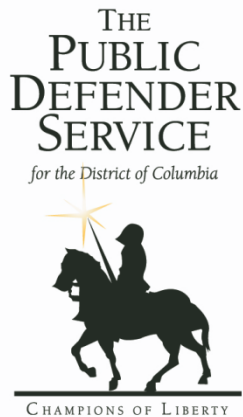


MEMORANDUM



To: Richard Schmechel, Executive Director
D.C. Criminal Code Reform Commission

From: Laura E. Hankins

Date: July 13, 2018

Re: Comments on First Draft of Report No. 21,
Recommendations for Kidnapping and
Related Offenses

In general, the Public Defender Service for the District of Columbia supports the Criminal Code Reform Commission's approach to reforming the District's kidnapping statute, D.C. Code § 22-2001, by narrowing the offense of "kidnapping" and creating the offense of "criminal restraint." PDS makes the following specific comments.

1. PDS proposes rewriting Criminal Restraint, RCC §22A-1404, to address a number of issues related to how the offense treats families and guardians.
 - A. Criminal restraint needs to be rewritten to clarify that (a)(2)(A), (B), and (C) are for conduct involving adult complainants and (a)(2)(D) is the only alternative available for charging criminal restraint of a person who is a child under the age of 16. This approach is supported by the commentary, which notes that the current kidnapping statute fails to specify and the DCCA has failed to determine "whether a person can commit kidnapping by taking a child with the child's consent, but without the consent of a parent or legal guardian." The commentary goes on to explain, "[h]owever, the RCC criminal restraint statute specifies that a person may commit criminal restraint by interfering with the freedom of movement of a person under the age of 16, if a parent, legal guardian, or person who has assumed the obligations of a parent has not freely consented to the interference, *regardless of whether the person under 16 has provided consent.*"¹ If the consent of the person under 16 can be disregarded, then it should be clear that a person cannot be charged with criminal restraint pursuant to (a)(2)(A), (B), or (C), all of which base liability on whether the defendant had the consent of the person with whose freedom s/he interfered.

¹ Report # 21, page 35 (emphasis added).

- B. PDS agrees with the Commission’s decision to “set the age of consent for interference with freedom of movement at 16 years.”² However, the Commission failed to account for the fact that persons under age 18 are still “children,” both under current D.C. law, see e.g., D.C. Code § 16-2301(3), and as proposed for the RCC, see §22A-1001(23). And children must follow the instructions of their parent(s) or they may be found to be a “child in need of supervision.” D.C. Code § 16-2301(8) defines a “child in need of supervision” as a child who “is habitually disobedient of the reasonable and lawful commands of his parent, guardian, or other custodian and is ungovernable.”³ Thus, a 16-year-old cannot decide to live someplace other than where his parent says he must live. A parent who tells her 17-year-old, “Stay in your room or you’ll be sorry,” should not be committing a criminal offense, even if the words are considered a threat to cause bodily injury (assuming the “threat” is to exercise reasonable parental discipline). PDS proposes that the 16 and 17 year olds be able to give or withhold consent regarding their freedom of movement with respect to persons who are not their parent or guardian; however, if a parent or guardian substantially interferes with the freedom of movement of a 16 or 17-year-old, then the conduct should not be criminal restraint.⁴
- C. PDS strongly objects to the elimination of the “parent to a minor exception” to Kidnapping in D.C. Code §22-2001.⁵ Understood in the context of the breadth of the kidnapping statute, excepting the conduct of parents to minors is sound policy that recognizes that minors must obey their parents’ lawful commands, perhaps particularly with respect to their freedom of movement. “We’re going on a trip and you’re coming with us.” “Go to your room.” “Do not leave this house.” “You’re living with your grandmother for the summer.” RCC § 22A-1404, as drafted in Report # 21, fails to recognize this relationship. It criminalizes the conduct of parents but provides a defense. PDS proposes that for Criminal Restraint the conduct of parents, with respect to their children under age 18, be excepted from criminal liability as under the current statute.
- D. PDS agrees with the Commission’s recognition that persons age 18 or older may have legal guardians with the legal authority to dictate the freedom of movement of their wards.⁶ However, the Commission fails to define “legal guardian” or recognize the variety of “guardianships,” and grants too much authority to “legal guardians” and not enough authority to wards.

² Report # 21, page 35.

