

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: June 15, 2017

SUBJECT: Comments to D.C. Criminal Code Reform Commission Second Draft of Report No. 2, Recommendations for Chapter 2 of the Revised Criminal Code - Basic Requirements of Offense Liability

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 Commission's Second Draft of Report No. 2, Recommendations for Chapter 2 of the Revised Criminal Code - Basic Requirements of Offense Liability (the Report). OAG reviewed this document and makes the recommendations noted below.¹

COMMENTS ON THE DRAFT REPORT

§ 22A-206, Hierarchy of Culpable Mental States

On page 3, the Report defines the Hierarchy of Culpable Mental States. It states:

(a) PURPOSE DEFINED.

(1) A person acts purposely with respect to a result when that person consciously desires that one's conduct cause the result.

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) A person acts purposely with respect to a circumstance when that person consciously desires that the circumstance exists.

(b) KNOWLEDGE & INTENT DEFINED.

(1) A person acts knowingly with respect to a result when that person is aware that one's conduct is practically certain to cause the result.

(2) A person acts knowingly with respect to a circumstance when that person is practically certain that the circumstance exists.

(3) A person acts intentionally with respect to a result when that person believes that one's conduct is practically certain to cause the result.

(4) A person acts intentionally with respect to a circumstance when that person believes it is practically certain that the circumstance exists.

Paragraphs (a)(1), (b)(1), and (b)(3) use the same sentence construction and word choice. We believe that a slight non-substantive change to each would make these sentences clearer. They each start with "A person" then refer to "that person" and then discuss "one's" conduct. By changing the word "one's" to "his or her" there would be no question that it is the same person whose mental state and conduct is being considered.²

To be consistent with paragraph (a) of the proposed code, and the rest of the first paragraph of the commentary, the last sentence of the first paragraph of the commentary should also be changed. The sentence currently reads, "However, the conscious desire required by § 206(a) must be accompanied by a belief on behalf of the actor that it is at least possible that the person's conduct will cause the requisite result or that the circumstance exists." The rest of that paragraph refers to the "person" and not the "actor." To make the commentary more clear and consistent this sentence should be modified to say, "However, the conscious desire required by § 206(a) must be accompanied by a belief on behalf of the person that it is at least possible that his or her conduct will cause the requisite result or that the circumstance exists."

On page 4, of the Report the commentary discusses inchoate liability. While footnote 2 appropriately gives examples of hypothetical offenses, there is no footnote that shows the difference in proof if these offenses used the phrase "with intent" rather than "with knowledge." To better explain these concepts the commentary should have another footnote. That footnote

² For example, Section 22A-206 (a)(1) would read, "A person acts purposely with respect to a result when that person consciously desires that his or her conduct causes the result."

should contain the same hypothetical offenses as footnote 2, but with the substitution of “with intent” for “with knowledge.”³

³ For example, “A hypothetical receipt of stolen property offense phrased in terms of possessing property “with intent that it is stolen” suggests that the property need not have actually been stolen.”

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MEMORANDUM

TO: Richard Schmechel
Executive Director
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FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: June 15, 2017

SUBJECT: Comments to D.C. Criminal Code Reform Commission First Draft of Report No. 5, Recommendations for Chapter 8 of the Revised Criminal Code – Offense Classes & Penalties.

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 Commission’s First Draft of Report No. 5, Recommendations for Chapter 8 of the Revised Criminal Code – Offense Classes & Penalties. (the Report). OAG reviewed this document and makes the recommendations noted below.¹

COMMENTS ON THE DRAFT REPORT

§ 22A-801, Offense Classifications

On pages 3 and 4, the Report proposes offense classifications and defines the terms “felony” and “misdemeanor.”

Paragraph (b) (1) states “‘Felony’ means an offense with an authorized term of imprisonment that is more than one (1) year or, in other jurisdictions, death .” We assume that by the inclusion of the phrase “or, in other jurisdictions, death” that the term “felony” will be used to define both

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.

in jurisdiction and out of state conduct. To avoid any confusion, we suggest that the language be redrafted as follows:

"Felony" means any offense punishable:

- (A) By an authorized term of imprisonment that is more than one (1) year; or
- (B) By death, in the case of a felony from a jurisdiction that permits capital punishment.

