



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

MINUTES OF PUBLIC MEETING

WEDNESDAY, January 3, 2018 at 10:00AM
CITYWIDE CONFERENCE CENTER, 11th FLOOR OF 441 4th STREET NW
WASHINGTON, D.C. 20001

On Wednesday, January 3rd, 2018 at 10:00am, 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 1107 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 (Chief Counsel for Management & Legislation) |
| Michael Serota (Chief Counsel for Policy & Planning) | Bryson Nitta (Attorney Advisor) |

Advisory Group Members in Attendance:

- | | |
|--|---|
| Dave Rosenthal (Designee of the Attorney General) | Donald Braman (Council Appointee) |
| Laura Hankins (Designee of the Director of the Public Defender Service for the District of Columbia) | Renata Kendrick Cooper (Designee of the United States Attorney) |

I. Welcome.

- a. The Executive Director reminded the Advisory Group that meetings in 2018 would be held the first Wednesday of every month, from 10:00am until 12:00pm. The next meeting would be February 7th at 10:00am.
- b. The Executive Director also note that the agency is developing draft recommendations for revision of homicide, sexual abuse, kidnapping, child neglect, and abuse of a vulnerable adult offenses. He solicited Advisory Group members to contact him with any revisions they believe should be made to those offenses.

II. The Advisory Group discussed First Draft of Report No. 11 - Recommendations for Extortion, Trespass, and Burglary Offenses.

- a. The Advisory Group began its discussion of the Office of the Attorney General (OAG) comments on Report No. 11. The OAG comments on obstruction of a public way suggested amending the reformed statute to explicitly include the fact the offense can be committed alone; prior DCCA case law had interpreted the offense as requiring the conduct of more than one person. That case law had then been overruled by a subsequent legislative amendment; therefore, OAG said that the statute should continue to reflect that amendment. Staff said it would examine the issue, and that it was not the intent of the reform to exclude liability for persons obstructing areas by themselves.
- b. The OAG comments also suggested that the revised statute had overly-narrowed the definition of “obstructing.” OAG suggested that the offense should include defendants who “obstruct or inconvenience” passersby. The Public Defender Service (PDS) representative objected to adding “inconvenience.” She noted that if the offense cuts that broadly, then racial minorities may be unfairly targeted by police. Staff noted that there might be an appropriate middle ground between the current reform language and the very broad “inconveniencing.” The Executive Director also said that drawing the statute too broadly might cause the statute to stretch into a loitering-like offense; these offense are often challenged on constitutional grounds. The OAG representative suggested adding in a provision (similar to the provision in unlawful demonstration) that requires a police officer’s order to move on before the offense can be committed may obviate some of the PDS representative’s concerns.
- c. The OAG comments also suggested including passageways through public parks explicitly. Staff said that the definition of “walkway” was intended to cover trails and sidewalks through public parks. The OAG representative suggested adding something about parks to the Commentary to be clear.
- d. The OAG comments on unlawful demonstration suggested adding “standing, sitting, lying down” back into the definition of “demonstration.” The list of included conduct seemed to only reflect group activity, not activity that is typically accomplished by a single person. Staff agreed the covered activities were not limited to group actions and agreed to review the language.
- e. The OAG comments on the reformed burglary offense suggested amending the statute such that a dwelling does not need to be occupied prior to the defendant’s entry. Instead, the offense could be drafted such that a defendant who drags a

victim into a dwelling *after* the defendant could be guilty of first-degree burglary. The Executive Director suggested that it would be better to wait to determine the scope of kidnapping before addressing this question; the conduct involved in the hypothetical will likely fall within a grade or degree of a revised kidnapping offense.

- f. The United States Attorney's Office (USAO) representative asked about the provision in the revised unlawful demonstration offense that provides a jury trial. She noted that the current penalty is ninety days, and a jury trial would not be guaranteed pursuant to D.C. Code § 16-705. The Executive Director said that although penalties were not being decided, and that penalties would be addressed at a later point in the project, there could be times where jury trials ought to be available, even if the penalty is still lower than 180 days. The USAO representative noted that the recent revisions to the assault on a police officer statute included changes to penalties so that community members, through a jury, could weigh in on APO cases. The Executive Director agreed, and said that the reason a jury trial has been added in unlawful demonstration is that the offense necessarily implicates some First Amendment issues and should be considered by community members. He urged the Advisory Group members to continue to note places where jury trials or bench trials may be particularly important, even though the group has not yet reviewed penalty recommendations.
- g. The Advisory Group then discussed some of the comments received from PDS regarding the report. First, PDS comments objected to the use of a permissive inference in the reformed trespass offense. Staff said that it appeared the permissive inference was created in order to ensure that MPD officers, who sometimes find people engaging in illegal activity in vacant homes, have probable cause to arrest such individuals without having to determine the actual owner of the vacant home at the scene. The OAG representative agreed and noted that this was a response to courts raising questions about probable cause in these types of cases.

III. The Advisory Group discussed First Draft of Report No. 8 - Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions

- a. The Advisor Group discussed OAG comments that suggested changing the definition of consent to account for undercover police operations. As the reformed consent definition is currently drafted, a defendant who thinks he is taking advantage of (for example) an elderly person, where that elderly person is actually an undercover officer, could only be guilty of an attempted offense. The OAG comments indicated that such a defendant is as blameworthy as a defendant who takes money from a real victim. The PDS representative objected to the proposed change; she said that in cases where officers pose as victims, the officer has not actually been victimized. Therefore, the defendant should not be punished as seriously as if a person had actually lost his or her property. She also said that undercover police operations also raise questions about entrapment, and whether a defendant who is possibly entrapped is as responsible, or responsible at all, for a crime. The USAO representative asked whether there are any situations where similar issues have arisen. She noted that receipt of stolen property (RSP) was amended in order to provide complete liability where the property was only

believed by the defendant to have been stolen. Staff said that certain child exploitation statutes appear to have similar provisions; the current D.C. Code provides a special offense for arranging for sexual contact with a child, where the child is actually a police officer undercover. However, staff said they were not aware of other statutes where the issue of consent in a sting operation has been addressed. Staff found only one case regarding the issue and it held that there was no liability (not even attempt) where a police officer apparently consented to a transaction underlying a charge of taking property without right. The PDS representative said that it seems there are special occasions where full liability may be appropriate for a “completed attempt;” however, these are exceptions and should not determine the rule. Staff also noted that these are all largely questions about penalties. A person who is caught attempting to defraud another person who is actually a police officer will still be punished, but at a different level. The Executive Director said that it may be useful to continue the discussion of these “completed attempts” when the Advisory Group discusses attempt penalties. He noted that having a higher penalty for a completed attempt would be possible and justifiable from an academic perspective. However, few, if any, other jurisdictions have created different penalty regimes for different types of attempts.

IV. Adjournment.

- a. The meeting was adjourned at 12:00pm. Audio recording of the meeting will be made available online for the public.