



D.C. Criminal Code Reform Commission
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Advisory Group Memorandum No. 11

To: Code Revision Advisory Group
From: Criminal Code Reform Commission (CCRC)
Date: June 7, 2017
Re: First Draft of Report No. 7, Definition of a Criminal Attempt

This Advisory Group Memorandum No. 11 supplements the First Draft of Report No. 7, *Recommendations on Chapter 3 of the Revised Criminal Code—Definition of a Criminal Attempt* (hereinafter, Report No. 7). It provides a brief overview of Report No. 7 and thereafter provides a brief overview of sentencing data relevant to the recommendations contained in Report No. 7.

I. BRIEF OVERVIEW OF REPORT NO. 7

The First Draft of Report No. 7 is comprised of draft legislation and commentary on RCC § 22A-301(a), Definition of Attempt, and RCC § 22A-301(b), Proof of Completed Offense Sufficient Basis for Attempt Conviction. Together, these draft general provisions comprehensively address the elements of a criminal attempt under the Revised Criminal Code. They include recommendations concerning the culpable mental state requirement of a criminal attempt, the conduct requirement of a criminal attempt (including both the line between preparation and perpetration, as well as the relevance of impossibility), and the relationship between a criminal attempt and the completed offense. Generally speaking, the substantive policies reflected in these recommendations seek to translate current District law. These recommendations are not intended, however, to resolve all policy issues relevant to treatment of criminal attempts under the Revised Criminal Code. Left unaddressed by these recommendations, for example, are a variety of relevant topics—such as the grading of criminal attempts, the potential adoption of a renunciation defense, and the potential adoption of a general endangerment offense to cover reckless attempts—that the CCRC plans to consider at a future date.

II. SUMMARY OF STATISTICS ON CRIMINAL ATTEMPTS

The CCRC has obtained some data relevant to recent felony convictions for criminal attempts and is seeking additional information. When the CCRC provides its recommendations on penalties for criminal attempts, it will provide a more in-depth discussion and analysis of that data. This memorandum provides only a summary of statistics, below. There are, however, three relevant caveats worth keeping in mind.

First, the summary presentation below is based on data received from the D.C. Sentencing Commission in January 2017. The Sentencing Commission’s March 28, 2017 data sharing policy states that dissemination of statistical information regarding sentencing that is provided by the Commission should be accompanied the following statement: “***Disclaimer:** The sentencing data provided is a statistical representation of information related to the D.C. Voluntary Sentencing Guidelines. Further interpretation of the data by the Criminal Code Reform Commission does not reflect the opinions or advisement of the D.C. Sentencing Commission, or its members.” This disclaimer applies to this memorandum.

Second, the CCRC received no notice of qualifications as to the reliability of the data. Nevertheless, there may be unknown data reliability issues, as at least a few clear errors have been found in the general data set that included the attempt data described in this memorandum.¹

Third, the Sentencing Commission’s data dictionary, provided to CCRC in January 2017, does not specify how attempt data is tracked with respect to attempts brought under the District’s general attempt statute versus attempts authorized by more narrowly tailored attempt statutes.² The data dictionary simply states that the “attempt” variable is a “[b]inary variable indicating whether the offense was sentenced as an attempt (in the form true/false).”³ It therefore appears that attempt charges brought under specific attempt provisions are likewise tracked as “attempts,” but staff cannot say with certainty whether such attempts are tracked consistently.

Fourth, and perhaps most importantly, a significant number of criminal attempts committed in the District are prosecuted under the District’s various enhanced simple assault (ESA) offenses, which prohibit the commission of a simple assault accompanied

¹ For example, the sentencing data indicate that a defendant was sentenced to 11,988 months for committing a homicide. This is clearly beyond the statutory maximum. Another example is a sentence of 548 months for Unauthorized Use of a Motor Vehicle, which also clearly exceeds the statutory maximum. These may reflect Superior Court data entry errors or errors at some later other stage of data sharing or analysis.