In addition, under current District law, there is one use of the word "felony" that does not comply with the definition in the proposal and which must be retained in the Revised Criminal Code. D.C. Official Code § 16-1022 establishes the offence of parental kidnapping. Section 22A-801 must be amended to account for offense.

Under certain circumstances the penalty for parental kidnapping is defined as a felony even though the maximum penalty is one year or less. D.C. Code § 16-1024 (b) states:

(b) A person who violates any provision of § 16-1022 and who takes the child to a place outside the District or detains or conceals the child outside the District shall be punished as follows:

(1) If the child is out of the custody of the lawful custodian for not more than 30 days, the person is guilty of a felony and on conviction is subject to a fine not more than the amount set forth in [§ 22-3571.01] or imprisonment for 6 months, or both...

(2) If the child is out of the custody of the lawful custodian for more than 30 days, the person is guilty of a felony and on conviction is subject to a fine of not more than the amount set forth in [§ 22-3571.01] or imprisonment for 1 year, or both ...

The reason why these penalties are defined as "felonies" is so that persons who are charged with parental kidnapping may be extradited. See D.C. Code 23-563.² To allow for parental kidnapping to be designated a felony, and for any other situations where the Council may want to create a felony offense that has a penalty of one year or less or a misdemeanor offense of more than a year, 22A-801 (a) should be amended to say "Unless otherwise provided by statute."

²D.C. Official Code § 23-563 states:

(a) A warrant or summons for a felony under sections 16-1022 and 16-1024 or an offense punishable by imprisonment for more than one year issued by the Superior Court of the District of Columbia may be served at any place within the jurisdiction of the United States.

(b) A warrant or summons issued by the Superior Court of the District of Columbia for an offense punishable by imprisonment for not more than one year, or by a fine only, or by such imprisonment and a fine, may be served in any place in the District of Columbia but may not be executed more than one year after the date of issuance.... [emphasis added]

Similar language should be added to the definitions of “Felony” and “Misdemeanor” found in 22A-801 (a) and (b).³

§ 22A-803, Authorized Terms of Imprisonment

Section 22A-803 (a) establishes the definitions for the various classes of felonies and misdemeanors. Paragraph (a) begins by saying that “... the maximum term of imprisonment authorized for an offense is ...” Except for a Class A felony, the definitions for all of the felony and misdemeanor offenses include the phrase “not more than...” The use of the term “not more than” appears redundant following that introductory language. For example, compare “the maximum term of imprisonment authorize for an offense is... for a Class 2 felony forty-five (45) years” with “the maximum term of imprisonment authorize for an offense is... for a Class 2 felony, not more than forty-five (45) years”.⁴

In the commentary, in the last paragraph on page 8 of the Report, it states “Under Supreme Court precedent, offenses involving penalties of six months or more are subject to a Sixth Amendment right to jury trial...” We believe that this is a typo and that the phrase should say “Under Supreme Court precedent, offenses involving penalties of more than six months are subject to a Sixth Amendment right to jury trial...” [emphasis added]⁵

RCC § 22A-804. AUTHORIZED FINES.

Section 22A-804 (c) establishes an alternative maximum fine based on pecuniary loss to the victim or gain to the defendant. This provision states:

(c) ALTERNATIVE MAXIMUM FINE BASED ON PECUNIARY LOSS OR GAIN. Subject to the limits on maximum fine penalties in subsection (b) of this section, if the offense of conviction results in pecuniary loss to a person other than the defendant, or if the offense of conviction results in pecuniary gain to any person, a court may fine the defendant:

- (1) not more than twice the pecuniary loss,
- (2) not more than twice the pecuniary gain, or

³ Additionally, for the sake of clarity, the language “except as otherwise provided by statute” should also be added to the beginning of the paragraph that lists the penalty for “attempts.” See § 22A-803 (b).