³ D.C. Code § 16-2301(8)(A)(iii).

⁴ The conduct of the parent or guardian could still be criminal under the child abuse and neglect statutes.

⁵ “Whoever shall be guilty of ...kidnapping... any individual by any means whatsoever, and holding or detaining...such individual ... *except, in the case of a minor, by a parent thereof,* shall, upon conviction thereof, be punished by imprisonment...” D.C. Code § 22-2001 (emphasis added).

⁶ See RCC §22A-1404(a)(2)(D) (“When that person is a child under the age of 16 *or a person assigned a legal guardian...*”) (emphasis added).

District law allows for the appointment of a “guardian” to an “incapacitated individual” pursuant to Chapter 20 of Title 21 of the D.C. Code. An “incapacitated individual” is “an adult whose ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that he or she lacks the capacity to manage all or some of his or her financial resources or to meet all or some essential requirements for his or her physical health, safety, habilitation, or therapeutic needs without court-ordered assistance or the appointment of a guardian or conservator.”⁷ An adult might also be only “an incapacitated individual for health-care decisions.”⁸ A “guardian” may be a “temporary guardian,” who is appointed for a finite period of time to serve as an “emergency guardian,” a “health-care guardian,” or a “provisional guardian.”⁹ A guardian may also be a “general guardian,” whose guardianship is neither limited in scope nor in time by the court,¹⁰ or a “limited guardian,” whose powers are limited by the court and whose appointment may be for a finite period of time or for an indeterminate period of time.¹¹ In guardianship proceedings, the court is to “exercise [its] authority ...so as to encourage the development of maximum self-reliance and independence of the incapacitated individual.”¹² “When the court appoints a guardian, it shall appoint the type of guardianship that is least restrictive to the incapacitated individual in duration and scope....”¹³ A general or a limited guardian may “take custody of the person of the ward and establish the ward’s place of abode within or without the District, if consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward.”¹⁴ However, no guardian to an incapacitated individual has the power “to impose unreasonable confinement or involuntary seclusion, including forced separation from other persons....”¹⁵

PDS proposes that the offense of “criminal restraint” follow the framework of the guardianship laws by maximizing the self-reliance and independence of the person, despite the fact that they have a guardian, and do so by recognizing their ability to consent or to withhold consent to the substantial interference with their movement. On the other hand, guardians who have the legal authority to take physical custody of their ward should not be criminally liable for exercising that authority. Relatedly, a guardian with the authority to take physical custody of a person, meaning they have authority to dictate or restrict their ward’s freedom of movement at least to some degree, should have

⁷ D.C. Code § 21-2011(11).

⁸ D.C. Code § 21-2011(11A).

⁹ D.C. Code § 21-2011(8)(A).

¹⁰ D.C. Code § 21-2011(8)(B).

¹¹ D.C. Code § 21-2011(8)(C).

¹² D.C. Code § 21-2044(a).

¹³ Id.

¹⁴ D.C. Code § 21-2047(b)(2).

¹⁵ D.C. Code § 21-2047.01(7).

that authority accorded respect in the criminal code by criminalizing the conduct of a person who substantially interferes with the ward's freedom of movement without the consent of the guardian.

- E. PDS proposes that, rather than making it a defense to a prosecution under what is currently RCC §22A-1404(a)(2)(D) that a person is a "relative" of the complainant, "relatives" be excepted from (a)(2)(D). The result is the same, the "relative" will not be convicted. The difference is whether on the way to that inevitable result, the relative can be charged with a crime, have an arrest record, be subject to pretrial detention or restrictions on his or her life, such as requirements to wear a GPS monitor, to submit to drug testing, to observe a curfew or a stay away for person(s) and/or location(s). In addition, because (a)(2)(D) necessarily involves a person under the age of 16, the conduct which constitutes that offense is always aggravated if the relative is more than 2 years older than the child. Since the aggravated form of the offense can almost always be charged, the burdens and risks of arrest – a worse charge on the arrest record, a greater likelihood of pretrial detention - correspondingly increase. The more fair and merciful approach would be to except the conduct rather than make it a defense.

