



D.C. Criminal Code Reform Commission
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Advisory Group Memorandum #13r¹

To: Code Revision Advisory Group
From: Criminal Code Reform Commission (CCRC)
Date: November 6, 2017
Re: First Draft of Report #12, Definition of a Criminal Conspiracy

This Advisory Group Memorandum #13 supplements the First Draft of Report #12, *Recommendations on Chapter 3 of the RCC—Definition of a Criminal Conspiracy* (Report No. 12). It provides a brief overview of Report No. 12 and thereafter provides a brief overview of sentencing data relevant to the recommendations contained in Report No. 12.

I. OVERVIEW OF REPORT NO. 12

Report No. 12 is comprised of draft legislation and commentary addressing four provisions: (1) RCC § 22A-303(a), Definition of Conspiracy; (2) RCC § 22A-303(b), Principles of Culpable Mental State Elevation Applicable to Results and Circumstances of Target Offense; (3) RCC § 22A-303(c), Jurisdiction When Object of Conspiracy is Located Outside the District of Columbia; (4) RCC § 22A-303(d), Jurisdiction When Conspiracy is Formed Outside the District of Columbia; and (5) RCC § 22A-303(e), Legality of Conduct in Other Jurisdiction Irrelevant.

The first two of these draft general provisions address the elements of a criminal conspiracy under the Revised Criminal Code (RCC).² They include recommendations concerning the plurality requirement, agreement requirement, culpable mental state requirement, impossibility, overt act requirement, and treatment of non-criminal objectives. The last three of the draft general provisions address particular jurisdictional issues relevant to conspiracy prosecutions.

Generally speaking, the substantive policies reflected in these recommendations seek to translate and fill gaps in current District law.³ These recommendations are not

¹ This memorandum was updated December 11, 2017 to correct errors re the data on pages 3-4.

² Note that the *Pinkerton* doctrine, while requiring proof of the elements of a conspiracy, is actually a theory of complicity. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.08 (6th ed. 2012); see *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)). Therefore, it is not addressed in Report No. 12, but is planned for consideration in the CCRC’s forthcoming work on accomplice liability.

³ One potential exception is that RCC § 22A-303(a) is limited to conspiracies to commit criminal “offenses,” whereas D.C. Code § 22-1805a(a)(1) applies to both “offenses” and conspiracies “to defraud

intended, however, to resolve all policy issues relevant to treatment of criminal conspiracies under the RCC. Left unaddressed by these recommendations, for example, are a variety of relevant topics—such as the grading of criminal conspiracies and the potential adoption of a renunciation defense—that the CCRC plans to consider at a future date.⁴

II. SUMMARY OF STATISTICS ON CRIMINAL CONSPIRACY

In the summer of 2017, the CCRC obtained 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 2016.⁵ The CCRC has performed analysis of this data, with help from the Lab in the Office of the City Administrator. The conspiracy 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.

As it relates to the statistics on conspiracy, there are two data fields of uncertain meaning: “is_guilty” and “is_guilty_charge.” The CCRC has interpreted the former to indicate a positive value if the defendant is guilty on any charge for his or her case, while it has interpreted the latter to indicate a positive value only if the defendant is guilty *on that particular charge* within his or her case. For example, if a defendant is charged with robbery and assault in the same case, and is convicted only on robbery, the “is_guilty_charge” field for the assault charge would be a negative value, while the “is_guilty” field would indicate a positive value (due to the guilty verdict for the robbery charge). Because *Figure 2* below reports information that uses the “is_guilty_charge” field, this assumption should be kept in mind. This caveat does not apply, however, to basic frequency information.

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

the District of Columbia or any court or agency thereof in any manner or for any purpose.” Whether this constitutes a change in law is, as discussed in the Report, contingent upon how the RCC addresses public corruption offenses.

⁴ Note that the District’s general conspiracy statute, D.C. Code § 22-1805a, grades conspiracies based upon whether the target offense can be categorized as a “crime of violence.” *Compare* D.C. Code § 22-1805a(a)(1) *with* D.C. Code § 22-1805a(a)(2). Whether to preserve that distinction, or to instead rely on a grading scheme that sets the penalty for a conspiracy at some proportion of the target offense, will be addressed in the CCRC’s forthcoming work.