⁴ The repeated use of term “not more than” pertaining to fines in § 22A-804 appears also to be redundant.

⁵ See *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 543 (1989) and *Lewis v. United States*, 518 U.S. 322 (1996).

(3) not more than the economic sanction in subsection (a) that the defendant is otherwise subject to, whichever is greater. The pecuniary loss or pecuniary gain must be alleged in the indictment and proved beyond a reasonable doubt.

OAG recommends that the sentence “The pecuniary loss or pecuniary gain must be alleged in the indictment and proved beyond a reasonable doubt” be modified and made into its own paragraph. In addition, OAG suggests changing the paragraph structure and language in the subparagraphs from “not more than” to “Up to” to make the paragraph clearer. Paragraph (c) should be amended to read:

(c) (1) ALTERNATIVE MAXIMUM FINE BASED ON PECUNIARY LOSS OR GAIN. Subject to the limits on maximum fine penalties in subsection (b) of this section, if the offense of conviction results in pecuniary loss to a person other than the defendant, or if the offense of conviction results in pecuniary gain to any person, a court may fine the defendant:

(A) Up to twice the pecuniary loss;

(B) Up to twice the pecuniary gain; or

(C) Up to the economic sanction in subsection (a) that the defendant is otherwise subject to.⁶

(2) If the pecuniary loss or pecuniary gain exceeds the amount of fine authorized by subsection (a), the amount of gain or loss must be alleged in the indictment and proved beyond a reasonable doubt.

By rewording and breaking out new paragraph (c)(2) from former paragraph (c)(3) it is clear that the government only has to allege gain or loss in an indictment and prove the amount beyond a reasonable amount when it seeks an alternative maximum fine and not merely when the government wants to justify the court’s imposition of a fine based on pecuniary loss or gain which is less than or equal to the statutory amount in subsection (a). This rewording makes it clear that it is only when the alternative maximum fine is sought that the government should have to allege and prove the amount of gain or loss.

OAG recommends that the Commission consider two substantive changes to § 22A-804 (d). This paragraph addresses the alternative maximum fine for organizational defendants. Paragraph (d) states, “Subject to the limits on maximum fine penalties in subsection (b) of this section, if an

⁶ As there are three choices, we recommend that the word “greater” be replaced with the word “greatest.” This would clarify what the court’s options are if both the pecuniary loss and pecuniary gain are greater than the sanction in subsection (a), but are of unequal amounts. Under our proposed change it would be clear that the court could impose the largest sanction (not merely the greater of one of the sanctions and subsection (a)).

organizational defendant is convicted of a Class A misdemeanor or any felony, a court may fine the organizational defendant not more than double the applicable amount under subsection (a) of this section.”⁷ First, there is no reason why the misdemeanor portion of this paragraph should be limited to Class A misdemeanors. Organizational defendants are frequently motivated by financial gain when committing offenses and a court should be able to set a fine that acts as a deterrent to such conduct. As the Council wrote in the Report on Bill 19-214, Criminal Fine Proportionality Amendment Act of 2012,

The reason for imposing an unusually high fine is appropriate for certain offenses in the interest of deterring violations. Of the listed offenses many were designed to deter corporate entities from engaging in prohibited conduct... While the penalty provisions may have low imprisonment terms, the larger fine currently associated with the provision is deemed important to deterring the specified conduct. In addition, organizational defendants are subject to section 1002(b) of the legislation – which effectively doubles any fine amount authorized under the law.⁸

The court should be authorized, in appropriate circumstance, to double the fine when an organizational defendant is convicted of any misdemeanor offense – not just a Class A misdemeanor.