In light of the above objections and proposals, PDS proposes rewriting the offense definition for criminal restraint as follows:

- (a) *Offense Definition.* A person commits the offense of criminal restraint when that person:
- (1) Knowingly interferes to a substantial degree with another person's freedom of movement;
 - (2) In one of the following ways;
 - (A) When that person in fact is 18 years of age or older and, in fact, that person does not have a guardian with the legal authority to take physical custody of that person,:
 - (i) Without that person's consent;
 - (ii) With that person's consent obtained by causing bodily injury or a threat to cause bodily injury; or
 - (iii) With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury; or
 - (B) When that person is 16 or 17 years of age and the defendant is not the parent, legal guardian, or person who has assumed the obligations of a parent to that person:
 - (i) Without that person's consent;
 - (ii) With that person's consent obtained by causing bodily injury or a threat to cause bodily injury; or
 - (iii) With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately

would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury; or

- (C) When that person is a child under the age of 16 and the defendant is not a relative or legal guardian of the child, without the effective consent of that child's parent, person who has assumed the obligations of a parent, or legal guardian; or
- (D) When that person is 18 years of age or older and has a guardian with the legal authority to take physical custody of that person, without the effective consent of that guardian.

2. PDS proposes that criminal restraint have a "Good Samaritan" defense for instances when a person substantially interferes with another's freedom of movement because the person has a reasonable belief that such interference is necessary to prevent imminent bodily harm to the other person. For example, a stranger seeing a young child wandering alone might, even knowing he does not have the consent of the child's parent, detain the child while he calls the police for help. Or an adult child of an elderly parent with dementia or Alzheimer's but who is not the "guardian" of their parent might, despite the protestations of the parent, bolt the doors of their shared home to prevent the parent from wandering off in the night and getting lost or wandering into traffic. PDS proposes the following language –

(d) *Defenses.* (1) It is a defense to prosecution under this section that the defendant acted based on a reasonable belief that such action was necessary to protect the complainant from imminent physical harm.

(2) Burden of proof – If evidence, however weak, is present at trial of the defendant's purpose to protect the complainant from imminent physical harm, the government must prove the absence of such circumstances beyond a reasonable doubt.

3. PDS proposes rewriting Kidnapping, RCC §22A-1402, to change how parents and guardians are treated under the offense. As it did for criminal restraint, PDS proposes that guardians of adult wards be treated separately and have their consent tied to the guardian's authority to take physical custody of their ward. PDS also proposes separate sections for persons who are 18 years of age or older, persons who are 16 or 17 years of age, and persons who are children under the age of 16. Although both persons who are 18 years of age or older and 16 and 17 year old are of the age of consent, PDS proposes treating them separately in order to accommodate guardians. Persons who are 18 years of age may or may not have guardians who have the legal authority to take physical custody of them, and that possibility matters for whether the consent of the adult (ward) or the guardian controls. In contrast, 16 and 17 year olds, always have guardians with the legal authority to take them in physical custody; they are generally called "parents." However, PDS supports the decision to make 16 the "age of consent" for freedom of movement. Unlike with criminal restraint, where PDS proposed excepting parents and, in some instances relatives, from criminal liability, PDS recognizes that the "with intent" element in kidnapping sufficiently narrows the criminal conduct. With one exception, PDS does not disagree that a parent,

guardian, or other relative, may not hold their minor child for ransom or reward, use their minor child as a shield of hostage, to facilitate the commission of any felony, etc. However, a parent, guardian, or person who has assumed the obligations of a parent must be free (not criminally liable) to substantially interfere with the freedom of movement with their minor child (under age 18) with the intent to inflict bodily injury when that infliction is in the exercise of parental discipline.

Specifically, PDS recommends that the offense definition of Kidnapping be written as follows:

- (a) *Offense Definition.* A person commits the offense of kidnapping when that person:
- (1) Knowingly interferes to a substantial degree with another person's freedom of movement;
 - (2) In one of the following ways:
 - (A) When that person in fact is 18 years of age or older and, in fact, that person does not have a guardian with the legal authority to take physical custody of that person,:
 - (i) Without that person's consent;
 - (ii) With that person's consent obtained by causing bodily injury or a threat to cause bodily injury; or
 - (iii) With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury; or
 - (B) When that person is 16 or 17 years of age:
 - (i) Without that person's consent;
 - (ii) With that person's consent obtained by causing bodily injury or a threat to cause bodily injury; or
 - (iii) With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury; or
 - (C) When that person is a child under the age of 16, without the effective consent of that child's parent, person who has assumed the obligations of a parent, or legal guardian; or
 - (D) When that person is 18 years of age or older and has a guardian with the legal authority to take physical custody of that person, without the effective consent of that guardian; and
 - (3) With intent to:
 - (A) Hold the complainant for ransom or reward;
 - (B) Use the complainant as a shield or hostage;
 - (C) Facilitate the commission of any felony or flight thereafter;
 - (D) Inflict bodily injury upon the complainant, except in the exercise of parental discipline by a parent, legal guardian, or person who

has assumed the obligations of a parent against a complainant under the age of 18;

