



D.C. Criminal Code Reform Commission
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To: Code Revision Advisory Group
From: Criminal Code Reform Commission (CCRC)
Date: January 13, 2017
Re: Copy of D.C. Sentencing Commission's Relevant Draft Statutory
Language on Liability Requirements

This Memorandum provides copies of: (1) statutory language recommended by the D.C. Criminal Code Reform Commission (CCRC) in the First Draft of Report No. 2, *Recommendations for Chapter 2 of the Revised Criminal Code—Basic Requirements of Offense Liability* (distributed to the Advisory Group on December 22, 2016); and (2) the draft statutory language addressing similar topics developed by the D.C. Sentencing Commission, as last referenced at the Sentencing Commission's September 20, 2016 meeting. This Memorandum responds to the request of two Advisory Group members on January 11, 2017. The Memorandum presents each section of the statutory language recommended by the CCRC with the relevant draft statutory language, if any, developed by the Sentencing Commission.

Please note that the draft statutory language from the Sentencing Commission was not given final approval by that agency, or that agency's Subcommittee on Criminal Code Revision. The draft statutory language from the Sentencing Commission is a compilation of statutory changes that were discussed by that agency's Subcommittee on Criminal Code Revision, some of which were specifically bracketed for further consideration, and all of which were subject to further changes. The statutory mandate and customary practices that were applicable to the Sentencing Commission's work on code revision between January 2013 and September 2016 also differ significantly from those applicable to the CCRC's work on code reform, which commenced on October 2016.

The First Draft of Report No. 2, *Recommendations for Chapter 2 of the Revised Criminal Code—Basic Requirements of Offense Liability*, provides a comprehensive explanation of the basis, rationale, and intended operation of the recommended statutory language and should be evaluated independent of any prior work by the Sentencing Commission.

Criminal Code Reform Commission Language

§ 22A-201 PROOF OF OFFENSE ELEMENTS BEYOND A REASONABLE DOUBT

- (a) **PROOF OF OFFENSE ELEMENTS BEYOND A REASONABLE DOUBT.** No person may be convicted of an offense unless each offense element is proven beyond a reasonable doubt.
- (b) **OFFENSE ELEMENT DEFINED.** “Offense element” includes the objective elements and culpability requirement necessary to establish liability for an offense.
- (c) **OBJECTIVE ELEMENT DEFINED.** “Objective element” means any conduct element, result element, or circumstance element. For purposes of this Title:
 - (1) “Conduct element” means any act or omission, as defined in § 22A-202, that is required to establish liability for an offense.
 - (2) “Result element” means any consequence that must have been caused by a person’s conduct in order to establish liability for an offense.
 - (3) “Circumstance element” means any characteristic or condition relating to either a conduct element or result element the existence of which is required to establish liability for an offense.
- (d) **CULPABILITY REQUIREMENT DEFINED.** “Culpability requirement” includes each of the following:
 - (1) The voluntariness requirement, as provided in § 22A-203;
 - (2) The causation requirement, as provided in § 22A-204; and
 - (3) The culpable mental state requirement, as provided in § 22A-205.

Corresponding Sentencing Commission Language

§ 22A-201 BURDEN OF PROOF FOR OFFENSE ELEMENTS

- (a) **PROOF BEYOND A REASONABLE DOUBT.** No person may be convicted of an offense unless each offense element is proved beyond a reasonable doubt.
- (b) **OFFENSE ELEMENT.** “Offense element” includes any objective element and culpability requirement required by an offense.
- (c) **OBJECTIVE ELEMENT DEFINED.** “Objective element” means any conduct, result, or circumstance, except as provided in § 22A-209. For purposes of this definition:

Advisory Group Memorandum No. 3,
Copy of D.C. Sentencing Commission's Relevant Draft Statutory Language on Liability Requirements

- (1) "Conduct" means an act or omission;
 - (2) "Circumstance" means a characteristic or condition; and
 - (3) "Result" means a change in a characteristic or condition caused by a person's conduct.
- (d) CULPABILITY REQUIREMENT DEFINED. "Culpability requirement" means any culpable mental state, as provided in § 22A-205; and any conduct, result, or circumstance subject to an inchoate culpable mental state, as provided in § 22A-209.