² More specifically, while the District’s general attempt statute (D.C. Code § 22-1803) is the primary basis of attempt liability under District law, it is not the only basis. For example, District law is also comprised of various independent attempt penalty provisions. Illustrative provisions include: (1) D.C. Code § 22-1837, which sets forth attempt penalties for various human trafficking related offenses; (2) D.C. Code § 22-3018, which sets forth attempt penalties for various sexual abuse-related offenses; (3) D.C. Code § 48-904.09, which sets forth attempt penalties for various drug-related offenses; (4) D.C. Code § 22-3154, which establishes the penalty for attempted manufacture or possession of a weapon of mass destruction; (5) D.C. Code § 22-3155, which establishes the penalty for attempted use, dissemination, or detonation of a weapon of mass destruction; and (6) D.C. Code § 22-2802, which establishes the penalty for attempted robbery. In addition, District law is also comprised of statutes that incorporate the term “attempts” into an offense definition—a drafting practice that communicates that an attempt to commit that offense may be punished identically to the completed offense. Illustrative examples include arson, D.C. Code § 22-301, malicious destruction of property, D.C. Code § 22-303, enticing a child or minor, D.C. Code § 22-3010, and unlawful entry, D.C. Code § 22-3302.

³ D.C. SENTENCING COMMISSION, SENTENCING GUIDELINES DATA DICTIONARY, at 7 (Jan. 1, 2017).

by the intent to commit another crime.⁴ The District’s ESA offenses were originally “created to allow a court to impose a more appropriate penalty for an assaultive act that results from an unsuccessful attempt to commit a felony or some other proscribed end.”⁵ And that is the role they still play today: generally speaking, they offer a more severe grading framework compared to that provided by the District’s general attempt statute.⁶ Given their role under District law, ESA offenses complicate analysis of the District’s attempt sentencing data, which does not tag such offenses as “attempts,” but rather, treats them individually. In practical effect, this means that an entire group of offenses that is the substantive equivalent of a criminal attempt is not treated as an “attempt” for analytical purposes.

Figures and Explanations (see caveats and disclaimer above).

<i>Figure 1: Number of Attempts By Year (By Count)</i>				
Year Sentenced	Non-Attempts	Attempts	Total Number of Counts	Attempts as Percentage of Total Counts
2010	2580	977	3557	0.27
2011	2634	816	3450	0.24
2012	2754	687	3441	0.20
2013	2100	386	2486	0.15
2014	2215	385	2600	0.15
2015	1681	327	2008	0.16

⁴ The District has three primary ESA offenses, each of which was “part of the first Code of Law for the District of Columbia” (hereinafter, 1901 Code) but still “remain on the books to this day” in largely the same format as originally enacted. *Perry v. United States*, 36 A.3d 799, 810-11 (D.C. 2011); see Act of Mar. 3, 1901, ch. 854, § 804, 31 Stat. 1189, 1321–22. First, there is D.C. Code § 22-401, which is the current version of § 803 of the 1901 Code: “Every person convicted of any assault with intent to kill or to commit first degree sexual abuse, second degree sexual abuse, or child sexual abuse, or to commit robbery . . . shall be sentenced to imprisonment for not less than 2 years or more than 15 years.” Second, there is D.C. Code § 22-402, which is the current version of § 804 of the 1901 Code: “Every person convicted of an assault with intent to commit mayhem . . . shall be sentenced to imprisonment for not more than 10 years.” And third there is D.C. Code § 22-403, which is the current version of § 805 of the 1901 Code: “Whoever assaults another with intent to commit any other offense which may be punished by imprisonment in the penitentiary shall be imprisoned not more than 5 years.”

⁵ *Perry*, 36 A.3d at 809.

⁶ See Model Penal Code § 211.1 cmt. at 182 (noting that ESA offenses are “functionally analogous to specific applications of the law of attempt, though generally requiring closer proximity to actual completion of the offense and carrying heavier penalties”).

2016	1733	447	2180	0.21
Grand Total	15697	4025	19722	0.20

Figure 1 shows the general frequency of attempt counts by year. Note that the “Non-Attempts” column shows the number of counts that are *not* flagged as attempts in the data, while the “Attempts” column shows the number of counts that *are* flagged as attempts in the data. The final column calculates the percentage of counts that are attempts on an annual basis. According to this table, one-fifth (20%) of all counts from 2010-2016 were sentenced as attempts.

Figure 2: Number of Attempts per Offense Severity Group (by Count, 2010-2016).