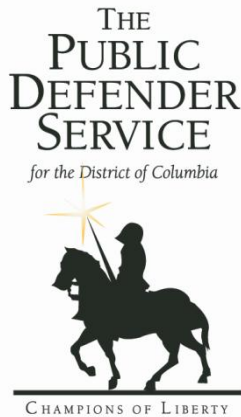
Second, § 22A-804 (d) limits the court’s ability to “double the applicable amount under subsection (a) of this section.” This paragraph does not address the courts authority to double fines for organizational defendants when the underlining fine is established in the individual offense, as an exception to the standard fine.⁹ Section 22A-804 (d) should be amended to add that “... a court may fine the organizational defendant not more than double the applicable amount under subsection(a) of this section or twice the maximum specified in the law setting forth the penalty for the offense.” [Proposed language underlined]

⁷ OAG recognizes that this paragraph is substantially based on D.C. Official Code § 22-3571.01(c).

⁸ See Section 1102 on page 15 of the Report on Bill 19-214, Criminal Fine Proportionality Amendment Act of 2012. Section 22A-804 (d) is based upon §1002(b) of Bill 19-214

⁹ The Criminal Fine Proportionality Amendment Act of 2012 exempts numerous offenses that carry higher fines than those established in the Act.

MEMORANDUM



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

From: Laura E. Hankins, General Counsel

Date: June 16, 2017

Re: Comments on First Draft of Report No. 5:
Recommendations for Chapter 8 of the
Revised Criminal Code: Offense Classes &
Penalties

PDS understands that the proposed classification system and the corresponding penalties are preliminary and subject to significant revision during the final phase of the Commission's work. Despite the preliminary nature of the proposals in Report No. 5, PDS has two grave concerns it requests the Commission consider at this time.

1. With respect to RCC § 22A-803, Authorized Terms of Imprisonment, specifically regarding the felony classes – PDS disagrees with the Commission's approach of aligning its proposed felony classes and corresponding maximum imprisonment terms with current District sentencing norms. PDS believes that criminal code reform is an opportunity to rationally recalibrate our criminal justice system to reflect evidence-based research about public safety and crime. To start, PDS recommends the Commission eliminate the excessive sentence of life without release and all sentences above 20 years of incarceration. Sentences of life without release, particularly where there is no "second look" provision or parole eligibility, are not supported by evidence about dangerousness of the offender and are inhumane. The association between age and general criminal behavior is well established: most crimes are committed by young people and older adults have low rates of recidivism.¹ For instance, the Justice Policy Institute reported on the release of a large number of people, mostly age 60 and up who had been convicted of homicides in Maryland but released due to an appellate ruling. As of March 2016, of the more than 100

¹ See Alfred Blumstein, Jacqueline Cohen, and P. Hsieh, *The Duration of Adult Criminal Careers*, (1982).

people who had been released, none had been convicted of a new felony offense.² Over the past decade, New Jersey, New York, and Michigan reduced their prison populations by a range of 20 percent through front end reforms such as decreasing sentence length and through back end reforms in their parole systems. No adverse impacts on public safety were observed in these states.³

The Commission, and ultimately the Council, should also consider the fiscal impact of constructing such an expensive sentencing system. Because persons convicted of felony offenses and sentenced to prison are in the legal custody of the Bureau of Prisons,⁴ the fiscal impact statements that accompany legislation creating felonies or changing felony penalties have not had to assess the costs of incarceration. When the Council promulgates new felony offenses, sets mandatory minimum prison sentences or increases the maximum term of imprisonment possible for a felony offense, it need never ask itself what the additional prison time will cost the District taxpayer. Many states are considering sentence reform because of budget deficits and the cost of prison overcrowding due to long sentences.⁵ The National Conference of State Legislatures estimated that the taxpayers paid approximately \$24 billion dollars to incarcerate persons convicted of something other than a non-violent offense; that estimate excludes spending on county and city jails and the federal corrections budget.⁶ Given the tremendous support in the District for statehood,⁷ and repeated calls for more local control over prosecutions and of the District's criminal justice system, the Commission, and ultimately the Council, should be mindful about building a sentencing system it would never be able to afford. Criminal code reform presents an ideal opportunity to weigh the high cost of long prison sentences against the little to no benefit in terms of increased public safety and propose the general reduction of

² *Defining Violence: Reducing Incarceration by Rethinking America's Approach to Violence*, ("Defining Violence") Justice Policy Institute, August 2016.
http://www.justicepolicy.org/uploads/justicepolicy/documents/jpi_definingviolence_final_report_9.7.2016.pdf.