Criminal Code Reform Commission Language

§ 22A-202 CONDUCT REQUIREMENT

(a) CONDUCT REQUIREMENT. No person may be convicted of an offense unless the person's liability is based on an act, omission, or possession.

(b) ACT DEFINED. "Act" means a bodily movement.

(c) OMISSION DEFINED. "Omission" means a failure to act when (i) a person is under a legal duty to act and (ii) the person is either aware that the legal duty to act exists or, if the person lacks such awareness, the person is culpably unaware that the legal duty to act exists. For purposes of this Title, a legal duty to act exists when:

(1) The failure to act is expressly made sufficient by the law defining the offense; or

(2) A duty to perform the omitted act is otherwise imposed by law.

(d) POSSESSION DEFINED. "Possession" means knowingly exercising control over property, whether or not the property is on one's person, for a period of time sufficient to allow the actor to terminate his or her control of the property.

Corresponding Sentencing Commission Language

§ 22A-202 CONDUCT REQUIREMENT

(a) CONDUCT REQUIREMENT. No person may be convicted of an offense that does not require an act, omission, or possession.

(b) ACT DEFINED. "Act" or "action" means a bodily movement.

(c) OMISSION DEFINED. "Omission" means a failure to act when the person is under a legal duty to act. A legal duty to act exists when:

(1) The failure to act is expressly made sufficient by the law defining the offense; or

(2) A duty to perform the omitted act is otherwise imposed by law.

Criminal Code Reform Commission Language

§ 22A-203 VOLUNTARINESS REQUIREMENT

(a) VOLUNTARINESS REQUIREMENT. No person may be convicted of an offense unless the person voluntarily commits the conduct element necessary to establish liability for the offense.

(b) SCOPE OF VOLUNTARINESS REQUIREMENT.

(1) *Voluntariness of Act.* Where a person's act provides the basis for liability, a person voluntarily commits the conduct element of an offense when that act was the product of conscious effort or determination, or was otherwise subject to the person's control.

(2) *Voluntariness of Omission.* Where a person's omission provides the basis for liability, a person voluntarily commits the conduct element of an offense when the person had the physical capacity to perform the required legal duty, or the failure to act was otherwise subject to the person's control.

Corresponding Sentencing Commission Language

§ 22A-203 VOLUNTARINESS REQUIREMENT

(a) VOLUNTARINESS REQUIREMENT. No person may be convicted of an offense the person does not voluntarily commit.

(b) VOLUNTARY COMMISSION OF AN OFFENSE. In order to voluntarily commit an offense, a person must voluntarily commit the conduct or circumstance element that completes the offense.

(c) VOLUNTARINESS DEFINED. "Voluntarily" means:

(1) With respect to a conduct element, the person possesses the physical ability to avoid engaging in the conduct; and

(2) With respect to a circumstance element, the person possesses the physical ability to avoid fulfilling the circumstance.

(d) BURDEN OF PROOF. The government must prove beyond a reasonable doubt that the accused voluntarily committed the charged offense when there is evidence [upon which a reasonable factfinder could find] that the accused did not voluntarily commit the offense.

Criminal Code Reform Commission Language

§ 22A-204 CAUSATION REQUIREMENT

(a) CAUSATION REQUIREMENT. No person may be convicted of an offense that contains a result element unless the person's conduct was the factual cause and legal cause of the result.

(b) FACTUAL CAUSE DEFINED. "Factual cause" means:

(1) The result would not have occurred but for the person's conduct; or

(2) In a situation where the conduct of two or more persons contributes to a result, the conduct of each alone would have been sufficient to produce that result.

