



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, JUNE 3, 2020, at 10:00 AM
CITYWIDE CONFERENCE CENTER, 11th FLOOR OF 441 4th STREET NW
WASHINGTON, D.C. 20001

On Wednesday, June 3, 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: 160 625 4909). 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)
Gabrielle Green (Attorney Advisor)	

Advisory Group Members and Guests in Attendance:

Laura Hankins (Designee of the Director of Public Defender Service for the District of Columbia)	Katerina Semyonova (Visiting Attendee of Public Defender Service for the District of Columbia)
Dave Rosenthal (Designee of the D.C. Attorney General's Office)	Seema Gajwani (Visiting Attendee of the D.C. Attorney General's Office)
Elana Suttentberg (Visiting Attendee of the United States Attorney for the District of Columbia)	Nishant Keerikatte (Visiting Attendee of the Office of the Deputy Mayor for Public Safety and Justice)
Don Braman (Council Appointee)	Paul Butler (Council Appointee)

I. Welcome and Announcements.

- a. The group observed a moment of silence in honor of George Floyd whose death last week during an arrest by Minneapolis MN police led to widespread protests in the District and nationally.
- b. The Executive Director introduced CCRC's summer legal interns: Varun Bhadha, Jocelyn Westray, and Jordan Chemtob.
- c. CCRC welcomes any questions on the outstanding reports before written comments are due on June 19.
- d. CCRC expects to issue a small batch of draft reports, including updated court statistics in late June, with the next full draft of all recommendations to-date in late July or early August. This may be the last draft before a September Advisory Group vote on the recommendations.
- e. Our next meeting will be held on July 1, 2020.

II. The Advisory Group discussed the written comments on the Second Draft of Report #41 - Ordinal Ranking of Maximum Imprisonment Penalties; the First Draft of Report #51 – Jury Demandable Offenses; and the First Draft of Report #52 – Cumulative Update to the Revised Criminal Code Chapter 6.

- a. The group discussed two OAG written comments on the jury demandability provision in RCC § 16-705.
 - i. First, a written comment from OAG said that it wished to hear from other Advisory Group members regarding whether and how to codify language specifying how courts should determine questions of fact about the status of the complainant as a law enforcement officer which, per the draft recommendation, could determine the right to a jury trial. The written comment said that OAG did not take a position on the right to a jury trial involving a law enforcement officer as a complainant at this time, pending input from other members.
 - ii. Second, a written comment from OAG said that it does not support the draft recommendation that offenses that carry incarceration of 90 days or less be jury demandable, and that a corollary to the CCRC's statutory mandate to provide for proportionate penalties is that "defendants who are facing the same amount of time incarcerated should have the same rights to a jury trial."
 - iii. Regarding the first comment:
 - 1. The Executive Director said that the CCRC was open to codifying a provision about burden of proof and standards and asked if OAG had any suggestions. However, the Executive Director noted that there are other instances under current law in which courts must decide a question of fact or mixed question of law and fact to determine whether a person has a right to a jury trial. For example, under D.C. Code § 22-3302, an unlawful entry on public property is jury demandable and an unlawful entry on private property is not. Jurisdiction determinations may rest on the location of alleged conduct. There are no codified rules of procedure for how to handle these matters, yet they are routinely handled by trial judges when they arise and decisions are subject to appeal.

2. OAG said that its concern is that, without codifying a procedure, the parties might frequently try a case to the wrong factfinder and be forced to retry the case after an appeal.
 3. PDS noted that the right is clearly triggered in every case in which the government “alleges” the complainant is a law enforcement officer as an element of the offense or an offense aggravator.
 4. OAG pointed out that the CCRC recommendation appears to apply whether or not the officer is working a tour of duty or in uniform. OAG offered a hypothetical in which a person who just happens to be an officer in another state is visiting the District as a tourist and is assaulted.
 5. The Executive Director agreed that the CCRC recommendation would provide for a jury trial whenever the complainant is a law enforcement officer, whether or not uniformed or on duty. The Executive Director said that CCRC would review the current draft definition of “law enforcement officer” to see if it could be amended to be clearer and that a clear definition may curtail some of these factual disputes cited by OAG as possible concerns—for example whether a probation officer is covered.
- iv. Regarding the second comment:
1. The Executive Director asked for clarification as to whether OAG’s comment was meant to be limited to inchoate offenses or whether OAG was broadly stating there should be no exceptions that would provide the right to a jury trial for an offense punishable by 90 days or less, including the circumstances specified in RCC § 16-705(b)(1)(C) – (E) (concerning police complainant, sex offender registration requirements, and potential immigration consequences).
 2. PDS objected to changing the RCC recommendation in a way that would continue the long-standing practice of charging an attempted offense instead of a completed offense solely to deny a defendant a right to a jury trial.
 3. OAG stated that its position is that if inchoate charge is punishable by less than 90 days, it should not be jury demandable.
 4. OAG said that it is not recommending any narrowing of the right to a jury trial that exists under current law for immigration consequences. For example, if a person faces deportation, they have the right to a jury under current District case law.
 - I. The Executive Director noted that the RCC provision goes beyond the recent D.C. Court of Appeals opinion in *Bado* and expands the right to a jury to include any offense that might be deportable for any defendant, without requiring disclosure that a particular defendant is subject to deportation.
 - II. OAG indicated that it will need to review the issue further.

