



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

WEDNESDAY, MAY 6, 2020, at 10:00 AM
CITYWIDE CONFERENCE CENTER, 11th FLOOR OF 441 4th STREET NW
WASHINGTON, D.C. 20001

On Wednesday, May 6, 2020, 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 telephonically at (650) 479-3208 (access code: 472 039 791). 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:

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| Richard Schmechel (Executive Director) | Rachel Redfern (Senior Attorney Advisor) |
| Jinwoo Park (Senior Attorney Advisor) | Patrice Sulton (Senior Attorney Advisor) |
| Gabrielle Green (Attorney Advisor) | |

Advisory Group Members and Guests in Attendance:

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| Laura Hankins (Designee of the Director of the Public Defender Service for the District of Columbia) | Katerina Semyonova (Visiting Attendee of the Public Defender Service for the District of Columbia) |
| Elana Suttentberg (Visiting Attendee of the United States Attorney for the District Columbia) | Dave Rosenthal (Designee of the District of Columbia Attorney General) |
| Kevin Whitfield (Representative of the D.C. Council Committee on the Judiciary and Public Safety) | Don Braman (Council Appointee) |

I. Welcome and Announcements.

- a. The Executive Director noted written comments for all outstanding reports are due on Friday, May 15, 2020.

- b. On or shortly after May 15, CCRC will issue another batch of recommendations, including an assortment of residual matters. Written comments will be due in mid-June.
- c. CCRC currently plans to have a voting draft of recommendations drafted to-date in mid- or late July and a vote in September, before our statutory deadline. However, the timeline may change, particularly if CCRC’s operating budget is extended into 2021, affording CCRC enough time to issue additional recommendations and improve existing recommendations.
- d. The next Advisory Group meeting will be held on June 3, 2020.

II. The Advisory Group discussed the written comments on the First Draft of Report #50, Cumulative Update to the Revised Criminal Code Other than Chapter 6:

- a. The Advisory Group discussed OAG’s comment on possession of a controlled substance, recommending changing paragraph (g)(2) (which is identical to current D.C. Code § 48-904.01(e)(2)) to include the language “Except as otherwise provided by federal law.” OAG clarified that the purpose of this recommendation is to avoid federal preemption issues. The Executive Director invited members to submit any authority relating to federal preemption issues in this context. USAO indicated that it also will review the issue too.
- b. The Advisory Group discussed USAO’s comment on the definition of debt bondage, recommending striking paragraphs (A) – (C) (which are identical to current D.C. Code § 22-1831(5)). The Executive Director offered a hypothetical in which a person works for 25 years to pay off a relatively small debt of \$20,000. Under current law this would appear to be chargeable as human trafficking even without proof of force or coercion. However, with USAO’s proposed change, it appears that would not amount to a human trafficking offense, under RCC Chapter 16, unless there is a coercive threat—but if there is a coercive threat, the reference to debt bondage in RCC offenses would do no work under the USAO definition, it being a mere species of coercive threat (in relation to a debt).
 - i. USAO replied that the comment was made to reflect the belief that the essence of the human trafficking offense is the use of “force” and that paragraphs (A) – (C) appear to offer only limited examples of force. USAO clarified that its comment is not intended to narrow the trafficking offense. USAO said that it did not intend to narrow the scope of human trafficking liability and indicated that it will review the offense definition language and the definition of “coercive threat” again and supplement its written comments, if necessary.
- c. The Advisory Group discussed USAO’s comments on felony murder concerning penalty proportionality and seriousness.
 - i. The Executive Director requested that all Advisory Group members include additional information when citing specific cases as examples of penalty proportionality or disproportionality, and provide specific

evidence when making assertions about the impact of a given change of law on the incidence of crime and public safety.

