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

WEDNESDAY, MARCH 6, 2019, at 10:00 AM
CITYWIDE CONFERENCE CENTER, 11th FLOOR OF 441 4th STREET NW
WASHINGTON, D.C. 20001

On Wednesday, March 6, 2018, 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)

Michael Serota (Sr. Attorney Advisor)

Rachel Redfern (Sr. Attorney Advisor)

Jinwoo Park (Attorney Advisor)

Patrice Sulton (Attorney Advisor)

Blake Allen (Intern)

Advisory Group Members and Guests in Attendance:

Laura Hankins (Designee of the Director of the Public Defender Service for the District of Columbia)

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

Don Braman (Council appointee) by phone

I. Welcome and Announcements

a. The Executive Director said that the next Advisory Group meeting will be held April 3, 2019.
b. The Executive Director noted that an updated draft report for most of RCC Chapter 2 (the General Part) will be distributed this week or next. A second compilation of

updated draft reports is forthcoming in early April of 2019. It will include statutory language, redlined statutory language (showing changes from prior drafts), and a document that addresses each of the advisory group written comments.

c. The Executive Director said that staff would be developing weapon and drug offenses shortly and solicited any affirmative comments or recommendations on possible changes.

II. The Advisory Group had no further comments on the written comments received for the Second Draft of Report No. 9: Recommendations for Theft and Damage to Property Offense.

III. The Advisory Group discussed the written comments received for the First Draft of Report No. 31: Escape from Institution or Officer.

a. The Advisory Group discussed a comment from PDS that requested greater clarity as to what constitutes leaving custody. Staff noted the commentary will be updated to clarify that "custody" requires a completed arrest, and fleeing from an officer who is attempting to make an arrest would not constitute leaving custody.

b. The Advisory Group discussed grading distinctions in the proposed escape statute. Specifically the Advisory Group discussed whether escape from a correctional facility should be graded the same as escape from custody of an officer.

   i. OAG noted that it would consider adopting three penalty grades, with escape from a facility constituting the highest grade, escape from an officer constituting the second grade, and failure to return or report to custody constituting the lowest grade. However, two grades, with escape from an officer and failure to return or report to custody grouped in the lowest grade, would be objected to.

c. The Advisory Group discussed whether escape from a facility requires leaving a building, or leaving the actual facility grounds. Staff replied that escape from a facility requires actually leaving the facility grounds.

d. The Advisory Group discussed whether staff-secure locations, such as halfway houses and group homes, should be included as a "correctional facility" for the purposes of the escape statute.

   i. PDS stated that the escape offense should not cover juveniles, particularly juveniles leaving a shelter house or group home. PDS stated that the purpose of the juvenile justice system is not served by charging escape. Children are placed in staff-secure facilities not to serve sentences but because a home placement is not safe or sufficient for the child at that time. Charging an escape is unnecessary because the court can sanction the escape at any further detention, review, or disposition hearing and increase the level of detention.

   ii. Professor Braman agreed with PDS and added that a child's escape might instead be characterized as the institution's failure to provide required care.

   iii. OAG favors retaining an escape offense for juveniles who flee group homes or shelters. In addition to care and rehabilitation, the juvenile justice system concerns itself with public safety. The D.C. Council has rejected the argument that additional charges are unnecessary when a juvenile is already under supervision. It is important to create a record of juveniles fleeing group homes

or shelters. In some cases, an arrest and charge of escape is the only consequence available for children who leave a shelter home or group home. OAG offered an example in which a child leaves a shelter home to visit a girlfriend but appears for court and does not engage in any violent or criminal activity.

iv. The Judiciary and Public Safety Committee representative asked if the government would apprehend a juvenile who fled a group home or shelter if escape did not criminalize this conduct. PDS replied that the government could still get a custody order from a judge. Staff said that it would research what additional authority exists to apprehend a child who has absconded were there no criminal liability for escape.

v. PDS stated that even if escape generally applies to juveniles, it should categorically not apply to "persons in need of supervision" cases.

IV. The Advisory Group discussed the written comments received for the First Draft of Report No. 32: Tampering with a Detection Device.

a. The Advisory Group discussed whether the tampering offense should cover tampering with a device that a person is required to wear pursuant to an order issued by a federal court or a court in another jurisdiction.

i. OAG noted it would approve of specifying that the tampering offense does not cover tampering with devices that are required pursuant to orders by courts in other jurisdictions.

ii. PDS noted it is unclear what mechanisms the federal government has to penalize people who tamper with devices and whether the inclusion of federal courts would expand offense liability. Staff said it would research this issue.

iii. PDS also noted that any changes to the tampering statute should not conflict with the interstate compact on adult offender supervision.

b. The Advisory Group discussed the meaning of the words "alter," "mask," and "interfere."

i. Responding to an alternative draft suggested by staff, OAG and PDS indicated that they would not object to deletion of the words "alter" and "mask," provided that the word "interfere" is interpreted broadly enough to cover interfering with the operation or detectability of a device.

c. In its written comments, OAG asked that the tampering statute cover juveniles who tamper with a detection device while they are held at a group home or shelter and, presumably, not on "pretrial release." Staff responded that the categories in the revised statute match the language in the current law. OAG noted that it does bring tampering charges in these cases, although it is not clear which specific provision in the current statute covers these cases.