5. The Executive Director referred to the rationales for the provision that are provided in the report, including the value of direct community participation in the criminal justice adjudication process. He also noted that most jurisdictions, 38, provide a jury trial for all crimes, no matter how small. And several others have jury demandability provisions more generous than the District currently does.
6. Professor Butler states that he hopes AG Racine will give this issue more serious attention, especially in the current climate.
7. USAO indicated that it would also review the issues raised by OAG regarding the relevant standards if the fact that the complainant is a law enforcement officer were to determine jury demandability. However, for now, there was no comment beyond the written comments.
8. Ms. Gajwani asked for clarification of the relevant legislative history, particularly whether the Council's focus has been on the consequences of conviction or the nature of the conduct.
 - I. PDS stated that the misdemeanor streamlining legislation that removed the right to a jury trial for many offenses was intended to conserve judicial resources and not a determination that the conduct is less serious. PDS stated that since then, there have been instances in which the Council found that it was important for the community to be the factfinder and set the offense penalty with the objective of ensuring a jury trial.
 - II. The Executive Director offered to provide citations to the relevant legislative history.
 - III. The Executive Director provided the revision of the District's Assault on a Police Officer ("APO") offense as a recent example. In the committee report for the NEAR Act, one rationale used by the Council was that, where the complainant is a police officer, providing a jury trial removes the burden on the court to state specific credibility findings that could adversely affect an officer's career. This rationale applies to all officers at all times. The Executive Director also noted that in the wake of the NEAR Act passage there was a sharp decline in APO charges and comparable uptick in simple assault charges, which suggests that government altered its charging practices to avoid the jury requirement the Council wanted.
 - IV. The Executive Director explained that misdemeanor streamlining by the Council reflected a very different criminal justice environment. The goal was to conserve resources going into misdemeanor prosecutions so they could be directed to felony prosecutions, at a time when the crime rate was much higher and there were many more

felonies. Its aims were expedience and pragmatism, not to aiding justice or ensure the protection individual rights.

V. The Executive Director said he disagreed with the OAG assertion that a corollary of the agency's mandate to issue recommendations for proportionate punishment is that persons facing the same imprisonment penalties should have the same right to a jury trial. While punishment has been a primary factor, it has not been and should not be the only consideration in determining whether an offense is serious enough to require a jury. The court's opinion in *Bado* is one clear example of an exception to the current six-month "rule," providing a jury trial for crimes with a lower amount of possible incarceration. The RCC jury demandability provision codifies other instances in which a jury is warranted, if not required.

VI. Professor Braman stated that expanding the right to a jury trial (or, rather ending the abrogation of that right) furthers the justice by fundamentally improving the legitimacy of the system. Professor Braman noted that the right to a jury is enjoyed by both the prosecution and the defense.

9. Professor Butler urged ending the restrictions on the right to a jury trial from the streamlining era to bring the District in line with other states and the stated will of the Council in recent legislation.

b. The group discussed a written comment by the USAO on the First Draft of Report #53, requesting that the CCRC revise commentary to make clear the CCRC's intent, as articulated at the May 2020 Advisory Group meeting, to have an increased reliance on consecutive sentences, rather than concurrent sentences.

i. The Executive Director clarified that, during last month's meeting, CCRC did not intend to convey that the RCC recommendations are designed to spur an increased reliance on consecutive sentencing. Similar to current law, there are few places in the RCC that require consecutive sentencing, but generally the RCC and current law instead defer to the court's discretion to sentence consecutively or concurrently under D.C. Code § 23-112. At the last meeting the Executive Director said he tried to emphasize the power of consecutive versus concurrent sentencing under current law and the RCC, and that power should be considered when assessing whether the law provides adequate punishment for criminal behavior. A punishment for a particular charge may be lowered in the RCC but if it commonly occurs with another chargeable offense and that other offense could be run consecutively, then in effect the judge has the power to impose a longer term of imprisonment. Looking just at a single penalty for a single charge doesn't tell the whole story. The RCC seeks to provide adequate punishment for criminal behavior overall, even the worst forms, but doesn't rely on just one "lead" charge to do so. The RCC may result in changes in how courts exercise their discretion over concurrent

- and consecutive sentencing, but the CCRC has no position on whether that will be justified in a particular case or broadly for all cases.
- ii. USAO said that, in last month's meeting the Council representative suggested that the RCC's organization may involve a shift in mentality from current practice and relying on a lead charge and that might result in more consecutive sentencing.
- c. The group discussed a written comment by the USAO on the First Draft of Report #52 opposing the elimination of mandatory minimum sentences (besides first degree murder, addressed in a prior comment).
- i. The Executive Director asked USAO to clarify its position on mandatory minima, particularly whether it opposes reducing – as opposed to fully eliminating – the minima in current District law.
 - 1. USAO said it would need to review the matter further.
 - ii. The Executive Director said that CCRC wants its recommendations to be supported by evidence. He noted that one of the USAO comments regarding its recommendation to maintain mandatory minimum sentences is that the RCC's proposal does not adequately deter either possession of firearms or the use of firearms during the commission of offenses against others. The Executive Director said that in this instance and more generally when any Advisory Group member makes assertions about deterrence effects it provide any supporting research evidence. He said that comments about deterrence, unlike proportionality determinations, are making empirical claims and any supporting evidence should be provided. He said that the CCRC has shared with the Advisory Group research, including a Department of Justice publication from 2016, summarizing research and flatly stating that increasing the severity of punishment does little to deter crime, and that a much more powerful deterrence is the certainty of being caught. The American Law Institute's recent Sentencing recommendations have a similar assessment of imprisonment sentences. The impact of the RCC recommendations on public safety are critical and at the front of everyone's minds, but there needs to be evidence about any such claims. If Advisory Group members are aware of evidence that runs counter to the research the CCRC has shared, it would be helpful. The more CCRC can connect research with statements about outcomes, the better, and it will help inform the Council and Mayor about the impact of the draft legislation.

III. Adjournment.

- a. The Executive Director asked if Advisory Group members had any more questions or concerns to discuss about the agenda items. There being no response, the meeting was adjourned at 11:32 a.m.