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

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

On Wednesday, December 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)

Jinwoo Park (Senior Attorney Advisor)

Patrice Sulton (Senior Attorney Advisor)

Kelsey Townsend (Legal Fellow)

Advisory Group Members and Guests in Attendance:

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) (by phone)

Elana Suttenberg (Visiting Attendee of The Office of the United States Attorney for the District of Columbia)

Kevin Whitfield (Designee of the D.C. Council Committee on the Judiciary and Public Safety)

Dave Rosenthal (Designee of the District of Columbia Attorney General)

Paul Butler (Council Appointee) (by phone)

Don Braman (Council Appointee)

I. Welcome and Announcements.

a. The Executive Director noted the next Advisory Group meeting will be held on January 8, 2020.
b. The deadline for written comments on materials currently under review is January 15, 2020. This deadline may be extended by one week to accommodate the holidays and any government shutdown. The Executive Director will email about any extensions.
c. The CCRC is currently working on a cumulative update to all recommendations, planned to be issued in February 2020. As with the last cumulative update, it will include a catalog of responses to each of the written Advisory Group comments.
d. The CCRC anticipates completing a voting draft of the RCC in 2020.

II. The Advisory Group discussed the First Draft of Report #41, Ordinal Ranking of Maximum Imprisonment Penalties:

a. The Advisory Group discussed the relative severity of sex offenses.
    i. In its written comments, OAG recommended increasing the penalty for nonconsensual sexual conduct.[1] OAG noted that arranging for sexual conduct with minor[2] is graded higher, even though it is an inchoate offense.
    ii. The Executive Director explained that the revised nonconsensual sexual conduct offense replaces a 180-day misdemeanor in current law that broadly encompasses more serious conduct such as enticing, sex abuse, and sex abuse of a minor that is also separately criminalized with heightened penalties. Like the current misdemeanor sexual abuse statute in current law, the revised nonconsensual sexual conduct is similar to a lesser included offense, but the revised nonconsensual sexual conduct offense increases the penalty for first degree (involving a sexual act) to a felony.
    iii. Ms. Suttenberg explained that the current misdemeanor sex abuse offense is often charged in what is colloquially termed "butt-grab" cases, where it is difficult to prove use of force sufficient to overcome. It also functions as an attractive plea-down option for offenses that would otherwise require sex offender registration.[3] Ms. Suttenberg stated that USAO prefers to retain a non-jury demandable misdemeanor sex offense, to preserve prosecutorial and judicial resources.
b. The Advisory Group discussed jury demandability.
    i. The Executive Director noted that the written comments recommend three rather different approaches to jury demandability:
        1. PDS recommended making all offenses that are punishable by incarceration jury demandable, just as they would be for a person who is facing immigration consequences.[4] PDS's recommendation

[1] RCC § 22E-1307; currently classified as a Class 9 felony for first degree and a Class A misdemeanor for second degree.
[2] RCC § 22E-1306; currently classified as a Class 8 felony.
[3] Misdemeanor sex abuse against requires registration only if the complainant is a minor.
[4] *Bado v. United States*, 186 A.3d 1243 (D.C. 2018).

noted that defendants may not want to disclose their immigration status in court.

2. OAG recommended drawing a bright line based on maximum penalty: all offenses punishable as Class A or B misdemeanors are jury demandable and all (completed or inchoate) offenses that are punishable as Class C, D, or E misdemeanors are not.
3. USAO recommended not expanding the right to a jury trial beyond what is currently authorized by current law.

ii. The group discussed the impact of providing jury trials in all cases on the efficiency of the criminal justice system.