⁵ Because of the nature of the request, some cases and charges from years prior to 2010 are included in the dataset. These cases appear where the final disposition or sentencing occurred in the 2010 to 2016 range. For example, a defendant charged with robbery in 2009 who is then sentenced for the case in 2010 would be present in the data the CCRC received. However, a defendant charged with robbery in 2009 who is sentenced for the case in 2009 would *not* be present. In other words, the dataset provides only a portion of cases prior to 2010. To ensure accuracy, charges occurring prior to 2010 are not included in the information below.

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.”

Third, the analysis does not distinguish between conspiracies to commit crimes of violence and other conspiracies, although these are punished differently in the D.C. Code.⁶ This limitation on the analysis is based on the CCRC’s concern that the Superior Court data may not consistently track the differences between conspiracies to commit crimes of violence and conspiracies more generally.

Fourth, the analysis may undercount conspiracy charges and convictions to the extent that offense-specific conspiracy charges and convictions are not included.⁷ Where a substantive offense definition provides its own basis for conviction of conspiracy to commit that substantive offense, it is not clear how the Superior Court records such charges. For example, the current kidnapping statute contains its own conspiracy provision.⁸ If a person were charged with conspiracy to kidnap under the kidnapping statute, it may be that the charge would be described as “kidnapping” in the Superior Court’s data system.

With the above caveats, the CCRC analysis of the frequency of conspiracy charges and convictions is as follows:

<i>Figure 1: Number of Adult Conspiracy Convictions (By Year)</i>		
Year	Number of Charges	Number of Charges Resulting in Guilty Verdict
2010	74	44
2011	105	52
2012	75	28
2013	65	32
2014	31	< 20
2015	35	< 20
2016	< 20	< 20

⁶ See D.C. Code § 22-1805a.

⁷ The analysis also may not account for those cases where an uncharged conspiracy serves as the “predicate for the *Pinkerton* theory” of liability. *Thomas v. United States*, 748 A.2d 931, 935 (D.C. 2000); see *supra* note 1. It is unclear at present how the Superior Court may record charges based on *Pinkerton* liability. Future analysis will seek to clarify this matter.

⁸ See D.C. Code § 22-2001.

Figure 1 shows the general frequency of conspiracy charges, broken out by year. Note that the number of charges for conspiracy seems to drop over time. In fact, less than twenty conspiracy charges appear in the data for 2016. The third column displays the number of convictions for conspiracy per year.⁹

APPENDIX A: RELEVANT DISTRICT CRIMINAL STATUTES¹⁰

D.C. Code § 22-1805a:

(a)(1) If 2 or more persons conspire either to commit a criminal offense or to defraud the District of Columbia or any court or agency thereof in any manner or for any purpose, each shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 5 years, or both, except that if the object of the conspiracy is a criminal offense punishable by less than 5 years, the maximum penalty for the conspiracy shall not exceed the maximum penalty provided for that offense.

(2) If 2 or more persons conspire to commit a crime of violence as defined in § 23-1331(4), each shall be fined not more than the amount set forth in § 22-3571.01 nor the maximum fine prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or imprisoned not more than 15 years nor the maximum imprisonment prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or both.

(b) No person may be convicted of conspiracy unless an overt act is alleged and proved to have been committed by 1 of the conspirators pursuant to the conspiracy and to effect its purpose.

(c) When the object of a conspiracy contrived within the District of Columbia is to engage in conduct in a jurisdiction outside the District of Columbia which would constitute a criminal offense under an act of Congress applicable exclusively to the District of Columbia if performed therein, the conspiracy is a violation of this section if:

(1) Such conduct would also constitute a crime under the laws of the other jurisdiction if performed therein; or

(2) Such conduct would constitute a criminal offense under an act of Congress exclusively applicable to the District of Columbia even if performed outside the District of Columbia.

⁹ The numbers are pulled from the number of charges marked with a positive value for the data field “is_guilty_charge.”

