



D.C. Criminal Code Reform Commission

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To: Code Revision Advisory Group (Advisory Group)
From: Criminal Code Reform Commission (CCRC)
Date: May 18, 2018
Re: Advisory Group Memorandum #18, Supplemental Materials to the First Draft of Report #21.

This memorandum supplements the first draft of report #21, which provides recommendations for kidnapping and criminal restraint in the Revised Criminal Code (RCC). This memorandum notes some points about past and future revision work that may be relevant to Advisory Group members' review. Appendix A provides a compilation of existing D.C. Code statutes relevant to provisions in the draft report. Appendix B provides a compilation of kidnapping conviction and charging statistics.

As always, the CCRC welcomes all comments from Advisory Group members. Please bear in mind that there will be a second draft of report #21 and changes may be substantial depending on Advisory Group feedback and review of statistical information. Consequently, minor corrections to spelling, formatting, and style in the commentary to this report may best be held for the second draft or communicated to staff apart from members' formal written comments.

FIRST DRAFT OF REPORT # 21, KIDNAPPING AND RELATED OFFENSES

Summary

The RCC First Draft of Report #21 makes several significant changes to the law of kidnapping in the District. The RCC divides the current kidnapping offense into two offenses, kidnapping and criminal restraint, each with two penalty gradations. Both offenses require that the defendant interfered to a substantial degree with another person's freedom of movement. In addition, kidnapping requires that the defendant had intent to achieve one of the goals enumerated in the revised kidnapping statute.

The RCC's kidnapping offense requires that the defendant interfered with another person's freedom of movement with intent to achieve particularly harmful or dangerous goals, while the lesser criminal restraint offense does not include this additional intent requirement. Under current law, a person can commit kidnapping by restraining a person for any reason that benefits the defendant¹, regardless of the degree of harm or risk of injury to the kidnapped person. Holding a person hostage and temporarily preventing a person from leaving a room are both

¹ *Walker v. United States*, 617 A.2d 525, 527 (D.C. 1992) (quoting *United States v. Wolford*, 444 F.2d 876, 880-81 (D.C. Cir. 1971)).

punishable under the current kidnapping statute and subject to the same maximum sentence. Unlike the current kidnapping offense, the RCC's kidnapping offense requires that the defendant had intent to hold the person for ransom; as a shield or as a hostage; to facilitate commission of another felony; to inflict bodily injury or commit a sex offense; to cause any person to believe that the kidnapped person will not be released without having suffered a significant bodily injury or sex offense; to permanently deprive a parent of custody of a minor; or to hold a person in a condition of involuntary servitude.

Interference with another person's freedom of movement that does not involve intent to achieve one of the goals required for the revised kidnapping statute is punishable by the RCC's criminal restraint offense. This offense covers conduct that would constitute kidnapping under the current statute, but that does not involve a high degree of harm or dangerousness required for the RCC's revised kidnapping offense.

Both the RCC's kidnapping and criminal restraint offenses also specify that the defendant must have interfered with another person's freedom of movement without consent, or with consent obtained by causing bodily injury, threat to cause bodily injury, or deception. If consent is obtained by deception, there is additional requirement that the defendant would have immediately resorted to force or threats should the deception fail. Any other means of interfering with a person's freedom of movement are not criminalized under the RCC's kidnapping or criminal restraint offenses. The current kidnapping statute does not clearly specify the means by which a person must restrain another person. The RCC's kidnapping and criminal restraint differ from property offenses that rely on the term "effective consent," in that other wrongful means of obtaining consent are not included. For example, coercing a person to remain in a particular location under threat to damage property does not constitute kidnapping or criminal restraint under the RCC.

Both the RCC's kidnapping and criminal restraint offenses require that the defendant interfered with a person's freedom of movement to a substantial degree. Trivial interference is not criminalized under either offense. Substantiality of interference may depend on both the duration and the nature of the interference. For example, locking someone in a room momentarily would not constitute interference to a substantial degree. Regardless of duration, some interference may be insubstantial. For example, locking one door in a room may not be a substantial interference to a person in the room if there are alternate, readily available exits.

