



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

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

On Wednesday, September 4, 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 (Sr. Attorney Advisor)

Jinwoo Park (Attorney Advisor)

Patrice Sulton (Attorney Advisor)

Nathaniel Wenstrup (Attorney Advisor)

Advisory Group Members and Guests in Attendance:

Laura Hankins (Designee of the Director of Public Defender Service for the District of Columbia) (until 11:00 a.m.)

Katarina Semyonova (Visiting Attendee of the Public Defender Service for the District of Columbia)

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

Dave Rosenthal (Representative of the Attorney General's Office)

Kevin Whitfield (Representative of the D.C. Council Committee on the Judiciary and Public Safety)(until 11:30 a.m.)

Paul Butler (Council Appointee)
(by phone)

I. Welcome and Announcements.

- a. The Executive Director introduced Attorney Advisor Nathaniel Wenstrup, who joined the Commission in August.
- b. The Executive Director noted that he provided the meeting schedule for FY 2020 via email to all Advisory Group members. He noted that additional meetings may be necessary in FY 2020. The next Advisory Group meeting will take place on Wednesday, October 2, 2019.
- c. Written comments on reports related to controlled substances are due on September 16, 2019. Comments on reports related to weapons are due on September 30, 2019.

II. The Advisory Group discussed the First Draft of Report #37, Controlled Substance Offenses and Related Provisions and Advisory Group Memorandum #23, Supplemental Materials to the First Draft of Report #37.

- a. The Executive Director noted that grading drug offenses based on weight aligns the revised statutes with the majority of other jurisdictions. The quantities selected for each drug are intended to be proportionate to each other, that is, roughly the same number of dosages for each substance. The Commission welcomes input with respect to the appropriate quantities, based on current practice and scientific expertise.
- b. OAG asked about the rationale behind grading some Schedule II drugs the same as most Schedule I drugs in first degree, but not grading all Schedule I drugs as first degree. OAG noted that Schedule I drugs are those that are designated as having no lawful purpose and may be more dangerous than Schedule II drugs.
 - i. Staff explained that the substances graded as first degree in the RCC are those that are defined as “abusive or narcotic,” under current law. This aspect of the gradation structure is consistent with the existing penalty provisions, although the current penalties do not account for drug quantities.
- c. The group discussed how weights will be calculated when a substance is impure.
 - i. OAG and PDS agreed that the weight for purposes of liability should exclude non-consumables such as containers used to transport the substance. For example, tobacco, marijuana, and cutting agents would be measured for controlled substance weight, whereas a cigarette carton, a person’s clothing, and bong water would not, even though the latter contain a measureable amount of a controlled substance.
 - ii. Staff noted that the Commission considered, but ultimately rejected, including a purity requirement. Staff noted that it did not find any other jurisdictions that grade based on the pure quantity of a controlled substance.
 - iii. USAO suggested amending the Commentary to make clear that the government only needs to offer proof of “a compound or mixture containing the controlled substance.”
 - iv. PDS offered a hypothetical in which law enforcement instructs or encourages a person to engage in conduct that increases the weight of the mixture. For example, as part of a sting operation, an officer may tell a person to dilute liquid PCP among twenty cigarettes instead of only three,

or to hide marijuana flower in a coffee can. This would artificially raise liability.

- v. PDS noted that, even if quantities are limited to consumables, the weight of an edible product may differ dramatically from the weight of the product in its pure form.
- vi. The group discussed mixtures of multiple controlled substances. For example, if a small amount of fentanyl is mixed with a large amount of marijuana, a person may then be charged with a large amount of fentanyl.
 - 1. The Council representative recommended asking the Department of Forensic Sciences about its testing capabilities with respect to purity and quantity. In particular, it may be helpful to understand how a large quantity that is multi-layered and not uniform would be tested.
 - 2. Staff noted that this hypothetical may be most effectively addressed through a merger provision.
- d. The Executive Director noted that the average sentences for drug offenses are much lower than the 30-year maximum available under current law and much lower than the national averages. The revised grading structure and penalty recommendations will better align the code with current District practice.
- e. Professor Butler explained that it is also important to consider unequal enforcement of the drug laws in the District. White residents are rarely charged with drug offenses, whereas African American residents are frequently targeted for sting and undercover operations.
 - i. The Executive Director noted that this fall, as the agency addresses penalties, race and gender data will be made available with other court data on charging and convictions.
- f. PDS asked for clarification as to the rationale for each of the quantities in the draft recommendations. PDS noted this could help guide the Council in determining relevant quantities for grading new controlled substances.
 - i. The Council representative suggested that the council could start using the lowest quantity thresholds, and adjust upwards depending on the potency or harmfulness of the substance.
 - ii. OAG noted that the quantities may influence the market. For example, a dealer may sell 25 grams of marijuana at a time to avoid the significant penalty increase for possession of an ounce or more.
- g. OAG asked why the agency did not make the radius for drug free zones consistent with the radius for gun free zones, to avoid confusion. OAG agreed that the 1000 feet in current law is high, but noted that 100 feet is only the length of three school buses. Moreover, the 300 feet used in weapons offenses is more intuitive because it is roughly the size of a football field or a city block.
 - i. The Executive Director explained that a longer distance was used for gun offenses because they are long-range weapons. The rationale is to protect school children from deliberate or accidental discharge.
 - ii. The Executive Director noted that the radius is calculated from the property grounds, not the school building itself.

