D.C. Criminal Code Reform Commission
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ADVISORY GROUP MEMORANDUM #19

To: Code Revision Advisory Group
From: Criminal Code Reform Commission (CCRC)
Date: May 18, 2018
Re: Supplemental Materials to the First Draft of Report #22

This Advisory Group Memorandum No. 19 supplements the First Draft of Report No. 22, Accomplice Liability and Related Provisions (Report No. 22). It provides an overview of Report No. 22 and sentencing data relevant to the recommendations contained in Report No. 22.

I. OVERVIEW OF REPORT NO. 22

Report No. 22 is comprised of draft legislation and commentary addressing two theories of complicity under the Revised Criminal Code (RCC). It is comprised of two general provisions: (1) RCC § 22A-210, Accomplice Liability; and (2) RCC § 22A-211, Liability for Causing Crime by an Innocent or Irresponsible Person.

The first of these draft general provisions addresses the elements of accomplice liability under the RCC. It is comprised of four sub-sections: (1) RCC § 22A-210(a), Definition of Accomplice Liability; (2) RCC § 22A-210(b), Principle of Culpable Mental State Elevation Applicable to Circumstances of Target Offense; (3) RCC § 22A-210(c), Principle of Culpable Mental State Equivalency Applicable to Results When Determining Degree of Liability; and (4) RCC § 22A-210(d), Relationship Between Accomplice and Principal.

Collectively, these provisions offer recommendations concerning the conduct requirement of accomplice liability, the culpable mental state requirement of accomplice liability, and the relation between the prosecution of the accomplice and the treatment of the person who is alleged to have committed the offense. The policies in these recommendations translate and fill gaps in current District law.

The second draft general provision proposed in Report No. 22 addresses liability for causing crime by an innocent or irresponsible person (often referred to as the "innocent instrumentality rule"). It is comprised of two sub-sections: RCC § 22A-211(a), Using Another Person to Commit an Offense; and (2) Innocent or Irresponsible Person Defined.

The first of these subsections, RCC § 211(a), establishes the primary components of the innocent instrumentality rule, namely, (1) the intermediary must qualify as an innocent or irresponsible person; (2) the relationship between the defendant's conduct and that of the intermediary must satisfy basic principles of causation; and (3) the defendant must act with the culpability required by the target offense. The second of

these subsections, RCC § 211(b), provides further clarity on the scope of the innocent instrumentality rule by defining the phrase "innocent or irresponsible person." The policies reflected in these recommendations are substantively consistent with District authorities, while, at the same time, providing a clearer and more comprehensive approach for applying the innocent instrumentality rule.

Note that these two general provisions are not intended to resolve all policy issues relevant to complicity under the RCC. Left unaddressed by these recommendations, for example, are at least two important topics that the CCRC may consider at a future date. The first is the availability and contours of a withdrawal defense to accomplice liability under the RCC.[1] The second is whether and to what extent the *Pinkerton* doctrine should be codified as an alternative basis of establishing complicity.[2]

Note also that Report No. 22 does not address D.C. Code § 22-1806, the District's criminal statute addressing "accessories after the fact."[3] This statute reflects the "modern view" that an accessory after the fact "is not truly an accomplice in the crime,"[4] i.e., "his offense is instead that of interfering with the processes of justice and is best dealt with in those terms."[5] Consistent with this view, the revision of D.C. Code § 22-1806 may best be addressed alongside other comparable government operations-related offenses.

II. NOTE ON SENTENCING DATA RELEVANT TO COMPLICITY

The CCRC is unaware of the existence of court data relevant to either accomplice liability or the innocent instrumentality rule. Both doctrines are theories of liability for imputing the criminal conduct of another actor to the defendant.[6] This means that, for

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[1] Although the staff is not currently prepared to make a recommendation on this topic, an approach broader than the renunciation defense to general inchoate crimes under RCC § 304 may be proposed. *See generally Plater v. United States*, 745 A.2d 953, 958 (D.C. 2000) ("Legal withdrawal [as a defense to accomplice liability] has been defined as '(1) repudiation of the defendant's prior aid or (2) doing all that is possible to countermand his prior aid or counsel, and (3) doing so before the chain of events has become unstoppable.") (quoting WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 13.3 (3d ed. Westlaw 2018); *compare* RCC § 304(a) ("In a prosecution for attempt, solicitation, or conspiracy in which the target offense was not committed, it is an affirmative defense that: (1) The defendant engaged in conduct sufficient to prevent commission of the target offense; (2) Under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent.").