OSG	Non-Attempts	Attempts	Total Number of Counts	Attempts as Percentage of Total Counts
D1	48	0	48	0
D2	1899	2	1901	0.001
D3	515	2240	2755	0.81
D4	2	345	347	0.99
M1	178	0	178	0
M2	317	0	317	0
M3	488	0	488	0
M4	256	0	256	0
M5	2099	14	2113	0.01
M6	1978	122	2100	0.06
M7	1614	13	1627	0.01
M8	4478	1289	5767	0.22
M9	1824	0	1824	0

Grand Total	15696	4025	19721	0.20
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Figure 2 is similar to *Figure 1*, above, except that instead of grouping by years, this table groups by Offense Severity Group (OSG). It shows that a substantial portion of counts flagged as attempts are drug offenses. OSG D3, in fact, has more attempts than non-attempts, and roughly 80% of all D3 counts were sentenced as attempts. D3 includes attempted possession with intent to distribute (PWID) and attempted distribution. Also of note, OSG M1-M4 contain *no counts flagged as attempts*.

<i>Figure 3: Total Number of ESA Counts (2010-2016).</i>	
Offense	Counts
Assault With Intent to Kill	284
Assault With Intent to Commit Robbery	141
Assault With Intent to Commit First-Degree Sex Abuse	9
Assault With Intent to Commit First-Degree Sex Abuse (Force)	6
Assault With Intent to Kill While Armed	4
Assault With Intent to Commit Mayhem	3
Assault With Intent to Commit First-Degree Sex Abuse (Threatening)	2
Assault With Intent to Commit Any Other Offense	2
Assault With Intent To Commit Third-Degree Sex Abuse	1
Assault With Intent to Commit First-Degree Child Sex Abuse	1

Grand Total	453
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Figure 3 breaks down the total number of ESA offenses by count for the period of time between 2010 and 2016.

<i>Figure 4: Number of Attempts by Offense (by Count, 2010-2016).</i>				
Offense (as Identified by Data)	Non-Attempts	Attempts	Total Number of Counts	Attempts as Percentage of Total Counts
Distribution Of a Controlled Substance	1040	1429	2469	0.58
PWID	1068	922	1990	0.46
Robbery	1284	516	1800	0.29
Burglary Two	439	373	812	0.46
Assault With A Dangerous Weapon	756	259	1015	0.26
Unlawful Possession of Liquid PCP	324	206	530	0.39
First Degree Child Sex Abuse	72	53	125	0.42
Second Degree Child Sex Abuse	56	41	97	0.42
Burglary One	163	35	198	0.18
First Degree Sex Abuse- Force	44	34	78	0.44
				0.04

Attempt to Commit Robbery	653	27	680	
First Degree Sexual Abuse	32	27	59	0.46
Kidnapping	120	24	144	0.17
PWID (Marijuana)	22	18	40	0.45
Burglary	2	17	19	0.90
Third Degree Sex Abuse- Force	33	10	43	0.23
Distribution of Controlled Substance to Minor	0	8	8	1
Second Degree Sex Abuse- Incompetent	5	5	10	0.50
Second Degree Sex Abuse-Threats	5	4	9	0.44
Assault with Significant Bodily Injury	586	2	588	0.003
Aggravated Assault Knowingly	269	2	271	0.007
Distribution of Counterfeit Substance	1	2	3	0.67
First Degree Sex Abuse- Threatening	0	2	2	1
Assault W/I to Commit Robbery	140	1	141	0.007
Assault On A Police Officer	85	1	86	0.01
Unarmed Carjacking	73	1	74	0.01

Aggravated Assault Knowingly Grave Risk	18	1	19	0.05
1st Degree Cruelty to Children	9	1	10	0.10
Obtain Controlled Substance By Fraud	5	1	6	0.17
Assault W/I To Commit Any Other Offense	1	1	2	0.50
Manufacture or Possessing W/Intent to Manufacture a Controlled Substance	0	1	1	1
Manufacture or Possession of a Weapon of Mass Destruction	0	1	1	1

Figure 4 breaks down attempts on the offense level by count. *Figure 4* is sorted by the number of counts that have been flagged as an offense (rather than by the “Non-Attempts” column or the “Grand Total”). Note that the offense names in the first column are pulled directly from the data. Additionally, this table does not provide data on all offenses; rather, only offenses that have a count flagged as an attempt in the data are included.