- III. The Advisory Group discussed the First Draft of Report #38 Enlistment of Minors and Maintaining Location to Distribute or Manufacture Controlled Substances:**
- a. The Executive Director noted that, subsequent to release of the draft report, staff became aware that D.C. Code § 48-904.02(a)(5) criminalizes conduct that is nearly identical to the conduct in D.C. Code § 48-904.07 that was recommended for repeal. A future draft will likely recommend repeal of this statute for the same reasons included in this report, such as overlap with accessory liability. Each offense is charged at most a couple times a year, with even fewer convictions.
 - b. The Executive Director explained that the recommendations for controlled substances and weapons are careful to not tamper with definitions that apply to other parts of the code, such as pharmacy and firearm regulations.
- IV. The Advisory Group discussed the First Draft of Report #39, Weapon Offenses and Related Provisions; Advisory Group Memo #24, Supplemental Materials to the First Draft of Report #39; and the First Draft of Report #40, Self-Defense Sprays:**
- a. OAG noted that RCC § 22E-4114(b)(3)(C) appears to change current law in a way not noted in the draft report by not separately requiring that “the purchaser is personally known to the seller or shall present clear evidence of his or her identity,” in addition to being of sound mind and over 21 years of age.
 - i. The Council representative noted that terms such as “identity,” which appears in this statute and in RCC § 22E-4116, are undefined and ambiguous. The Council representative recommended copying or cross-referencing the identification requirements in the regulations governing the sale of firearms.
 - ii. Staff explained that the revised statutes did not intend to change the scope of the current law. Staff will take these recommendations under review. However, staff is wary of changes to the civil provisions in current Title 22 that may require an extensive review and changes to similar provisions in other Titles and the DCMR.
 - b. OAG and the Council representative stated that RCC § 22E-4105 should reflect law as to persons who are subject to an Extreme Risk Protection Order (ERPO), which does not restrain a person from assaulting, stalking, threatening or harassing another person.
 - i. Staff explained that the ERPO legislation did not amend D.C. Code § 22-4503. Instead, it states that a person who complies with an ERPO cannot be prosecuted for unlawful possession of a firearm.
 - ii. The Council representative stated that the Council intended to punish a person who violates an ERPO under the lower penalties provided separately in the ERPO statute.
 - c. OAG stated that the forthcoming penalty recommendations may impact prosecutorial jurisdiction.
 - i. Staff explained that, based on its review, the current case law (e.g., *Crawley, Hall*) does not clearly hold that maximum penalties affect prosecutorial jurisdiction, instead drawing a line based on whether a statute is in the nature of a police regulation.
 - ii. OAG said it believes, based on case law, that it may not prosecute any felony offenses, including possession of multiple restricted bullets and

possession of a large-capacity ammunition feeding device. These charges are currently prosecuted by USAO. A charging agreement often serves to work out prosecutorial authority.

- iii. Staff solicited comments on prosecutorial authority and home rule issues in further detail and requested a copy of a the current charging agreement between USAO and OAG.
- d. The Council representative asked for clarification as to which Title 7 provisions will be revised.
 - i. The Executive Director explained that, unless the Commission's statutory mandate is extended beyond this fiscal year, it will not make any further recommendations about firearms regulations. Memo #24 includes a chart in Appendix B showing the correlation between the current statutes and the revised statutes.
- e. USAO asked for clarification as to whether the revised definitions will apply to the Title 22 offenses that are not revised.
 - i. The Executive Director confirmed that the revised definitions will not apply to offenses that are not revised.

V. Adjournment.

- a. There being no further questions or comments from Advisory Group members, the meeting was adjourned at 11:41 a.m.