The RCC's kidnapping and criminal restraint offenses also change District law with respect to whether defendants may be sentenced to kidnapping or criminal restraint when the interference was incidental to commission of another offense. Prior to the D.C. Court of Appeal's (DCCA) decision in *Parker v. United States*, District courts employed a fact-based inquiry to "determine whether in fact two separate crimes were committed, or whether they merged."² In *Parker*, the DCCA held that courts should not rely on a fact-based analysis, and, in the continued absence of legislative intent on point, instead apply a *Blockburger* elements test to determine if a defendant may be convicted for both kidnapping and a separate offense that arise from a single act or

² *Parker v. United States*, 692 A.2d 913 (D.C. 1997) (quoting *Robinson v. United States*, 388 A.2d 1210 (D.C. 1978)).

course of conduct.³ Under the *Blockburger* approach, almost any sexual assault, robbery, and many ordinary assaults are also punishable as kidnapping. The revised kidnapping and criminal restraint statutes prohibit a defendant from being sentenced for kidnapping or criminal restraint if the interference with another person’s freedom of movement was incidental to commission of another offense. This provision is intended to re-instate the fact-based inquiry that District courts employed prior to *Parker v. United States* to determine whether sentences for both kidnapping and separate offenses that arise from the same act or course of conduct are permitted.

The RCC kidnapping and criminal restraint offenses also have aggravated versions that incorporate various penalty enhancements as offense elements. The current kidnapping statute has only one penalty grade, but separate statutory provisions authorize enhanced penalties for committing kidnapping while armed with a dangerous weapon, or the status of the complainant. In parallel fashion to the RCC’s treatment of penalty enhancements in the RCC’s homicide, robbery, and assault statute, the revised kidnapping and criminal restraint offenses incorporate the “while armed” penalty enhancement under current D.C. Code § 22-4502 by increasing the penalties when the defendant used a dangerous weapon. Including as elements of aggravated kidnapping and aggravated criminal restraint that the complainant was a “protected person” —a defined term that includes minors, seniors, vulnerable adults, law enforcement officers while in the course of their duties, public safety employees while in the course of their duties, transportation workers while in the course of their duties, District officials and employees while in the course of their duties, and citizen patrol members while in the course of a citizen patrol— replaces a host of freestanding D.C. Code statutory provisions.⁴

Incorporating the D.C. Code’s many penalty enhancement provisions into the revised aggravated kidnapping and criminal restraint offenses has many benefits, including the specification of culpable mental states as to enhancement elements, and in many instances more proportionate penalties. However, a different organizational strategy could be used, retaining some or all enhancements as separate statutory provisions, and Advisory Group feedback on this point would be much appreciated.

With respect to the incorporation of penalty enhancements for the use of a dangerous weapon or firearm in the RCC kidnapping and criminal restraint offenses, it should also be noted that the proposed revisions do not address the current offense of possessing a firearm during a crime of violence or dangerous crime (PFCOV).⁵ In current law, PFCOV is a separate offense carrying a mandatory minimum five years imprisonment and up to fifteen years as a maximum that does not merge with armed kidnapping or other while-armed offenses. The CCRC has not yet fully reviewed PFCOV and is not prepared to make a reform recommendation at this time. However,

³ *Parker v. United States*, 692 A.2d 913 (D.C. 1997) (holding a defendant may be convicted of both kidnapping and a separate offense arising from a single act or course of conduct so long as each offense “requires proof of a fact which the other does not.”).

⁴ See Commentary to RCC § 22A-1001(15) “Protected person” for relevant D.C. Code citations and discussion.

⁵ D.C. Code § 22-4504(b) (“No person shall within the District of Columbia possess a pistol, machine gun, shotgun, rifle, or any other firearm or imitation firearm while committing a crime of violence or dangerous crime as defined in § 22-4501. Upon conviction of a violation of this subsection, the person may be sentenced to imprisonment for a term not to exceed 15 years and shall be sentenced to imprisonment for a mandatory-minimum term of not less than 5 years and shall not be released on parole, or granted probation or suspension of sentence, prior to serving the mandatory-minimum sentence.”).

one possibility under consideration is to broaden a PFCOV-type offense to cover the possession of other dangerous weapons (besides firearms) during the commission of specified crimes. Such a PFCOV-type offense would then include within its scope the conduct covered by the current enhancements for committing a crime of violence or similar offense when “armed with or having readily available” a firearm or other dangerous weapon as provided in current D.C. Code § 22-4502. In combination with the RCC’s aggravated kidnapping and criminal restraint offenses that incorporate use of a dangerous weapon in their enhancements, such a PFCOV-type offense would ensure all⁶ conduct penalized under the current D.C. Code § 22-4502 while armed enhancement and the current D.C. Code § 22-4504 PFCOV offense would remain criminalized. Advisory Group feedback on this possibility would be much appreciated, particularly whether such an offense would make the changes to incorporate dangerous weapon penalties in the RCC homicide offense statutes more acceptable.