[2] *See generally Wilson-Bey v. United States*, 903 A.2d 818, 840 (D.C. 2006) (*en banc*) ("[T]he *Pinkerton* doctrine provides that 'a co-conspirator who does not directly commit a substantive offense may [nevertheless] be held liable for that offense if it was committed by another co-conspirator in furtherance of the conspiracy and was a reasonably foreseeable consequence of the conspiratorial agreement.'") (quoting *Gordon v. United States*, 783 A.2d 575, 582 (D.C. 2001)).

[3] D.C. Code § 22-1806 ("Whoever shall be convicted of being an accessory after the fact to any crime punishable by death shall be punished by imprisonment for not more than 20 years. Whoever shall be convicted of being accessory after the fact to any crime punishable by imprisonment shall be punished by a fine or imprisonment, or both, as the case may be, not more than 1/2 the maximum fine or imprisonment, or both, to which the principal offender may be subjected.")

[4] LAFAVE, *supra* note__, at 2 SUBST. CRIM. L. § 13.3.

[5] LAFAVE, *supra* note__, at 2 SUBST. CRIM. L. § 13.6.

[6] D.C. Code § 22-1805 ("In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be."); *see Brooks v. United States*, 599 A.2d 1094, 1099 (D.C. 1991) (D.C. Code § 22-1805 establishes that [c]riminal

example, "[i]t is not necessary that an aiding and abetting charge have been included in an indictment or information in order to instruct the jury on aiding and abetting."[7] As a result, it appears that there is no established way to track the frequency with which complicity prosecutions occur in the District.

APPENDIX A: RELEVANT DISTRICT CRIMINAL STATUTES

D.C. Code § 22-1805:

In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be.

APPENDIX B: RELEVANT REDBOOK INSTRUCTIONS

Criminal Jury Instructions for the District of Columbia, Instruction No. 3.102—Willfully Causing an Act to be Done (5th ed. 2017):

You may find [name of defendant] guilty of the crime charged in the indictment without finding that s/he personally committed each of the acts constituting the offense or was personally present at the commission of the offense. A defendant is responsible for an act which s/he willfully causes to be done if the act would be criminal if performed by him/her directly or by another. To "cause" an act to be done means to bring it about. You may convict [name of defendant] of the offense charged if you find that the government has proved beyond a reasonable doubt each element of the offense and that [name of defendant] willfully caused such an act to be done, with the intent to commit the crime.

Criminal Jury Instructions for the District of Columbia, Instruction No. 3.200—Aiding and Abetting (5th ed. 2017):

You may find [^] [name of defendant] guilty of the crime charged in the indictment without finding that s/he personally committed each of the acts that make up the crime or that s/he was present while the crime was being committed. Any person who in some way intentionally participates in the commission of a crime can be found guilty either as an aider and abettor or as a principal offender. It makes no difference

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accountability does not depend inexorably upon personal performance of the acts comprising an offense. He who assists the perpetrator of crime in its commission is as much answerable as if he had engaged in all of its essential aspects himself.") (internal quotations and citation omitted).

[7] Commentary on D.C. Crim. Jur. Instr. § 3.200 (citing *Tyler v. U.S.*, 495 A.2d 1180 (D.C. 1985); *U.S. v. Kegler*, 724 F.2d 190 (D.C. Cir. 1984); *U.S. v. Boone*, 543 F.2d 412 (D.C. Cir. 1976); *Mason v. U.S.*, 256 A.2d 565 (D.C. 1969)); *see, e.g., United States v. Galiffa*, 734 F.2d 306, 312 (7th Cir. 1984) (providing the rule that an "aiding and abetting charge . . . 'need not be specifically pleaded and a defendant indicted for a substantive offense can be convicted as an aider and abettor' upon a proper demonstration of proof so long as no unfair surprise results" (quoting *United States v. Tucker*, 552 F.2d 202, 204 (7th Cir. 1977))).

which label you attach. The person is as guilty of the crime as s/he would be if s/he had personally committed each of the acts that make up the crime.