- (E) ~~or to commit~~ Commit a sexual offense as defined in RCC XX-XXXX against the complainant;
- (F) Cause any person to believe that the complainant will not be released without suffering significant bodily injury, or a sex offense as defined in RCC XX-XXXX;
- (G) Permanently deprive a parent, legal guardian, or other lawful custodian of custody of a minor; or
- (H) Hold the person in a condition of involuntary servitude.

PDS also recommends adding the term “parental discipline” to subsection (c), Definitions, and defining it by reference to the “parental discipline defense” for child abuse at RCC §22A-1501(f).

- 4. PDS recommends adding a Good Samaritan defense to Kidnapping, using the same language as proposed for Criminal Restraint.
- 5. PDS objects to aggravating kidnapping or criminal restraint based on the aggravator “with the purpose of harming the complainant because of the complainant’s status.”¹⁶ Conduct against a law enforcement officer, public safety employee, citizen patrol member, or District official or employee is aggravated pursuant to subsection (a)(2)(A), when that person is a “protected person.” The additional aggravator at subsection (a)(2)(B) is not justified. There is not a unique and across the board vulnerability for all District of Columbia employees and their families that warrants their addition to this list.

¹⁶ Subsection (a)(2)(B) of both aggravated kidnapping and aggravated criminal restraint.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division



MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: July 13, 2018

SUBJECT: First Draft of Report #21. Recommendations for Kidnapping and Related Offenses

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #21 - Recommendations for Kidnapping and Related Offenses.¹

COMMENTS ON THE DRAFT REPORT

RCC § 22A-1401. Aggravated Kidnapping

The offense definition of aggravated kidnapping includes when a person commits kidnapping with the purpose of harming the complainant because of the complainant’s role in public safety or their status as a District official or employee, or a family member of a District official or employee.² The word “harm”, however, is not defined. Merriam-Webster defines harm as

¹ This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

² RCC § 22A-1401 (a)(2)(B) establishes that one of the ways that a person commits aggravated kidnapping is when they commit kidnapping as defined in RCC § 22A-1402 and who does this “With the purpose of harming the complainant because of the complainant’s status as a [:] Law enforcement officer; Public safety employee; Participant in a citizen patrol; District official or employee; or Family member of a District official or employee...”

“physical or mental damage.”³ Therefore, one would assume that this word has a broader meaning than the phrase “bodily injury” which is contained in the definition of the underlining offense of kidnapping or that term would have been used in the aggravated assault provision. See RCC § 22A-1402(a)(3)(D). To avoid needless litigation, the Commission should either define the word “harm” or explain in the Commentary the difference between the definitions of “harm” and “bodily injury.”

RCC § 22A-1401(d) states, “Multiple Convictions for Related Offenses. A person may not be sentenced for aggravated kidnapping if the interference with another person’s freedom of movement was incidental to commission of any other offense.”⁴ This limitation appears to be included to address the situation where the victim was moved or detained for a brief distance or a brief period of time so that another crime can be committed. (e.g. The victim is moved from the mouth of an alley a few feet in so that he can immediately be robbed). What is left unanswered, however, is the boundaries of this exception. (e.g. The victim is moved from the mouth of an alley a few feet in so that he can be robbed but because a movie lets out the victim is kept in the alley for 20 minutes until everyone walks by.) The Commentary should give examples of what is clearly incidental to the commission of another crime and what is not.⁵

RCC § 22A-1402. Kidnapping

The offense of kidnapping requires that the person interferes with the victim’s freedom of movement in specified ways. Paragraph (a)(2) lists those ways.⁶ One of the ways is “With that person’s consent obtained by deception, provided that, if the deception had failed, the defendant immediately would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury...” See RCC § 22A-1402 (a)(2)(C). It is not apparent from the text or the Commentary how the government could prove this counterfactual. The

³ See <https://www.merriam-webster.com/dictionary/harm>

⁴ The same limitation on sentencing is contained in the kidnapping, aggravated criminal restraint, and criminal restraint provisions. See RCC § 22A-1402 (e), RCC § 22A-1403 (d), and RCC § 22A-1404 (e).