1. The Executive Director noted that the District is in a minority nationally in not providing jury trials in all crimes involving incarceration. Fewer than a dozen jurisdictions are in this group and several of those afford juries in more circumstances than the District.
2. Ms. Suttenberg stated that it takes parties longer to prepare for a jury trial and noted that some misdemeanor calendars, such as domestic violence calendars, have four trials scheduled per day.
3. Ms. Semyonova stated that the delay is a function of the indictment clock. Citing the *Ugast* opinion, she disagreed with the assertion that jury trials would overburden the system or the jury pool. Katya Semyonova also stated that the trial call is improperly used as a case screening tool in misdemeanor courtrooms.
4. Mr. Rosenthal noted that providing a jury trial in minor cases, such as a mass arrest of hundreds of protestors, may interrupt felony calendars, adversely impacting the defendants and victims who are awaiting trial in those more serious cases.
5. Mr. Whitfield stated that it is important to fund the system at a level that allows the full process to take place and cautioned against removing process due to financial considerations. The representative explained that when resources are lacking, it should inform prosecutorial priorities but not affect the rights of defendants.
6. Professor Butler stated that efficiency is not most relevant consideration, noting democracy is expensive. Professor Butler also noted that when he was a Special AUSA, there were nine or ten misdemeanor jury trials per calendar per day without difficulty.
7. Professor Braman explained that there are many ways to increase efficiency. For example, some jurisdictions require officers to call and clear with the prosecutors before making an arrest. This approach reduces number of arrests and the number of no papered cases. It also educates police officers about what is and is not arrestable, reducing officers' frustration. Professor Braman also stated that the CCRC's mandate is not to make the system more efficient but to make it more fair.

iii. The group discussed the impact of providing jury trials on due process.

1. Professor Butler, citing to the concurring opinion in *Bado v. United States*, characterized the current system of denying jury trials in misdemeanor cases as dreadful and anti-democratic. Professor Butler emphasized the importance of the perception of fairness, noting that it was very important to him as a defendant in criminal case to know that he had the same rights as similar-situated people in other jurisdictions.
2. Mr. Whitfield expressed concern about the denial of the right to a jury trial corrupting the core analysis when fashioning penalties, which should be the nature of the conduct and culpability. The representative also explained that the charging decision process should be based on evidence and not gaming the system to make it easier to secure a conviction. The representative noted that North Carolina allows an immediate right to a new trial by a jury if a defendant is found guilty after a bench trial. In South Carolina (which permits nonlawyers to serve as judges), a defendant is entitled to a jury trial for any offense that carries jail time.
3. Mr. Rosenthal stated that he did not think court statistics necessarily support the commonly-held belief that juries are more likely to acquit than judges.
4. The Executive Director said that conflating factors (such as plea bargaining and evidentiary issues) make court statistics an unreliable indicator of the probability of success at trial.

iv. The Executive Director asked the group to specify any relevant considerations to distinguishing some offenses rather than other as jury demandable, other than maximum penalty.
1. Ms. Hankins stated that a jury trial should be available for all offenses punishable by over six month incarceration, all offenses that would be deportable (irrespective of the defendant's personal immigration status), all offenses that require sex offender registration or gun offender registration, all offenses that trigger a felony recidivism enhancement, and all attempts to commit an offense that would otherwise be jury demandable.
2. The Executive Director noted that it may be difficult to discern which RCC offenses are deportable and invited PDS to specify the specific offenses or a clear standard for determining such offenses.

c. The Advisory Group discussed the relative severity of the revised burglary offenses.
i. The Executive Director noted that the revised burglary offense is, in many ways, broader than common law burglary.[5] For example, it does not require *forced* entry or an intent to commit a crime *inside* the premises. He noted that many criminal law experts have argued for getting rid of burglary as a distinct crime and relying on other statutes and attempt

[5] The Executive Director distributed an overview of the burglary offense written by Wayne LaFave. 3 Subst. Crim L. § 21.1(g) (3d ed.).

liability to sanction burglary-type behavior. The Executive Director provided a copy of an analysis to this effect by Professor Wayne LaFave.

ii. The Executive explained that there are examples of burglaries that involve egregious conduct and egregious harms (e.g., a home invasion with intent to commit an offense against persons). However, while cases involving these fact patterns are commonly thought of as "burglaries" under current law, they also amount to very serious offenses under the RCC (e.g., attempted assault, attempted sexual assault, attempted murder) and current law. Under the RCC, the most egregious conduct in the fact pattern drives the maximum penalty. The additional penalty for the burglary offense effectively operates like an enhancement for engaging in other criminal conduct in a location that warrants treating it more seriously. The penalty for the revised burglary offense should reflect how much *additional* liability is warranted given the particular trauma that may occur by virtue of the protected location. The First Draft of Report #41 proposes five years, three years, and one year of additional exposure. Convictions for burglary in the RCC would be in addition to liability for predicate behavior which could be sentenced consecutively.

