surveys, this approach is considered the gold standard; it has outperformed Pew in terms of accuracy. Background materials on the Yougov methodology were distributed to the Advisory Group.
 - ii. Milestones map onto offenses in current District law with which Advisory Group members and other stakeholders are already familiar (e.g., murder, manslaughter, aggravated assault, felony assault, simple assault). However, survey respondents were not informed of that fact.
 - iii. The survey is a rough tool and measures only relative (not absolute) severity. The tests were conducted at different times with different panels of respondents, all of whom are registered voters. There are some extreme outlier responses (e.g., ranking possession of an open container of alcohol as equivalent to homicide) and other noise in the system. The mean average is not always the most accurate measure to use as a statistical matter, and the median or mode is the better indicator of central tendency for ratings near the bottom or top of the ratings.
- i. USAO asked whether District statutes governing backup time will remain in place. For example, under current law, a five-year statutory max effectively amounts to a maximum of three years imposed upfront, with two years of supervised release.
 - i. The Executive Director said that the Commission has no current plans to issue any recommendations to revise statutes concerning backup time.
 - ii. The Executive Director said that this is one of many factors that makes it especially difficult to compare statutory maxima from other jurisdictions. Offense definitions, guidelines, and parole systems vary greatly from state to state. The time served and time imposed may be more accurate measures.
- j. The Executive Director invited input as to what other information may be helpful (e.g., court data on sentencing judges) in assessing penalty proportionality.
- k. PDS asked whether any other group members found the data surprising.
 - i. The Council representative noted that the survey results with regard to felony murder were higher than some academic experts appear to recommend.
 - ii. The Executive Director noted that many aspects of the survey data are notable. For example, causing a moderate injury with a firearm was ranked as more serious than causing a serious injury without a weapon, indicating the effect of a weapon's use. Burglary without committing an additional offense inside was ranked quite low, but burglary combined with a serious offense was ranked higher.
- l. USAO asked about whether the data reflects the sentence that was imposed even if execution of some or part of the sentence is suspended.

- i. The Executive Director explained that the spreadsheet can be expanded to show additional columns, which indicate how much of the sentence was suspended.
- ii. The data concern the initial (first in time) sentence and does not show whether the suspended time was imposed later, after revocation of probation.

IV. Adjournment.

- a. The meeting was adjourned at 11:30 am.