⁵ The same issue arises in the context of RCC § 1403, Aggravated Criminal Restraint, and RCC § 1404, Criminal Restraint. See RCC § 1403(a)(2)(B) and RCC § 1404(a)(2)(C).

⁶ RCC § 22A-1402 (a)(2) establishes the ways that a person’s freedom of movement should not be substantially interfered with. They are:

- (A) Without that person’s consent;
- (B) With that person’s consent obtained by causing bodily injury or a threat to cause bodily injury;
- (C) With that person’s consent obtained by deception, provided that, if the deception had failed, the defendant immediately would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury; or
- (D) When that person is a child under the age of 16 or a person assigned a legal guardian, without the effective consent of that person’s parent, person who has assumed the obligations of a parent, or legal guardian;

victim in this situation has been deceived. He or she would have no way of knowing what the person would have done had the deception failed and, so, the government would not have evidence that enables it to meet this offense prong. The Commentary does not shed any light either on how this element would be proved or whether any other Model Penal Code jurisdiction has adopted an element that requires the government to prove what would have happened, but did not.

Additionally, to be convicted of kidnapping the deceived victim, the government must prove the first element of the offense, that is that the person “knowingly interferes to a substantial degree with another person’s freedom of movement.” See RCC § 1402(a)(1). But so long as the deception lasts, it cannot be said that the victim’s freedom of movement was curtailed because the victim chose to be in the location where he or she was.

The same issue arises when the victim is under the age of 16. Paragraph (a)(2) states that a person can commit the offense of kidnapping, “When that person is a child under the age of 16 or a person assigned a legal guardian, without the effective consent of that person’s parent, person who has assumed the obligations of a parent, or legal guardian.” See RCC § 22A-1402 (a)(2)(D). On page 12 of the Commentary it states, “enticing a child to get into a car and remain in the car as it drives away with the truthful promise of candy at the final destination may constitute kidnapping assuming the defendant also satisfied the intent requirement under subsection (a)(3).”⁷ However, to be convicted of kidnapping a child the government must also prove the first element of the offense, that is that the person “Knowingly interferes to a substantial degree with another person’s freedom of movement.” See RCC § 1402(a)(1). But if the child willingly goes into the car and happily stays there then it cannot be shown that the child’s freedom of movement has been interfered with. The child has merely been persuaded to stay in the car.⁸

The offense of kidnapping requires that the person restrains the victim’s movement with a specified intent. Subsection RCC 22A-1402 § (a)(3)(A) specifies that kidnapping includes acting with intent to hold the complainant for ransom or reward. However, the Commentary, on page 11 states, “Holding a person for ransom or reward requires demanding anything of pecuniary

⁷ RCC § 22A-1402 (a)(3) establishes the intent element for kidnapping. They are to:

- (A) Hold the complainant for ransom or reward;
- (B) Use the complainant as a shield or hostage;
- (C) Facilitate the commission of any felony or flight thereafter;
- (D) Inflict bodily injury upon the complainant, or to commit a sexual offense as defined in RCC XX-XXXX against the complainant;
- (E) Cause any person to believe that the complainant will not be released without suffering significant bodily injury, or a sex offense as defined in RCC XX-XXXX;
- (F) Permanently deprive a parent, legal guardian, or other lawful custodian of custody of a minor; or
- (G) Hold the person in a condition of involuntary servitude.

⁸ The same issues outlined in this section apply to the Criminal Restraint provision found in RCC § 22A-1404, Criminal Restraint.

value in exchange for release of the complainant.” The problem is that the word “pecuniary” in the Commentary is too limited. Merriam-Webster defines “pecuniary” as either “consisting of or measured in money” or “of or relating to money.”⁹ Therefore, following the explanation in the Commentary, a person who was held until the perpetrators received specified jewelry of sentimental value or other property would not be guilty of kidnapping. The Commentary should be modified to read, “Holding a person for ransom or reward requires demanding anything of value in exchange for release of the complainant.”

⁹ See <https://www.merriam-webster.com/dictionary/pecuniary>.