³ Judith Greene & Marc Mauer, *Downscaling Prisons: Lessons from Four States*, The Sentencing Project (2010).

⁴ D.C. Code § 24-101.

⁵ See e.g., "Skyrocketing prison costs have states targeting recidivism, sentencing practices." https://www.washingtonpost.com/blogs/govbeat/wp/2015/05/19/skyrocketing-prison-costs-have-states-targeting-recidivism-sentencing-practices/?utm_term=.a13e38050348; "Fiscal and prison overcrowding crises could lead to Three-Strikes reform." <http://www.mercurynews.com/2011/07/22/fiscal-and-prison-overcrowding-crises-could-lead-to-three-strikes-reform/>.

⁶ *Defining Violence* at page 20.

⁷ "District voters overwhelmingly approve referendum to make D.C. the 51st state." https://www.washingtonpost.com/local/dc-politics/district-voters-overwhelmingly-approve-referendum-to-make-dc-the-51st-state/2016/11/08/ff2ca5fe-a213-11e6-8d63-3e0a660f1f04_story.html?utm_term=.5234e8fc29f3.

maximum terms of imprisonment for felonies and the elimination of the life without possibility of release penalty.

In further support of reducing the prison terms proposed for the felony classes in Report No. 5, PDS focuses on and strongly objects to the proposed 45-year term of imprisonment for the Class 2 felony. A 45-year term penultimate penalty is significantly more severe than the 20-year maximum recommended by the American Law Institute and than the 30-year maximum recommended in the Proposed Federal Criminal Code. Further, the 45-year penalty is not justified by the data included in Memorandum #9, which supplements Report No. 5.

According to Figure 1, there are nine criminal offenses in Title 22 that have a maximum penalty of 30 years imprisonment. This grouping of offenses would correspond with the proposed Class 3 felony and its recommended 30-year maximum. There are six offenses that have a maximum penalty of life without possibility of release (LWOR). This grouping corresponds with the proposed Class 1 felony. Between the 30-year maximum grouping of offenses and the LWOR maximum grouping in the D.C. Code, Figure 1 shows that there is one offense with a maximum penalty of 40 years (which I assume is armed carjacking) and one offense with a maximum penalty of 60 years (which I assume is first-degree murder).

Figure 3 is a little more complicated in that it compares the Sentencing Guidelines groups and the proposed felony classifications; the correspondence between the two is a little tricky. Category 3 on Figure 3 compares the maximum proposed penalty for Class 3 (30 years or 360 months) and the top of the box for the Master Grid Group 3 for column A and for column D. Figure 3 indicates that a maximum of 360 months for Class 3 felony offenses would more than adequately accommodate the top of the box for Column A, 180 months, and Column D, 216 months. PDS recommends lowering the penalty proposed for Class 3 to significantly less than 30 years. Category 2 in Figure 3 compares the 45-year (540 months) penalty proposed for Class 2 felony to the Master Grid Group 2 for column A and column D. Again, Figure 3 indicates that a maximum of 45 years for Class 2 felony offenses is significantly higher than top of the box for Column A, 288 months (24 years), and Column D, 324 months (27 years). PDS acknowledges that the maximum prison term for the class should be higher than the top of the box in Column D, for example to allow for aggravating circumstances of the particular incident. A maximum penalty of 45 years, however, allows for an excessive 18 years “cushion” above the top of the box for Master Grid group 2, column D. Category 1 in Figure 3 corresponds to Master Group 1, the group into which first-degree murder is ranked. Thus the one offense with a statutory maximum of 60 years (720 months), as shown on Figure 1, is the main offense (and variations of it) in Master Group 1 and the maximum penalty is 720 months for column A and column D.