¹⁰ This appendix merely references the District’s general conspiracy statute, which is the primary basis of conspiracy liability under District law. As noted *supra*, however, District law is comprised of a variety of additional conspiracy penalty provisions. Because statutes such as these are primarily relevant to determining the penalty of a conspiracy, they will be collected in a future memorandum, which specifically addresses conspiracy penalties.

(d) A conspiracy contrived in another jurisdiction to engage in conduct within the District of Columbia which would constitute a criminal offense under an act of Congress exclusively applicable to the District of Columbia if performed within the District of Columbia is a violation of this section when an overt act pursuant to the conspiracy is committed within the District of Columbia. Under such circumstances, it is immaterial and no defense to a prosecution for conspiracy that the conduct which is the object of the conspiracy would not constitute a crime under the laws of the other jurisdiction.

APPENDIX B: RELEVANT REDBOOK INSTRUCTIONS

Selected Portions of Criminal Jury Instructions for the District of Columbia, Instruction No. 7.102—Conspiracy: Basic Instruction (5th ed. 2017):

[^] [Name of defendant] [^] [Each of the defendants] is charged with conspiring to [^] [describe object of the conspiracy]. It is against the law to agree with someone to commit the crime(s) of [^] [describe object(s) of the conspiracy].

[The charge of conspiracy to [^] [describe object of the conspiracy], is a separate charge from [^] [describe offense if charged separately from the conspiracy] itself [with which [^] [name of defendant] also is charged]. [You must consider each defendant separately in deciding whether the government has proved each of the elements as to that person.]]

[^] [Define elements of substantive offense(s).]

The government is not required to prove that the objective was achieved. The elements of conspiracy, each of which the government must prove beyond a reasonable doubt, are that:

1. [Between [^] [beginning date] and [^] [concluding date]], an agreement existed between two or more people to commit the crime of [^] [describe object of the conspiracy]. This does not have to be a formal agreement or plan, in which everyone involved sat down together and worked out the details. On the other hand, merely because people get together and talk about common interests, or do similar things does not necessarily show that an agreement exists to [^] [describe object of conspiracy]. It is enough that the government proves beyond a reasonable doubt that there was a common understanding among those who were involved to commit the crime of [^] [describe offense]. So, the first thing that must be shown is the existence of an agreement.
2. [^] [Name of defendant] intentionally joined in that agreement. It is not necessary to find s/he agreed to all the details of the crime, or that s/he knew the identity of all the other people the government has claimed were participating in the agreement. A person may become a member of a conspiracy even if that person agrees to play only a minor part, as long as that person understands the unlawful nature of the plan and voluntarily and intentionally joins in it with the

intent to advance or further the unlawful object of the conspiracy. [Even if [^] [name of defendant] was not part of the agreement at the very start, s/he can become a member of a conspiracy later if the government proves that s/he intentionally joined the agreement. Different people may become part of the conspiracy at different times.]

But mere presence at the scene of the agreement or of the crime, or merely being with the other participants, does not show that [^] [name of defendant] knowingly joined in the agreement. Also, unknowingly acting in a way that helps the participants, or merely knowing about the agreement itself, without more, does not make the defendant part of the conspiracy. So the second thing that must be shown is that [^] [name of defendant] was part of the conspiracy.

[3. One of the people involved in the conspiracy did something for the purpose of carrying out the conspiracy. This something is referred to as an overt act. The charged overt act[s] [is] [are] [^] [describe charged overt act[s]]. [The government need not prove that all of these overt acts were taken, but in order to find the defendant guilty, you must all agree on at least one overt act that was done.]]

A conspiracy can be proved indirectly, by facts and circumstances that lead to a conclusion that a conspiracy existed. The government must prove that such facts and circumstances existed and that they lead to the conclusion that a conspiracy existed. . . .

In summary, a conspiracy is a kind of partnership in crime. For any defendant to be convicted of the crime of conspiracy, the government must prove two [three] things beyond a reasonable doubt: first, that [during (the charged time period)] there was an agreement to [^] [describe object of conspiracy]; [and] second, that [^] [name of defendant] intentionally joined in that agreement; [and third, that one of the people involved in the conspiracy did one of the overt acts charged].