



D.C. Criminal Code Reform Commission

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MINUTES OF PUBLIC MEETING

WEDNESDAY, MAY 2, 2018 at 10:00 AM

CITYWIDE CONFERENCE CENTER, 11th FLOOR OF 441 4th STREET NW
WASHINGTON, D.C. 20001

On Wednesday, May 2, 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 1117 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)

Jinwoo Park (Attorney Advisor)

Patrice Sulton (Attorney Advisor)

Advisory Group Members and Guests in Attendance:

Don Braman (Council Appointee)

Paul Butler (Council Appointee) (By phone)

Renata Kendrick Cooper (Designee
of the United States Attorney)

Laura Hankins (Designee of the Director of
the Public Defender Service)

Katerina Semyonova (Visiting Attendee of
the Public Defender Service)

I. Welcome and Announcements

- a. The Executive Director noted that May 11, 2018 is the due date for written comments on outstanding draft reports.
- b. The Executive Director noted that the scheduled August 1, 2018 meeting has not been moved or cancelled, but requested that members of the Advisory Group inform him about potential scheduling conflicts during summer months.
- c. The Executive Director said that the set of written materials that will be sent out in mid-May will likely include draft recommendations pertaining to accomplice liability, kidnapping, and PFCOV. He also said that draft recommendations on sexual abuse, disorderly conduct, rioting, and human trafficking are next in queue, and he solicited any advance comments from the Advisory Group on what aspects of these offenses should be reformed.

II. The Advisory Group had no additional discussion of the Written Comments on the First Drafts of Reports #13 – 17 or the Third Draft of Report #2.

III. The Advisory Group discussed First Draft of Report No. 18: Solicitation & Renunciation.

- a. The PDS representative raised for consideration the possibility of eliminating the requirement for a renunciation defense that the target offense not have occurred. She highlighted that, per staff’s memorandum, a strong minority of jurisdictions apply this approach. She also presented a hypothetical in which a co-conspirator withdraws from a conspiracy with two other actors, questioning why, under these circumstances, liability would be appropriate.
- b. Agency staff noted that where the target offense occurs, the negation of blameworthiness that generally supports the renunciation defense seems less complete. Staff also highlighted that under the hypothetical presented a broader withdrawal defense would likely preclude responsibility for the crimes subsequently committed by the co-conspirators. Staff encouraged the PDS representative to submit written comments in support of the recommended revision for further consideration.

IV. The Advisory Group discussed First Draft of Report No. 19: Homicide

- a. The Executive Director noted that the First Draft of Report No. 19 is more tentative than usual, and that the Advisory Group memorandum flagged various issues that remain outstanding or merit further review. The Executive Director noted that manslaughter is a common law offense in the District, that the statutes for first and second degree murder in the District are virtually unchanged since 1901, and that there is a lot of case law relevant to homicide that must be considered.
- b. PDS made several recommendations concerning how aggravators and/or penalty enhancements should be treated for homicide. First, PDS recommended eliminating the while armed enhancement for homicide, observing that incorporating a while armed enhancement into homicide enhances nearly all homicides, since nearly all homicides are committed with a weapon. PDS also recommended eliminating the draft gradation of aggravated murder altogether, and instead relying on separate penalty enhancements. Third, PDS recommended putting all aggravators relevant to

murder together in a new, single statute. PDS said that, as currently drafted with aggravating factors incorporated into the offense's gradations, the revised homicide statute is hard to read, and would be difficult to use for indictment. Fourth, PDS noted that some aggravators shouldn't apply to reckless murder, because they necessarily involve a greater level of intent that would prove first degree murder, and that some other penalty enhancements in current law shouldn't apply to the revised homicide statute at all. Lastly, PDS noted that, procedurally, it would be useful and/or beneficial to have at least some enhancements—such as extreme physical pain/mental suffering, and mutilation/desecration—considered at a separate proceeding to avoid the risk of unfair prejudice.