iii. The Executive Director noted that USAO stated, in its written comments, that the maximum penalty for each offense should accommodate the most serious version of that offense. The Executive Director said that such an approach is incomplete because it is important to consider the entire constellation of penalties available under the RCC for a given fact pattern, the entire liability a defendant faces for their behavior. Focusing on the penalty for one offense can be misleading as to the penalty exposure a defendant faces. The RCC focuses on ensuring the overall penalty a defendant faces for behavior is proportionate. In contrast with the current D.C. Code, the revised burglary statute reflects the belief that the underlying predicate conduct should be the main source of criminal liability, rather than letting one offense, burglary, do all the work accounting for the most egregious types of conduct that occur during a burglary.

iv. Ms. Suttenberg stated that the RCC approach may not always result in longer sentences in every case. For example, a judge may impose a sentence for a burglary offense to run concurrent to the sentence for the predicate offense.

    1. The Executive Director said that the CCRC's goal is to make the amount of authorized, available punishment sufficient, not to ensure judges reach particular outcomes in particular cases.

v. The Executive Director noted that the 30-year penalty under current law is not supported by practice in other jurisdictions, and District practice, while much lower, is still unusually high compared to the rest of the country. BJS statistics indicates that among all state prisoners across the country, where burglary is the most serious offense in the case, 78.3% of burglaries are punished by less than 3 years incarceration; 91.5% less than 5 years; 98.1% less than 10 years; and 99.7% less than 20 years.

vi. The Executive Director said that the CCRC public opinion surveys of District residents do not support anything near a 30 year sentence for burglary, nor do the District Superior court data where the high end (97.5%) of unenhanced burglary sentences is 10 years and enhanced burglary sentences is 15 years. It appears that, because the maximum penalty is so high, that charge subsumes the role of the more egregious conduct (e.g., assault) in that location. The District's penalties are much more severe than other states and still not near the statutory maximum. The most egregious facts are addressed through other aspects of the RCC.

vii. Ms. Suttenberg stated that the trauma caused by invading the location (which may lead to nightmares) is not subordinate to the harm caused by other conduct. Ms. Suttenberg stated that the maximum should be high enough to accommodate the worst case for a person with the highest criminal history score.

1. Mr. Rosenthal agreed that there is a distinctive harm to burglary, stating that butt grab on the street is very different than waking up to a butt grab in your home.
2. Ms. Hankins said that neither USAO nor OAG written comments raise this point on the six-month penalty for trespass by knowingly entering or remaining in a dwelling.

viii. The Executive Director agreed that there is a distinct, serious, and potentially traumatic harm inflicted by virtue of committing an offense in a location such as a dwelling. That is why the RCC draft recommends providing felony-level liability for the offense. However, the 30-year maximum in current law is not supported by other jurisdictions, survey evidence, or current District practice as evident in court statistics.

ix. The Executive Director urged the group to review the spreadsheet that organizes the RCC offenses by severity and consider which offenses are comparable to burglary assuming there is separate liability for the predicate harm. The Executive Director also encouraged the group to consider what other RCC liability is available for a given fact pattern, giving special attention to attempt liability, which has become a more robust charge in the RCC and does a lot of work. The Executive Director noted that USAO written comments provided one such hypothetical involving a simple assault and threat to commit a sex assault during a burglary, and said this was a helpful test for the RCC—does the RCC authorize adequate punish for such conduct, not just in one offense, but cumulatively? The Executive Director encouraged the group to ensure that the event that happened is adequately punished by the entire revised code and the array of offenses available for prosecution, and not by each offense in isolation.

III. Adjournment.

a. The meeting was adjourned at 12:00 pm.