Figure 4 is perhaps more helpful for recognizing the proposed penalty for Class 2 felony should be much lower than 45 years, even if that class were reserved for the most serious offense in the

Code. Figure 4 in Memo #9 shows that the average sentence and the mean sentence for Category 1 (meaning the average sentence for murder I) are both 30 years, both well below the 45-year penalty proposed for Class 2 felony. Category 2 on Figure 4 compares the 45-year (540 months) proposed for Class 2 felony to the average and mean sentences for Master Grid Group 2 offenses and also demonstrates that the 45-year penalty proposed for Class 2 could be greatly reduced and still well accommodate current sentencing practice for those offenses. The average sentence for that category is 225 months (18 years, 9 months) and the mean sentence is 228 months (19 years), lower than the proposed 45-year maximum by 26 years, 3 months and 26 years respectively.

While PDS focuses here on the maximum imprisonment terms proposed for the three most serious classes for RCC §22A-803, all of the penalties should be examined in light of the sentencing practices but also in light of evidence-based research on public safety and of the potential fiscal impact of incarceration.

2. With respect to RCC § 22A-803, Authorized Terms of Imprisonment, specifically regarding the Class B misdemeanor penalty – The Commission proposes in Report No. 5 to eliminate the 6-month prison term as the penultimate penalty for misdemeanor offenses and instead to have the 180-day prison term as the penultimate misdemeanor penalty.⁸ The 180-day/6-month distinction is important because, as the Report notes, D.C. Code §16-705 requires a jury trial as compelled by the Constitution⁹ or if the offense is punishable by imprisonment for *more than 180 days*.¹⁰ Six months is longer than 180 days;¹¹ therefore offenses with a penalty of 6 months imprisonment are jury demandable; those with a penalty of 180 days are not. PDS would prefer that the maximum penalty for Class B be set at 6 months. PDS acknowledges that, under current law, a 6-month penalty would make every offense assigned to that class jury-demandable and that flexibility around this misdemeanor mid-point might have merit. Thus, to provide for such flexibility, PDS would not object to Class B having a maximum penalty of 180 days **IF** there were also a statutory provision that stated offenses categorized in Class B were jury demandable unless otherwise provided by law. Report No. 5 proposes the opposite default rule – that Class B misdemeanors would be non-jury demandable unless there were a plain statement in the offense definition that the offense was to be jury demandable. Because “trial by jury in criminal cases is fundamental to the American scheme of justice,”¹² the default should be that Class B misdemeanors are jury demandable unless there is a plain statement in the offense definition that the offense is not jury demandable.

⁸ The ultimate term of imprisonment penalty for a misdemeanor is one year.

⁹ D.C. Code § 16-705(a).

¹⁰ D.C. Code § 16-705(b)(1).

¹¹ *Turner v. Bayly*, 673 A.2d 596, 602 (D.C. 1996).

¹² *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

Trial by jury is critical to fair trials for defendants. “The history of trial by jury in criminal cases has been frequently told. It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta.... The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.”¹³

Requiring jury trials is not only a acknowledgement of the core principle of American justice that a defendant should be tried by a jury of his or her peers, it also recognizes the importance to the community of serving as jurors. As the Supreme Court noted in *Batson v. Kentucky*, “Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try.... [B]y denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror.”¹⁴ Constructing a system that by default precludes jury trials harms not only the defendant but the community as a whole. The ability of District residents to participate in civic life is already curtailed compared to residents of States; the Commission should not restrict that participation further by default.

When the Commission engages in the work of adjusting penalties and gradation of offenses to provide for proportionate penalties¹⁵ and when the D.C. Council promulgates new misdemeanors, they should have to explicitly decide to deprive the defendant and the community of a jury trial and they should have to publicly declare they made that decision, not hide behind a default rule buried in a penalty classification system.

¹³ *Id.* at 151, 156.

¹⁴ *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).

¹⁵ D.C. Code § 3-152(a)(6).