- A. Professor Braman generally agreed with PDS regarding a reorganization of the revised murder statute to leave aggravating factors and penalty enhancements out of the offense because doing so would simplify and streamline the statute.
- c. PDS recommended that the revised statute should not remove premeditation and deliberation requirements from first-degree murder, and said that, as a matter of practice, charging decisions reflect the distinction. PDS said that a quick, unthinking murder would not be charged in Superior Court as first-degree murder, regardless of whether such murders could satisfy the minimal premeditation and deliberation requirements under DCCA case law.
 - A. Agency staff noted that the current RCC draft language includes a substantial planning aggravator that would distinguish murders involving advance planning from those decided in a relatively short amount of time.
 - B. Staff also noted however that a majority of reformed jurisdictions have abolished the premeditation and deliberation distinction, though many non-reform states retain it.
 - C. The Executive Director said that, both with respect to premeditation/deliberation in particular and other issues more generally, agency staff would appreciate any feedback on how current practice may derogate from the minimal requirements in current District case law.
- d. PDS asked whether and to what extent three degrees of manslaughter serves the interests of proportionality.
 - A. Agency staff noted that, as with staff's aggravated murder, even though it doesn't have a name and isn't labeled as a separate offense, under current law there exist many penalty enhancements applicable to voluntary manslaughter that raise the applicable penalty 50% or more. Some of these enhancements, such as the age of the victim, may be applied to a crime committed during heat of passion in current practice.
 - B. The Executive Director said that sentencing proportionality was an issue for future discussion, but that several possibilities could exist, including aggravated manslaughter being penalized more, less, or just as seriously as second degree murder.
- e. The Executive Director generally noted that, as a matter of practice, relatively few enhancements are being used; chiefly the while-armed, minor, and senior enhancements are used. But the CCRC won't have more data with respect to murder before the deadline for Advisory Group comments.

- f. The Executive Director welcomed any written comments on the points raised by PDS, and encouraged Advisory Group members to pinpoint particular enhancements for elimination/further consideration.

V. The Advisory Group discussed First Draft of Report No. 20: Abuse and Neglect of Children, Elderly, and Vulnerable Adults

- a. The Executive Director noted that the First Draft of Report No. 20 addresses various problems in the current statute, including by poor drafting, related means of civil liability, and the unclear scope of parental duties. These abuse and neglect offenses, more generally, raise difficult problems related to treatment of minors, consent, and parental discipline more generally. Few jurisdictions address these issues clearly by statute.
- b. The PDS representative offered a hypothetical involving a 12 year-old who tries to remove a splinter from another 12 year-old friend without that parent's consent. How should the law deal with this issue, or similar ones that occur outside the context of sports or a fight after school?
- c. The Executive Director said that it is hard to address many questions concerning the autonomy of young people to consent in a uniform, clear, consistent way by statute. Intuitions of what's fair differ sharply according to the particular age and the specific type of behavior at issue.
- d. The Executive Director generally observed that these offenses, per current District case law, capture to some degree purely psychological harms which criminal law almost never cognizes. Carefully limiting the scope of liability for purely psychological harms is an unusual and important task for code revision.
- e. The PDS representative raised a question about serious mental injury, highlighting a parental decision not to medicate a child for anxiety/depression. How would the law deal with this kind of issue?
 - A. Agency staff noted that this kind of situation would raise issues of omission liability, justifiability, and the scope of parental duties to provide care.
- f. The Executive Director noted that child abuse often involves assaultive conduct, and, therefore, frequently overlaps with assault offenses. He also observed that while not OAG offenses, these criminal statutes may have implications for the civil system concerning child welfare. OAG may have input on how recommended changes to the criminal law could affect the civil regime.
- g. The USAO representative said that we should be mindful of the potential civil implications of our work on District law. The possibility for extrapolation from one area to another is omnipresent.

VI. Adjournment.

- a. The meeting was adjourned at 11:50 AM. Audio recording of the meeting will be made available online for the public.