V. The Advisory Group discussed the written comments received for the First Draft of Report No. 33: Correctional Facility Contraband.

a. The Advisory Group discussed OAG's comment regarding the detainment authority provision. OAG noted that the detainment authority should cover people who bring contraband to a correctional facility. Staff replied that it would update language in the commentary to clarify this point.

b. The Advisory Group discussed amending the detainment authority provision in § 22E-3403 (e) to specify that the head of the facility may detain a person pending surrender to any law enforcement agency, not only a member of the Metropolitan Police Department. PDS said it does not object to including agencies that the Mayor has authorized to make arrests at New Beginnings, such as the U.S. Park Police, in the detainment authority provision.
c. The Advisory Group discussed exclusions to liability for correctional facility contraband. The group discussed PDS's suggestion that the exclusion be amended to include possession of a syringe, needle, or other medical device that is prescribed to the person and for which there is a medical necessity to access immediately or constantly.
    i. Staff noted that in many cases where medication or devices are medically necessary, the person would either have consent to possess these items, or could raise a necessity defense.
    ii. OAG said that it did not object to this exclusion for lawyers and other visitors, but noted that it would like to hear from the Department of Corrections (DOC) about potential safety concerns with allowing people at correctional facilities to possess needles or syringes. Staff noted that whether or not the contraband criminal offense does or does not include an exclusion for needles and devices prescribed to a person, DOC could retain the authority to bar inmate possession of such items and impose administrative sanctions for such behavior.
d. The Advisory Group discussed whether the correctional facility contraband offense should be amended to include possession of contraband in staff secure locations.
    i. PDS and OAG agreed that the scope of current law should not be expanded to include halfway houses, shelter houses, or group homes, if those locations are not included in current law.

VI. The Advisory Group discussed the written comments received for the First Draft of Report No. 34: De Minimis Defense.

a. The Advisory Group discussed OAG's oral comment relating to an example in the commentary in which a parent steals $100 worth of groceries. OAG suggested that the hypothetical be amended to remove the value amount, focusing only on the theft of groceries. Staff agreed that this would be a useful revision.
b. OAG stated that while it is generally in support of a de minimis defense, it has concerns about its appropriate administration.
    i. OAG expressed concern that a de minimis defense could invite nullification of many low-level misdemeanors on the basis that they criminalize trivial harms.
        1. Staff replied that in applying the de minimis provision, fact finders and judges should assume that the conduct criminalized by any offense necessarily involves non-trivial harms. The de minimis provision only seeks to capture those unusual instances that fall outside of the heartland fact patterns for a given offense.
    ii. OAG questioned whether the blameworthiness factors codified in subsection (b) raise pure issues of fact, or mixed issues of fact and law.
        1. Staff replied that some aspects of the identified factors raise mixed issues of fact and law. This includes whether a particular societal

objective is "legitimate." For example, if the defendant in a drug possession case argues that heroin makes people feel high, and that getting high is a legitimate societal objective, the court could reject this claim as a matter of law. Likewise, if the defendant in a theft case argues that his stealing food from a minority owned store sends a message that minorities aren't welcome, and that making minorities feel unwelcome is a legitimate societal objective, the court could reject this claim as a matter of law.

iii. OAG asked what restrictions there would be on the types of evidence a fact finder could consider in evaluating the de minimis defense.
    1. Staff responded that subsection (b) specifies four concrete, relatively narrow factors subject to "other appropriate considerations." Thereafter, the commentary clarifies that "[w]hat qualifies as an "appropriate factor[]" is to be determined by the court as a matter of law, in light of general principles of fairness and efficient judicial administration." Accordingly, these four factors, in addition to any other judicially-recognized factors, delineate the body of evidence that would be logically relevant to negating blameworthiness. The court could exclude any evidence that falls outside of this body.
    2. In addition, a court might also be able to preclude consideration of logically relevant evidence as a matter of common law judicial discretion. For example, a court might determine that the prejudicial impact of logically relevant evidence outweighs its probative value, and therefore exclude it on procedural grounds. Or the court might preclude the presentation of logically relevant evidence on more fundamental policy grounds—as it has in the context of a diminished capacity defense or voluntary intoxication defense.

iv. OAG raised concerns about the lack of current District case law, which could result uncertainty about the scope and application of the de minimis defense. OAG asked whether the defense could be amended to include greater specificity.
    1. Staff briefly mentioned various possibilities, and invited further discussion of revisions that would address OAG's concerns.

v. Staff stated that if OAG or any other Advisory Group members have recommendations for specific changes to the de minimis defense, staff would welcome them.

VII. Adjournment.

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