(c) LEGAL CAUSE DEFINED. "Legal cause" means the result was a reasonably foreseeable consequence of the person's conduct. A consequence is reasonably foreseeable if its occurrence is not too remote, accidental, or otherwise dependent upon an intervening force or act to have a just bearing on the person's liability.

[No Corresponding Sentencing Commission Language]

Criminal Code Reform Commission Language

§ 22A-205 CULPABLE MENTAL STATE REQUIREMENT

(a) CULPABLE MENTAL STATE REQUIREMENT. No person may be convicted of an offense unless the person acts with a culpable mental state with respect to every result and circumstance required by the offense, with the exception of any result or circumstance for which that person is strictly liable under § 22A-207(b).

(b) CULPABLE MENTAL STATE DEFINED. “Culpable mental state” means purpose, knowledge, recklessness, negligence, as defined in § 22A-206, or any comparable mental state specified in this Title.

(c) STRICTLY LIABILITY DEFINED. “Strictly liable” or “strict liability” means liability in the absence of purpose, knowledge, recklessness, or negligence, as defined in § 22A-206, or any comparable mental state specified in this Title.

Corresponding Sentencing Commission Language

§ 22A-204 CULPABLE MENTAL STATE REQUIREMENT

(a) CULPABLE MENTAL STATE REQUIREMENT. No person may be convicted of an offense unless the person acted with a culpable mental state, as provided in § 22A-205, with respect to every result and circumstance element of the offense, with the exception of any result or circumstance element for which the person is strictly liable.

(b) STRICT LIABILITY DEFINED. “Strict liability” means the absence of a culpable mental state with respect to a result or circumstance element.

(c) IDENTIFYING STRICT LIABILITY ELEMENTS. A person is strictly liable for any result or circumstance element in an offense that immediately follows the phrase “in fact.”

Criminal Code Reform Commission Language

§ 22A-206 HIERARCHY OF CULPABLE MENTAL STATES

(a) PURPOSE DEFINED. "Purposely" or "purpose" means:

(1) With respect to a result, consciously desiring that one's conduct cause the result.

(2) With respect to a circumstance, consciously desiring that the circumstance exists.

(b) KNOWLEDGE DEFINED. "Knowingly" or "knowledge" means:

(1) With respect to a result, being aware that one's conduct is practically certain to cause the result.

(2) With respect to a circumstance, being aware that it is practically certain that the circumstance exists.

(c) RECKLESSNESS DEFINED. "Recklessly" or "recklessness" means:

(1) With respect to a result, being aware of a substantial risk that one's conduct will cause the result.

(2) With respect to a circumstance, being aware of a substantial risk that the circumstance exists.

(3) In order to act recklessly as to a result or circumstance, the person's conduct must grossly deviate from the standard of care that a reasonable person would observe in the person's situation.

(4) In order to act recklessly as to a result or circumstance "under circumstances manifesting extreme indifference" to the interests protected by an offense, the person's conduct must constitute an extreme deviation from the standard of care that a reasonable person would observe in the person's situation.

(d) NEGLIGENCE DEFINED. "Negligently" or "negligence" means:

(1) With respect to a result, failing to perceive a substantial risk that one's conduct will cause the result.

(2) With respect to a circumstance, failing to perceive a substantial risk that the circumstance exists.

(3) In order to act negligently as to a result or circumstance, the person's conduct must grossly deviate from the standard of care that a reasonable person would observe in the person's situation.

(e) PROOF OF GREATER CULPABLE MENTAL STATE SATISFIES REQUIREMENT FOR LOWER.

(1) *Proof of Negligence.* When the law requires negligence as to a result or circumstance, the requirement is also satisfied by proof of recklessness, knowledge, or purpose.

(2) *Proof of Recklessness.* When the law requires recklessness as to a result or circumstance, the requirement is also satisfied by proof of knowledge or purpose.

(3) *Proof of Knowledge.* When the law requires knowledge as to a result or circumstance, the requirement is also satisfied by proof of purpose.