1. For example, he said it would be helpful to know: What were all the charges, what were all the convictions, what were all the sentences, were the sentences consecutive or concurrent?
 2. He said that appellate decisions are sometimes less helpful, as they often do not present all of the facts of a case, only discussing those that are relevant to a disputed issue.
 3. He noted that, as has been previously discussed, when multiple offenses are involved, the revised code aims to ensure that the penalty for the entire conduct is proportionate, not that the penalty for each individual charge reflects the seriousness of all charges involved in a given case. How the law breaks conduct up into crimes can artificially minimize or magnify the seriousness of the conduct, and the CCRC goal is to ensure proportionate punishment for the conduct as a whole.
 4. Additionally, he noted that well-established social science research from the Department of Justice's National Institute of Justice that increasing prison sentences can exacerbate – instead of reduce – crime rates. Though perhaps counterintuitive, this evidence is consistent with findings by the American Law Institute and others have found.
 5. CCRC wants to be very careful in vetting assertions about public safety because they are powerful. If there is countervailing social science evidence, please include it as context. The CCRC wants to provide evidence-based recommendations to the Council and Mayor to the extent possible.
- ii. USAO stated that appellate decisions were included as practical examples of felony murder and accomplice liability because they are public records that are readily accessible.
1. USAO agreed that appellate decisions may provide only a limited discussion of a case.
 2. USAO stated that, in addition to the number of years in a given sentence, the label that is assigned to the offender has independent value to victims and the community.
 3. USAO stated that it aims to illustrate gaps in liability to ensure public safety is protected.
- iii. PDS noted a distinction between a gap in liability and subjective concerns about underpunishment because a conduct is criminalized as a lower-level offense or with a lower penalty.

1. PDS stated that, although choosing a few horrendous cases may be helpful and illuminating, it should not be the primary consideration that drives policy. For example, PDS said it did not rely on examples of particularly sympathetic cases to justify a significant reduction in penalties, but such cases exist.
 2. PDS stated that USAO's position on penalties is not always aligned with the community's perspective.
 3. USAO agreed that it cited the most heinous examples, explaining that a maximum penalty must be high enough to account for the worst possible version of an offense. Where a case is particularly sympathetic, courts have discretion to impose a lower sentence.
 4. OAG noted that the RCC, in a draft report now under review, proposes to eliminate mandatory minima, which would permit a judge to give a lighter sentence than under current law in a particularly sympathetic case.
 5. The Executive Director noted that the demarcation between 1st degree murder which currently has a mandatory minimum of 30 years, and 2nd degree murder which currently has no mandatory minimum, has a significant practical effect under current law. Court data distributed to the Advisory Group shows that 25 – 50% of sentences for first degree murder are at the statutory floor. This suggests the mandatory minimum is preventing judges from providing lower penalties for some first degree murders—presumably those where the circumstances are most sympathetic.
- iv. Professor Braman explained that the examples USAO cited do not appear to highlight a gap in liability. Had the government proven the elements of 1st degree murder at trial, the desired maximum sentence would have been available. Felony murder, which is growing unpopular in a number of states, does not eliminate a gap in liability as much as it relieves the government of its burden of proving the requisite intent in a murder case.
1. USAO agreed that 1st degree murder may have been an available charge in some of the cases it cited but would have been required to prove premeditation and deliberation. USAO stated that choosing to engage in felony conduct requires planning and, if the felony then results in a death that is more culpable conduct than an instantaneous 2nd degree murder.
 2. Professor Braman offered an example to illustrate that it is not always true that felony murder is more heinous conduct than second degree murder. Where a person commits the least serious version of a felony and a resulting death is entirely accidental,

felony murder elevates that conduct to the same level as a case in which someone, with full premeditation, plans and purposefully murders someone.

- v. The Council representative explained that the structure of the RCC requires a shift in mindset from the sentencing schemes of old that often gave judges broad discretion to impose a life sentence for a single charge and run all other charges concurrent. Consecutive sentencing is rarely used even though it is available. In contrast, the RCC requires the court to look at the core harm of each offense, without hitching other conduct that constitutes other offenses. Penalties can then be run consecutive if that would be necessary for proportionate punishment.

- 1. The Executive Director noted a distinction between ensuring that the maximum penalty accounts for the most egregious version of an offense and ensuring that it accounts for the most egregious combination of offenses. In current practice, offenses are drawn broadly, maximum ceilings are set high, and judges appear to rely on a single sentence for a single offense instead of evaluating each type of criminal behavior that was involved in the situation. Instead of letting any one offense do all of the work, however, the RCC more precisely asks: Is the overall available punishment (which may be spread out between multiple offenses) proportionate? To do otherwise is to effectively ignore or minimize some aspects of the conduct (for which the penalty is run concurrent) and overemphasize other aspects of the conduct (which provides a punishment so high as to also account for other aspects of the conduct).

- vi. USAO asked for clarification of the RCC's merger provision in 22E-214 with respect to felony murder.

