First Draft of Report #53 - Pinkerton Liability

SUBMITTED FOR ADVISORY GROUP REVIEW
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DISTRICT OF COLUMBIA CRIMINAL CODE REFORM COMMISSION
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This Draft Report contains recommended reforms to District of Columbia criminal statutes for review by the D.C. Criminal Code Reform Commission's statutorily designated Advisory Group. A copy of this document and a list of the current Advisory Group members may be viewed on the website of the D.C. Criminal Code Reform Commission at www.ccrc.dc.gov.

This Draft Report has two main parts: (1) draft statutory text for an enacted Title 22 (Title 22E) of the D.C. Code; and (2) commentary on the draft statutory text. The commentary explains the meaning of each provision and considers whether existing District law would be changed by the provision.

Any Advisory Group member may submit written comments on any aspect of this Draft Report to the D.C. Criminal Code Reform Commission. The Commission will consider all written comments that are timely received from Advisory Group members. Additional versions of this Draft Report may be issued for Advisory Group review, depending on the nature and extent of the Advisory Group's written comments. The D.C. Criminal Code Reform Commission's final recommendations to the Council and Mayor for comprehensive criminal code reform will be based on the Advisory Group's timely written comments and approved by a majority of the Advisory Group's voting members.

The deadline for the Advisory Group's written comments on this First Draft of Report #53—Pinkerton Liability, is June 19, 2020.

Oral comments and written comments received after these dates may not be reflected in the next draft or final recommendations. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

RCC § 22E-304. Limitation on Vicarious Liability for Conspirators.

(a) A person who is a party to a criminal conspiracy as defined under RCC § 22E-303 shall not be liable for an offense committed by another party to the conspiracy, unless:

(b) Either:

(1) The person satisfies the requirements for criminal liability specified in RCC § 22E-210, RCC § 22E-211, or RCC § 22E-302; or

(2) Expressly specified by statute that a party to a conspiracy may be held criminally liable for an offense committed by another party to the conspiracy.

COMMENTARY

Explanatory Note. *This section specifies that a party to a conspiracy under RCC § 22E-303 may not be held liable for a criminal act of another party to the conspiracy unless an independent basis of liability is established under the RCC provisions concerning accomplice liability, liability for causing crime by an innocent actor, or liability for solicitation, or under a District statute that otherwise expressly specifies such liability to exist. This section negates existing District case law recognizing what is commonly referred to as the Pinkerton doctrine.*

Subsection (a) specifies that a person who commits a criminal conspiracy is not liable for a criminal offense committed by another participant in the conspiracy, unless an independent basis for liability is established in one of two ways. This subsection codifies that there is no general, vicarious liability for co-conspirators while recognizing that other statutes may provide a basis for vicarious liability. As used here, "criminal conspiracy" refers to the crime defined under RCC § 22E-303, whether or not another person is charged with or convicted of such a crime.[1]

Subsection (b) includes two circumstances in which an actor may be held liable for the acts committed by another participant in the conspiracy. Paragraph (b)(1) specifies that a person may be vicariously liable for an offense committed by another party to the conspiracy if that person satisfies requirements for criminal liability specified in RCC §§ 22E-210, 22E-211, or 22E-302. These sections specify the requirements for accomplice liability, liability for causing crime by an innocent actor, and solicitation. A person has vicarious liability for an offense committed by a co-conspirator if these other bases of liability satisfied, and a prosecution may proceed under one or more of these bases of liability.

Paragraph (b)(2) provides that a person may be held liable for an offense committed by another party to the conspiracy if another statutory provision expressly specifies that a person may be liable for a criminal offense committed by a fellow party to a conspiracy. A prosecution may proceed under such a statutorily-specified basis of liability.

Relation to Current District Law. *RCC § 22E-304 changes current District law by barring general, vicarious liability for the substantive crimes of a co-conspirator.*

The current D.C. Code does not provide general, vicarious liability for the substantive crimes of a co-conspirator. A person may be subject to vicarious liability for actions of another under the current conspiracy statute, D.C. Code § 22–1805a, under the aiding and abetting statute, D.C. Code § 22–1805, or under the statute for soliciting a crime of violence D.C. Code § 22–2107. However, District case law has established that, in addition to conspiracy, accomplice,

[1] For example, this section applies to an offense committed by an unindicted co-conspirator.

and solicitation liability, a person can be held liable for the substantive offenses committed by a co-conspirator when such a crime was in furtherance of the conspiracy and reasonably foreseeable.[2] This District case law follows the U.S. Supreme Court ruling in *Pinkerton v. United States* that a party to a conspiracy to violate federal crimes in the Internal Revenue Code may be held liable for a criminal offense committed by another party to the conspiracy if the offense is in furtherance of the conspiracy, and was reasonably foreseeable.[3] This theory of liability has become commonly known as the *Pinkerton* doctrine, and has been adopted by many United States jurisdictions[4] (though several jurisdictions have rejected the approach[5]).

RCC § 22E-304 supersedes District case law expanding criminal liability under the *Pinkerton* doctrine. Beyond the liability a person faces for entering into a conspiracy, soliciting another to commit a crime or acting as an accomplice, the doctrine imposes additional liability for criminal offenses committed by others in a manner that arguably results in either improper punishment for the acts of another or double punishment for the conspiracy.[6] Under *Pinkerton*, a person who is party to a conspiracy may be held liable for any reasonably foreseeable crimes committed by other parties in furtherance of the conspiracy. This effectively lowers the requisite mental state for the other offense to negligence, the least culpable mental state codified under the RCC.[7] Consequently, a person may be held liable for a crime committed by another under *Pinkerton*, even if that person did not intend, or have any suspicion, that another party to the conspiracy would commit an additional offense in furtherance of the conspiracy.[8] This approach may be consistent with some civil law standards for imposing liability,[9] but has been sharply criticized for being inconsistent with culpable mental state requirements throughout American criminal law.[10]

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[2] *Wilson–Bey v. United States,* 903 A.2d 818, 840 (D.C.2006) (*en banc*) (quoting *Gordon v. United States,* 783 A.2d 575, 582 (D.C.2001)). (““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”).

