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

WEDNESDAY, September 6, 2017 at 2:00PM
CITYWIDE CONFERENCE CENTER, 11th FLOOR OF 441 4th STREET NW
WASHINGTON, D.C. 20001

On Wednesday, September 6, 2017 at 2:00pm, 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)

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

I. Welcome.

a. The Executive Director noted that the agency's Attorney Advisor Jinwoo Park was absent, due to the birth of his first child. The Advisory Group members and staff offered congratulations to Jinwoo.

b. The Executive Director updated the Advisory Group on the Commission's efforts to obtain data. He said that the Commission had received an initial dataset directly from the Superior Court, and that the Court and Chief Judge had been particularly helpful in providing the necessary data. However, some additional data has been requested that will facilitate analysis. The Executive Director will provide analyses when they become available.

   i. The Office of the Attorney General (OAG) representative asked whether juvenile data can or should be included in the Commission's data requests.

   ii. The Executive Director said that the agency has only requested adult data. He said that juvenile data may be harder to obtain, given privacy concerns. However, such data could certainly be useful for purposes of comparison.

c. The Executive Director reviewed upcoming changes to the Advisory Group's meeting schedule. He reminded the Advisory Group members that a make-up meeting is scheduled for September 19th. He said that that, in addition to any remaining items from Report #8, the meeting would focus on Report #9, which discusses recommendations for reforming theft offenses and property destruction offenses.

d. The Executive Director asked whether, to accommodate one member's change in schedule, other Advisory Group members could move the meeting times for the remaining 2017 meetings, on October 4th, November 1st, and December 6th, to 3:00pm - 5:00pm, from the previously planned 2:00pm – 4:00pm. The Advisory Group members in attendance tentatively agreed that this change would be possible. The Executive Director said that he would follow up about room availability before confirming the change with members by email.

e. Finally, the Executive Director updated the Advisory Group members with respect to the Commission's work sequence. He said that the Commission would focus its work on offenses against persons rather than drug offenses over the coming months. He also said that the Commission plans to deliver its report on conspiracy in November. The Public Defender Service (PDS) representative asked when comments will be due for that report, given the holidays. The Executive Director said he could not say at this time when those comments would be due, that it would depend on the length of the conspiracy recommendations and the timetable for review of other recommendations.

II. Discussion of Advisory Group Written Comments on the First Draft of Report No. 6, Penalty Classifications.

a. The Executive Director noted OAG Comments on RCC § 22A-805(a), addressing enhancements for equivalent elements noted that it was unclear what the scope of the provision is. In particular, OAG had noted that it was unclear what was meant by "equivalent" and "gradation." The Executive Director explained that the provision was intended to cover situations wherein a sentencing enhancement and a factor for increasing the grade of an offense within the offense definition itself overlapped. RCC § 22A-805(a) was intended to ensure that there was no double-counting of both an increase in the grade of the offense and the application of a sentencing enhancement. The Executive Director also noted, however, that it was not apparent at this point in time that any of the Revised Criminal Code's enhancement provisions will be factors for grading in specific offenses; and if there is overlap between the reformed penalty enhancements and the elements of a reformed offense, that could be addressed in a provision specific to that offense instead of a general provision. Therefore, he suggested that RCC § 22A-805(a) may not be necessary and proposed eliminating the definition. As the Commission's work moved forward, the Commission would be sure to consider whether a grading factor overlapped with a penalty enhancement, and address the overlap at that point. The OAG representative said this change would address their concern.

b. The Executive Director then noted that the OAG Comments also addressed RCC § 22A-806(f)(5)(i), a provision that helps define what may constitute a prior conviction for purposes of penalty enhancements. The OAG comments highlighted the ambiguity inherent in the term "occasion." The Executive Director explained that RCC § 22A-806(f)(5)(i) was an attempt to look limit the number of convictions that could be counted as a prior convictions, where those convictions arose out of the same basic set of facts or circumstances. He noted that the Voluntary Sentencing Guidelines refer to "event" for similar purposes. Rather than use "event" or "occasion," the Executive Director suggested the language could be changed to the same "act or course of conduct." This is word would likely narrow the scope of the limitation compared to both "occasion" and "event," but would still be useful. Staff explained that, even considering double jeopardy, it is possible to have convictions for two different offenses arising from the same act (e.g., carjacking and robbery) due to the application of the *Blockburger* test. Thus, if RCC § 22A-806(f)(5)(i) uses the word "act," it would limit the counting of two convictions that would otherwise fail to pass the *Blockburger* test; in that sense, the use of "act" does cause different results. The Executive Director further noted that the use of any word or phrase in this area of law is going to raise difficult questions on the margins. Further, the Executive Director pointed out that the word

"occasion" was in use in the current recidivist penalty enhancement at D.C. Code § 22-1804a, though the term had not been the interpreted by the Court of Appeals and was ambiguous. Both the OAG and the PDS representative requested that the Commentary clarify what the word "occasion" is intended to convey, and that both would like to have further opportunity to consider which word ("occasion" or "act") should be adopted.