Possible Issues for Subsequent Drafts

There are three issues which the CCRC staff may address in subsequent draft reports, and specific statutory language and policy decisions may depend on how other offenses or general provisions are drafted. Advisory Group feedback on these possibilities would be much appreciated.

First, CCRC may draft an additional criminal coercion offense that more broadly criminalizes coercing another person to engage in, or refrain from committing, any act. This offense would generally criminalize interfering with another person’s liberty through coercive means. The offense would be closely related to the RCC extortion offense,⁷ except that instead of requiring that the defendant use coercion to obtain property of another, criminal coercion would more broadly cover the use of coercion to cause another person to engage in, or refrain from engaging in, any act. Such a criminal coercion offense also would be a lesser-included offense of the RCC criminal restraint and kidnapping offenses. For example, a threat to destroy the complainant’s property that causes a person to stay in their home may be criminal coercion, but, because the threat did not entail a threat of bodily injury, it would not constitute a criminal restraint or kidnapping.

Second, the draft kidnapping statute references sex offenses that will be defined elsewhere in the RCC. Under the RCC kidnapping statute, one means of committing kidnapping is interfering with another person’s freedom of movement with intent to commit a sex offense or to cause another person to believe that a sex offense will be committed against the kidnapped person. The CCRC has not yet reviewed and proposed revisions to sex offenses. When staff has proposed revisions to sex offenses, it will be necessary to revisit whether kidnapping should be defined to include intent to commit any sex offense, or to cause a person to believe that any sex

⁶ And, insofar as mere possession of a dangerous weapon (e.g. a long-bladed knife) during a crime of violence is not covered by the current while-armed enhancement (because the knife is not “readily available”) or the current PFCOV enhancement (because it is limited to firearms), such a revised PFCOV-type offense that includes dangerous weapons would expand coverage compared to current law. But see the similar crime in D.C. Code § 22-4514(b) (prohibiting possession “with intent to use unlawfully against another” of a dangerous weapon).

⁷ RCC §22A-

offense will be committed against the kidnapped person, or if only select sex offenses should be included.

Third, the draft kidnapping statute includes interfering with another person's freedom of movement with intent to hold that person in a condition of involuntary servitude. The CCRC has not yet reviewed the human trafficking offenses, some of which involve forced labor. When the CCRC has reviewed human trafficking offenses, it may revisit the intent to hold a person in a condition of involuntary servitude element in the RCC kidnapping offense.

APPENDIX A: RELEVANT DISTRICT CRIMINAL STATUTES

§22-2001. Definition and penalty; conspiracy.

Whoever shall be guilty of, or of aiding or abetting in, seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual by any means whatsoever, and holding or detaining, or with the intent to hold or detain, such individual for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall, upon conviction thereof, be punished by imprisonment for not more than 30 years. For purposes of imprisonment following revocation of release authorized by § 24-403.01, the offense defined by this section is a Class A felony. This section shall be held to have been violated if either the seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, carrying away, holding, or detaining occurs in the District of Columbia. If 2 or more individuals enter into any agreement or conspiracy to do any act or acts which would constitute a violation of the provisions of this section, and 1 or more of such individuals do any act to effect the object of such agreement or conspiracy, each such individual shall be deemed to have violated the provisions of this section. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.

§16-1022. Prohibited Acts.

(a) No parent, or any person acting pursuant to directions from the parent, may intentionally conceal a child from the child's other parent.

(b) No relative, or any person acting pursuant to directions from the relative, who knows that another person is the lawful custodian of a child may:

(1) Abduct, take, or carry away a child with the intent to prevent a lawful custodian from exercising rights to custody of the child;

(2) Abduct, take, or carry away a child from a person with whom the relative has joint custody pursuant to an order, judgment, or decree of any court, with the intent to prevent a lawful custodian from exercising rights to custody to the child;

(3) Having obtained actual physical control of a child for a limited period of time in the exercise of the right to visit with or to be visited by the child or the right of limited custody of the child, pursuant to an order, judgment, or decree of any court, which grants custody of the child to another or jointly with the relative, with intent to harbor, secrete, detain, or conceal the child or to deprive a lawful custodian of the physical custody of the child, keep the child for more than 48 hours after a lawful custodian demands that the

child be returned or makes all reasonable efforts to communicate a demand for the child's return;