To find that a defendant aided and abetted in committing a crime, you must find that the defendant knowingly associated himself/herself with the commission of the crime, that s/he participated in the crime as something s/he wished to bring about, and that s/he intended by his/her actions to make it succeed.

Some affirmative conduct by the defendant in planning or carrying out the crime is necessary. Mere physical presence by [name of defendant] at the place and time the crime is committed is not by itself sufficient to establish his/her guilt. [However, mere physical presence is enough if it is intended to help in the commission of the crime.] [It is not necessary that you find that [name of defendant] was actually present while the crime was committed.]

The government is not required to prove that anyone discussed or agreed upon a specific time or method of committing the crime. [The government is not required to prove that the crime was committed in the particular way planned or agreed upon.] [Nor need the government prove that the principal offender and the person alleged to be the aider and abettor directly communicated with each other.]

[I have already instructed you on the elements of [each of] the offense[s] with which [name of defendant] is charged. With respect to the charge of [^] [name of offense], regardless of whether [name of defendant] is an aider and abettor or a principal offender, the government must prove beyond a reasonable doubt that [name of defendant] personally acted with [^] [insert mens rea required for the charged offense]. [Repeat as necessary for additional offenses, e.g., with respect to the charge of [^] [name of offense], the government must prove beyond a reasonable doubt that each defendant personally acted with [^] [insert mens rea]]. [When there are alternate mental states that would satisfy the mens rea element of the offense, such as in second-degree murder (specific intent to kill or seriously injure or conscious disregard of an extreme risk of death or serious bodily injury), the Court may want to instruct that the principal and the aider and abettor do not need the same mens rea as each other.]]

[Where felony murder based on a felony enumerated in D.C. Official Code § 22-2101 is charged: [Solely with] [With] respect to the charge of felony murder [^] [insert underlying felony], the government need not prove that the principal or the aider and abettor(s) had the specific intent to kill the decedent or that the principal and the aider and abettor(s) had the same intent as each other with respect to the killing. If two or more people, acting together, are committing or attempting to commit [^] [insert underlying felony] and one of them, in the course of the felony and in furtherance of the common purpose to commit the [^] [insert underlying felony], kills a human being, both the person who committed the killing and the person or persons who aided and abetted in the [^] [specify the underlying felony] are guilty of felony murder. [A person who aids and abets the commission of [^] [insert underlying felony] is guilty of felony murder for a killing that was committed in furtherance of a common purpose to commit that felony or

a killing that was, in the ordinary course of things, a natural and probable consequence of acts done in committing that felony. But a person participating in a [^] [insert underlying felony] is not guilty of first-degree felony murder if her/his accomplice kills the deceased in a separate and distinct act and to satisfy the accomplice's own ends.]]

[With respect to possessory firearm offenses (see, e.g., PFCV ß 22-4501, CPWOL ß 22-4504): For [^] [name of defendant] to be guilty of aiding and abetting the offense of [^] [insert possessory firearm offense], the government must prove beyond a reasonable doubt [both that s/he aided and abetted the commission of [^] [insert name of crime of violence or dangerous crime] and also] that s/he aided and abetted the possession of a firearm. To aid and abet the possession of a firearm, [^] [name of defendant] must have engaged in some affirmative conduct to assist or facilitate the principal's possession of a firearm.]

[With respect to while armed offenses (§ 22-4502): An aider and abettor is legally responsible for the principal's use of a weapon during an offense if the government proves beyond a reasonable doubt that the aider and abettor had actual knowledge that the principal would be armed with [or would have readily available] a dangerous weapon during the commission of the offense. You may consider the surrounding circumstances in determining whether the aider and abettor knew that the principal would be armed with [or would have readily available] a dangerous weapon during the commission of the offense. You may consider any statement made, acts done or not done, the reasonable foreseeability that some weapon would be required to commit the offense, and any other facts and circumstances received in evidence that indicate the aider and abettor's actual knowledge or lack of actual knowledge that the principal would be armed with [or would have readily available] a dangerous weapon during the offense.]

[It is not necessary that all the people who committed the crime be caught or identified. It is sufficient if you find beyond a reasonable doubt that the crime was committed by someone and that the defendant knowingly and intentionally aided and abetted in committing the crime.]