c. The Executive Director then noted that the OAG comments also addressed RCC § 22A-806(f)(5)(iv), which limits the counting of prior convictions that have been pardoned. OAG suggested that it would be appropriate to also add that prior convictions that had been sealed due to actual innocence should also not be counted. The PDS representative at the meeting also suggested adding a provision that would not count prior convictions for conduct that had been subsequently decriminalized. The United States Attorney's Office (USAO) representative agreed, but said that the language should carefully refer to decriminalized *conduct*, not just to decriminalization generally. The PDS and OAG representatives agreed, and the Executive Director said he would look at adding such provisions regarding pardons and decriminalized conduct in the second draft of the enhancement.
d. The Executive Director then noted that the OAG comments on RCC § 22A-807, which provides a penalty enhancement for hate crimes, asked whether the Commission intended to limit the application of the enhancement to offenses against persons. The OAG comments said it would be inappropriate to exclude property offenses from the scope of the hate crime enhancement. The Executive Director explained that this was not the intention of the Commission, and suggested that the use of the word "harm" rather than "injure" could make the statute clearer with respect to its application to property offenses, and that reference in the commentary to property offenses would also be clarificatory. The OAG representative agreed that the use of the word "harm" would help clarify the provision. The OAG representative said this change would address their concern.
e. The Executive Director then noted that the PDS comments on RCC § 22A-807 said that the current set of characteristics that may provide the basis for an enhancement is too broad. The PDS comments recommended eliminating some of these classes or categories of persons, specifically: marital status, personal appearance, family responsibility, and matriculation. The Advisory Group members considered whether some of these characteristics were in fact subsets of other protected characteristics (e.g., whether a gay married couple would be protected under both "marital status" as well as "sexual orientation"). The OAG representative noted that "personal appearance" would seemingly cover overweight people, that no other characteristic within the set of classes would apply, and that an enhancement for targeting such persons seemed appropriate. Staff noted that the list of applicable

characteristics in current law appears to be pulled directly from the District's civil law human rights regime. Staff also pointed out that the relevant policy question is whether the regular statutory maxima are insufficient to properly punish a person who commits a substantive offense because of prejudice toward these categories of persons. Advisory Group did not agree on whether to strike or retain some of these characteristics. The Executive Director said that he would take the various comments into consideration in formulating the second draft.

f. The USAO representative raised the question of whether the name of the enhancement should be "hate crime" or should instead continue using the phrase "bias-related crime." The USAO noted that "hate crime" is more likely to be informative to most members of the public, but that "bias-related crime" is the title of the current enhancement. She said that it would be helpful to either change the name of the enhancement in the Revised Criminal Code or to make a note in the Commentary that "hate crimes" covered "bias-related crimes." The Executive Director asked if members had concerns with the change of name to "hate crimes." The PDS representative said that it depended on the resolution of the scope of predicate categories—if categories such as "matriculation" continue to be a basis for the enhancement, then "hate crime," which connotes traditional categories of race, gender, religion, etc., would be inappropriate. The Executive Director said these comments would be taken into consideration in formulating the second draft.

g. The OAG comments on Report #6 also suggested that the Commission should consistently use the term "defendant" when relevant. The Advisory Group agreed consistent use of this term would be useful. The Executive Director said that he would seek to implement this in formulating the second draft.

III. Discussion of First Draft of Report No. 7, Recommendations for Chapter 3 of the Revised Criminal Code—Definition of a Criminal Attempt; and of Advisory Group Memo No. 11—Definition of Criminal Attempt.

a. Staff noted that PDS's written comments provided three drafting recommendations. First, PDS suggested adjusting the language to note that the defendant's "conduct" is dangerously close to completing the offense. Staff said that this change will be incorporated. Second, PDS recommended changing the focus from committing an offense to "accomplishment of the offense." Staff agreed that the emphasis should be on accomplishment, but suggested that the phrase "completion of the offense" may be more accessible. Third, PDS's comments offered a substantive change. Specifically, PDS suggested that the attempt provision should add the "reasonable adaptation" requirement, presently applicable to the subjective prong of the dangerous proximity test, to the objective prong of the dangerous proximity test as well. Staff said that broad inclusion of the "reasonable adaptation" requirement has some basis in case law, and that the exclusion of the "reasonable adaptation"

requirement from the dangerous proximity test was primarily motivated by considerations of simplicity and accessibility. Staff noted that, in its view, all conduct that satisfies the objective dangerous proximity test would seem to be "reasonably adapted" to the completion of the offense. Therefore, including "reasonable adaptation" does not seem necessary but also may not be problematic. Staff said that inclusion of that phrase will be considered further in the second draft.

b. Staff also noted that PDS's written comments included two recommendations concerning explanatory hypotheticals in the Commentary's footnotes, and said that the hypotheticals may not have sufficient detail. Staff said these explanatory footnotes would be reexamined once the Commission's work on assault gradations and penalties has been completed.

c. Staff then noted USAO's comment that the "Advisory Group should discuss further whether the DCCA sees a meaningful distinction between the 'dangerous proximity' and 'substantial step' tests, considering *Hailstock*." The USAO representative pointed out that the *Hailstock* decision used the phrase "substantial step" in order to construe "dangerous proximity," and that the case was relatively recent. Staff pointed out that although the *Hailstock* opinion uses the phrase "substantial step" as a means of proving dangerous proximity, most DCCA case law both prior to and subsequent to *Hailstock* makes use of the phrase "dangerous proximity" absent reference to a "substantial step." More generally, staff highlighted that the dangerous proximity test and substantial step test are understood to constitute distinct and competing approaches to resolving the same issue, and that neither *Hailstock* nor *Mobley* appear to intend to adopt, or have had a basis for adopting, a new and broader approach. Staff said that its recommendations were consistent with the "dangerous proximity" approach to attempts and that it would review the commentary discussion concerning *Hailstock* to ensure that the references there to "substantial step" do not detract from the overall analysis of District case law on attempt.

d. The Executive Director said that, due to the late time, the Advisory Group would reopen for discussion any further questions about *Hailstock* and the attempt recommendations at the beginning of the next Advisory Group meeting on September 19, 2017.

IV. Training of the Board of Government Ethics and Accountability.

a. The Executive Director cancelled the planned training based on the availability of many Advisory Group members.

V. Adjournment.

a. The meeting was adjourned at 4:00pm. Audio recording of the meeting will be made available online for the public.