- 1. The Executive Director explained that in the examples cited in USAO's written comments it appeared that a person could be charged with both 2nd degree murder under a depraved heart theory of prosecution and, in addition, be sentenced for a felony first degree sex assault, burglary, etc.. Those convictions would not merge under current District law or the RCC. Were the 2nd degree murder convictions obtained solely on a felony murder theory, then the conviction would merge with the predicate felony, both under the current District law and the RCC. The RCC doesn't change how merger works with respect to felony murder. But, only by looking at more information about cases – such as all charges, all convictions, and all sentences – can a comparison between the

maximum penalty under current law and the maximum penalty under the RCC be made. In many cases, the RCC penalties may be equal or higher.

2. OAG asked whether the RCC includes a provision addressing consecutive versus concurrent sentencing.
 - a. The Executive Director stated that current D.C. Code § 23-112 remains unchanged.
 - b. Very few provisions under current law or the RCC (e.g., offenses committed on release) require consecutive sentencing. This is left to the prerogative of the court.
 - c. The Executive Director explained some of the challenges presented by the current court data. It is often unclear whether sentences are consecutive or concurrent and to what. Even where there is a single conviction, it is difficult to measure the impact of charge bargaining.
- vii. The Executive Director said it was important to distinguish between sentencing changes and scope of liability changes. In the latter it may be easier to draw a connection between the change in law and claims about change in public behavior. But, USAO's written comment broadly asserted that the RCC's proposed change to categorize felony murder as second degree murder instead of first degree murder would lead to an increase in crime. In fact, the RCC's categorization of felony murder as second degree murder (or enhanced second degree murder) may not substantially change the maximum penalties available when viewing the revised code as a whole. Through charging of RCC offenses, a person may be subject to the same imprisonment time as in prior cases for one charge. More basically, any suggestion that the crime rate will change based changing the maximum penalties available may be a tough assertion to support. Research on the deterrence effect of different penalties (referenced in a Department of Justice publication distributed to the Advisory Group in a prior memo) is consistent in finding that marginal and even significant increases do not deter criminal behavior and that increased incarceration may instead have a criminogenic effect. CCRC welcomes any countervailing research.
- d. USAO raised a question about the sexual assault consent defense in RCC § 22E-1301(e)(2). Specifically, USAO asked whether effective consent should be a standard defense, which the government must disprove, instead of an affirmative defense. USAO and PDS raised a concern about the provision causing confusion when the complainant is a minor.

- i. The Executive Director indicated that CCRC will revisit these issues before the next draft. Effective consent is a difficult area of law. It is unclear in current District law and it has been a point of consternation for the American Law Institute (“ALI”) for years in its efforts to develop recommendations for updating the Model Penal Code. However, the RCC does not include the degree of detail the ALI used in its model draft. The Executive Director said that RCC does not intend to criminalize consensual sadomasochistic activity that accidentally causes a significant bodily injury, and the culpable mental state or lack thereof in the current draft defense may need to be changed. The RCC will also revisit the structure of the offenses, defenses, and enhancements with an eye toward clarifying proof requirements in cases that involve both force and age elements.

III. The Advisory Group discussed the Second Draft of Report #41, the First Draft of Report #51, Advisory Group Memo #31, the First Draft of Report #52, or Advisory Group Memo #32:

- a. OAG raised a question about the repeat offender penalty enhancement in RCC § 22E-606. Specifically, the phrase “in fact” appears before “commits a felony/misdemeanor,” and OAG asked whether it should instead appear after “commits [an offense]” and before “at the time has [a prior conviction].”
 - i. The Executive Director noted that the OAG representative may be referring to a recurring drafting problem. When the RCC cross-references an offense codified another statute, it does not intend to change the mental state required for the cross-referenced offense. The question is how to draft statutes to be clear about this, by using “in fact” (which may give the mistaken impression that no culpable mental state is required for the referenced offense) before such cross-references or not. CCRC will revisit the issue of drafting these provisions or the commentary with more clarity, to signal that intended meaning.
- b. OAG raised a question about the intended meaning of the phrase “not on the same occasion” in RCC §§ 22E-606. Specifically, OAG asked whether the phrase is intended to mean “on a different occasion than the instant offense,” “on a different occasion than another prior offense,” or both.
 - i. The Executive Director invited OAG to include this drafting issue in its written comments so that CCRC is reminded to revisit it before the next draft.

IV. Adjournment.

- a. There being no further questions, the meeting was adjourned at 11:57 a.m.