Corresponding Sentencing Commission Language

§ 22A-205 CULPABLE MENTAL STATE DEFINITIONS

(a) CULPABLE MENTAL STATES DEFINED.

(1) "Purposely" means:

- A. With respect to a result element, consciously desiring that the result occur; and
- B. With respect to a circumstance element, consciously desiring that the circumstance exists.

(2) "Knowingly" or "Knows" means:

- A. With respect to a result element, being practically certain that one's conduct will cause the result; and
- B. With respect to a circumstance element, being practically certain that the circumstance exists.

(3) "Recklessly" means:

- A. With respect to a result element, consciously disregarding a risk that the result will occur. The risk must be substantial and unjustifiable from the perspective of a reasonable person considering the circumstances known to the actor. Disregard of the risk must grossly deviate from the standard of care that a reasonable person would observe in the actor's situation.

- B. With respect to a circumstance element, consciously disregarding a risk that the circumstance exists. The risk must be substantial and unjustifiable from the perspective of a reasonable person considering the circumstances known to the actor. Disregard of the risk must grossly deviate from the standard of care that a reasonable person would observe in the actor's situation.

(4) "Negligently" means:

- A. With respect to a result element, failing to perceive a risk that the result will occur. The risk must be substantial and unjustifiable from the perspective of a reasonable person considering the circumstances known to the actor. Failure to perceive the risk must grossly deviate from the standard of care that a reasonable person would observe in the actor's situation.
- B. With respect to a circumstance element, failing to perceive a risk that the circumstance exists. The risk must be substantial and unjustifiable from the perspective of a reasonable person considering the circumstances known to the actor. Failure to perceive the risk must grossly deviate from the standard of care that a reasonable person would observe in the actor's situation.

(b) **PROOF OF GREATER CULPABILITY SATISFIES REQUIREMENT FOR LOWER.** When the law requires negligence as to an objective element, the requirement is also satisfied by proof of purpose, knowledge, or recklessness as to the element. When the law requires recklessness as to an objective element, the requirement is also satisfied by proof of knowledge or purpose as to the element. When the law requires knowledge as to an objective element, the requirement is also satisfied by proof of purpose as to the element.

(c) **SUBSTITUTE CULPABLE MENTAL STATE OF INTENT.** "Intentionally" means either purposefully or knowingly. When the law requires intent as to an objective element, the requirement is satisfied by proof of purpose or knowledge as to the element.

Criminal Code Reform Commission Language

§ 22A-207 RULES OF INTERPRETATION APPLICABLE TO CULPABLE MENTAL STATE REQUIREMENT

(a) DISTRIBUTION OF ENUMERATED CULPABLE MENTAL STATES. Any culpable mental state specified in an offense applies to all subsequent results and circumstances until another culpable mental state is specified, with the exception of any result or circumstance for which the person is strictly liable under § 22A-207(b).

(b) IDENTIFICATION OF ELEMENTS SUBJECT TO STRICT LIABILITY. A person is strictly liable for any result or circumstance in an offense:

(1) That is modified by the phrase “in fact,” or

(2) To which legislative intent explicitly indicates strict liability applies.

(c) DETERMINATION OF WHEN RECKLESSNESS IS IMPLIED. A culpable mental state of “recklessly” applies to any result or circumstance not otherwise subject to a culpable mental state under § 22A-207(a), or subject to strict liability under § 22A-207(b).

Corresponding Sentencing Commission Language

§ 22A-206 RULES OF CONSTRUCTION GOVERNING CULPABLE MENTAL STATES

(a) RULE OF DISTRIBUTION. A specified culpable mental state applies to all subsequent result and circumstance elements in an offense, with the exception of any result or circumstance element for which the person is strictly liable, until another culpable mental state is specified.

(b) RULE OF IMPLICATION. A culpability requirement of recklessness applies to any result or circumstance element not otherwise subject to a culpable mental state under § 22A-206(a) but to which some culpable mental state is required under § 22A-204(a).