(4) Having custody of a child pursuant to an order, judgment, or decree of any court, which grants another person limited rights to custody of the child or the right to visit with or to be visited by the child, conceal, harbor, secrete, or detain the child with intent to deprive the other person of the right of limited custody or visitation;

(5) Conceal, harbor, secrete, or detain the child knowing that physical custody of the child was obtained or retained by another in violation of this subsection with the intent to prevent a lawful custodian from exercising rights to custody to the child;

(6) Act as an aider and abettor, conspirator, or accessory to any of the actions forbidden by this section;

(7) After being served with process in an action affecting the family but prior to the issuance of a temporary or final order determining custody rights to a child, take or entice the child outside of the District for the purpose of depriving a lawful custodian of physical custody of the child; or

(8) After issuance of a temporary or final order specifying joint custody rights, take or entice a child from the other joint custodian in violation of the custody order.

§ 16–1023. Defense to prosecution; continuous offenses; expenses; jurisdiction.

(a) No person violates this subchapter if the action:

(1) Is taken to protect the child from imminent physical harm;

(2) Is taken by a parent fleeing from imminent physical harm to the parent;

(3) Is consented to by the other parent; or

(4) Is otherwise authorized by law.

(b) If a person violates § 16-1022 of this subchapter, the person may file a petition in the Superior Court of the District of Columbia that:

(1) States that at the time the act was done, a failure to do the act would have resulted in a clear and present danger to the health, safety, or welfare of the child; and

(2) Seeks to establish custody, to transfer custody, or to revise or to clarify the existing custody order; except that if the Superior Court of the District of Columbia does not have jurisdiction over the custody issue, the person shall seek to establish, transfer, revise, or clarify custody in a court of competent jurisdiction.

(c) If a petition is filed as provided in subsection (b) of this section within 5 days of the action taken, exclusive of Saturdays, Sundays, and legal holidays, a finding by the court that, at the time the act was done, a failure to do the act would have resulted in a clear and present danger to the health, safety, or welfare of the child is a complete defense to prosecution under this subchapter.

(d) A law enforcement officer may take a child into protective custody if it reasonably appears to the officer that any person is in violation of this subchapter and unlawfully will flee the District with the child.

(e) A child who has been detained or concealed shall be returned by a law enforcement officer to the lawful custodian or placed in the custody of another entity authorized by law.

(f) The offenses prohibited by this subchapter are continuous in nature and continue for so long as the child is concealed, harbored, secreted, detained, or otherwise unlawfully physically removed from the lawful custodian.

(g) Any expenses incurred by the District in returning the child shall be reimbursed to the District by any person convicted of a violation of this subchapter. Those expenses and costs reasonably incurred by the lawful custodian and child victim as a result of a violation of this subchapter shall be assessed by the court against any person convicted of the violation.

(h) Any violation of this subchapter is punishable in the District, whether the intent to commit the offense is formed within or without the District, if the child was a resident of the District, present in the District at the time of the taking, or is later found in the District.

Appendix B: Relevant Statistics

In early 2018, the CCRC received data from the D.C. Superior Court pursuant to a data request filed earlier in the year. The data pertain to all adult criminal dispositions in Superior Court from 2010 through 2016.¹⁸ The CCRC has performed preliminary analysis of this data, with help from the Lab in the Office of the City Administrator. The statistics provided below are based on the CCRC and Lab analysis, which is subject to the following caveats.

First, there is a possibility of error in the analysis due to CCRC misinterpretation of codes in the data. The Superior Court does not currently have a publicly-available data dictionary that explains the meaning of its data codes. While some data fields are easily identifiable on their own terms (e.g., “charge_code” refers to the statute citation within the D.C. Code for a given offense, while “charge_description” is the general name for the offense), others are not.

Second, some relevant statistics cannot be reported per the CCRC’s Data Use Agreement (DUA) with the Superior Court. One of the DUA’s terms requires that reports produced by CCRC will not contain a table with a cell indicating a value less than twenty. The purpose of this provision is to ensure that no statistical work is done on a sample size too small to give meaningful information. Therefore, in some of the figures below, if a value would be less than twenty, the figure will so indicate with the following notation: “< 20.” With these caveats, the CCRC analysis of the frequency of offenses against persons charges and convictions is as follows:

2010-2016 (7 years) Total Adult Dispositions in Superior Court			
Charge Code	Charge Description	# Charges	# Convictions
22DC2001	Kidnapping	518	125