<i>Figure 5: Average Sentences for Attempts and Non-Attempts.</i>			
	Non-Attempt	Attempt	Grand Total
Average Length of Sentence Imposed (Months)	42.44	16.37	37.11
Average Length of Sentence (Months)	36.60	9.14	31.00

Figure 5 shows the average sentence for non-attempts and attempts as a whole. “Sentence Imposed (Months)” refers to a data element in the data dictionary described as: “The length of an offender’s sentence, in months, including any portion of the sentence

that is suspended.”⁷ Similarly, “Sentence (Months)” refers to a data element in the data dictionary described as: “Length of an offender’s sentence, in months, minus any time suspended. Indicates the actual time an offender is sentenced to serve.”⁸ The data dictionary notes that this latter element “is the [Sentencing] Commission’s primary variable for tracking and analyzing sentence lengths.”⁹ Note that this data does not include sentences for ESA offenses in the “Attempts” average. The average “Sentence (Months)” and average “Sentence Imposed (Months)” may vary slightly if ESA offenses are included in the calculation of the average Attempt figure, as opposed to the average Non-Attempt figure.

⁷ D.C. SENTENCING COMMISSION, SENTENCING GUIDELINES DATA DICTIONARY, at 12 (Jan. 1, 2017).

⁸ *Id.*

⁹ *Id.*

APPENDIX A: RELEVANT DISTRICT CRIMINAL STATUTES¹⁰

D.C. Code § 22-1803:

Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit a crime of violence as defined in § 23-1331 shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 5 years, or both.

APPENDIX B: RELEVANT REDBOOK INSTRUCTIONS

Selected Portions of Criminal Jury Instructions for the District of Columbia, Instruction No. 7.101—Attempt (5th ed. 2016):

Superior Court:

The elements of the crime of attempted [^] [specify crime], each of which the government must prove beyond a reasonable doubt, are that:

1. [^] [Name of defendant] intended to commit the crime of [^] [specify crime];
2. [^] [Name of defendant] did an act reasonably adapted to accomplishing the crime of [^] [specify crime]. [^] [Name of defendant] must have done more than prepare to commit [^] [specify crime]. His/her act must have come dangerously close to committing the crime. [You may convict the defendant of an attempt to commit a crime even if the evidence shows the crime was completed.]

[^] [Read elements of underlying crime.]

....

Comment:

[] The District of Columbia Court of Appeals has used various formulations to describe the conduct that constitutes an attempt: "except for some interference," "beyond mere preparation" and "dangerous proximity." Because "dangerous proximity" has been used

¹⁰ This appendix merely references the District's general attempt statute, which is the primary basis of attempt liability under District law. As noted *supra*, however, District law is comprised of a variety of additional attempt penalty provisions. Because statutes such as these are primarily relevant to determining the penalty of an attempt, they will be collected in a future memorandum, which specifically addresses attempt penalties.

in the instruction historically, the Committee elected to retain it, while noting in this comment that the Court has also used the other formulations. In addition, the Committee changed "completing the crime" to "committing the crime." The Committee thought "dangerously close to completing the crime" could be confusing to a jury if the offense, such as robbery, requires multiple steps to complete, such as taking and asportation.

....

In cases analyzing when conduct has crossed the line from "mere preparation" to become an attempt to commit a crime, the Court has used the "dangerously close" or "dangerous proximity" language or combined "beyond mere preparation" and "dangerous proximity." [] A majority of the Committee decided that because the court uses the beyond mere preparation and dangerously close language most often when analyzing when particular conduct has crossed the line from "mere preparation" to become an attempt to commit a crime, such language should be retained in this edition.

The "dangerously close" test does not require that the defendant have commenced the last act sufficient to produce the crime; it focuses instead on the proximity of the defendant's behavior to the intended crime

A defendant may be convicted of an attempt even if the underlying crime is completed

Impossibility may be a defense to certain attempt crimes. "Legal impossibility occurs when a defendant's actions, or actions a defendant causes, even if fully carried out would not constitute a crime." [] When a defendant's objective "is to do something that is not a crime," there is a defense of legal impossibility. [] However, "factual impossibility, where the intended substantive crime is impossible of accomplishment merely because of some physical impossibility unknown to the defendant, is not a defense." [] "Factual impossibility occurs when the objective of the defendant is proscribed by the criminal law, but a circumstance unknown to the actor prevents him or her from bringing about that objective." [] Because the distinction between factual and legal impossibility "is often elusive," however, "it may be more useful to inquire whether a defendant had the requisite mens rea and performed substantive acts in furtherance of a criminal objective." []

....