[3] *Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946).

[4] *E.g.*, Minn. Stat. § 609.05; Tex. Penal Code Ann. § 7.02; Wis. Stat. § 939.05. *State v. Walton*, 630 A.2d 990, 998-99 (Ct 1993); *People v. Bell*, 447 N.E.2d 909, 916 (Ill. App. Ct. 1983); *Smith v. State*, 549 N.E.2d 1036, 1038 (Ind. 1990); *State v. Tyler*, 840 P.2d 413, 424 (Kan. 1992); *State v. Stein*, 360 A.2d 347, 358 (N.J. 1976); *Commonwealth v. Roux*, 350 A.2d 867, 871-72 (Pa. 1976); *State v. Kukis*, 237 P. 476, 481 (Utah 1925).

[5] *E.g.*, Ala. Code § 13A-4-3; HRS § 702-22; Mont. Code Ann. § 45-2-302; N.H. Rev. Stat. Ann. § 626:8. State ex rel. Woods v. Cohen, 844 P.2d 1147, 1151 (Ariz. 1992); People v. McGee, 399 N.E.2d 1177, 1182 (N.Y. 1979); State v. Lind, 322 N.W.2d 826, 841-42 (N.D. 1982); State v. Stein, 27 P.3d 184, 189 (2001).

[6] *See, e.g.*, *Pinkerton*, 328 U.S. at 649-650 (“If [the Pinkerton doctrine] does not violate the letter of constitutional right, it fractures the spirit.”) (J. Rutledge dissenting).

[7] Alex Kreit, *Vicarious Criminal Liability and the Constitutional Dimensions of Pinkerton*, 57 Am. U. L. Rev. 585, 589 (2008) (“The ‘reasonably foreseeable’ requirement, for instance, imposes a minimum mens rea of negligence for vicarious liability stemming from a conspiracy”). Commentators have argued that the “reasonable foreseeability” requirement “provid[es] no meaningful limits on vicarious liability.” Mark Noferi, *Towards Attenuation: A "New" Due Process Limit on Pinkerton Conspiracy Liability*, 33 Am. J. Crim. L. 91, 113 (2006).

[8] For example, A and B agree to distribute a controlled substance. Unbeknownst to A, B decides to kill rival C in order to increase the volume of sales. Under the *Pinkerton* theory, A could be held liable for murder, even though he did not kill anyone, or know that B intended to kill anyone.

[9] *See, e.g.,* George P. Fletcher, *Rethinking Criminal Law* 663 (1978) (noting that while vicarious liability “might make some sense in the field of torts . . . it is patently absurd to think of conspirators controlling each other's acts.”).

[10] *See, e.g.,* Matthew A. Pauley, *The Pinkerton Doctrine and Murder*, 4 Pierce L. Rev. 1, 3 (2005) (“the Pinkerton rule, is one of the most controversial doctrines in modern criminal law”). Wayne LaFave, § 13.3(a)Complicity and conspiracy distinguished, 2 Subst. Crim. L. § 13.3(a) (3d ed.) (noting “the *Pinkerton* rule never gained broad acceptance”) Both the Model Penal Code and proposed revised Federal criminal code reject *Pinkerton* liability.

The *Pinkerton* doctrine contrasts sharply with RCC § 22E-210, which defines the requirements for accomplice liability, and current District law regarding accomplice liability. Under RCC § 22E-210, an actor may be held liable for a criminal offense committed by another only if the person "acts with the culpability required for that offense."[11] This reflects well established District case law, which requires that an accomplice has "the culpable mental state required for the underlying crime committed by the principal."[12] In addition, accomplice liability requires that the actor *purposely* assists or encourages the principal to engage in conduct constituting the offense. Only when these stringent mental state requirements are satisfied can a person be held liable as an accomplice to another person's criminal conduct. *Pinkerton*, by contrast imposes liability for criminal offenses committed by others while *lowering* the requisite culpable mental state.[13]

Consider the following hypothetical. A and B agree to run an illegal bookmaking operation. Without informing B, A decides to take out the competition by severely beating a rival bookmaker C with a weapon, demanding that he stop taking bets. B did not know that A was going to beat C, and had no intent that the bookmaking operation would lead to violence. Nonetheless, under the *Pinkerton* doctrine, B could be held liable for felony assault and is subject to the same penalties as if he had beaten C himself, provided that A's conduct was reasonably foreseeable and in furtherance of the conspiracy. Although B acted culpably by entering into the conspiracy in the first place, the penalties provided for criminal conspiracy[14] adequately provide a proportionate penalty.

RCC § 22E-304 changes current District law by reversing DCCA case law that recognizes the *Pinkerton* doctrine. This change improves the proportionality of the revised criminal statutes.

Relation to National Legal Trends. The change to current District law is supported by national legal trends. The Model Penal Code,[15] the Proposed Federal Criminal Code[16] and

Proposed New Federal Criminal Code § 401 (1971) expressly provides that if one is a co-conspirator he is also liable as an accomplice only if the usual requirements are met.

[11] RCC § 22E-210.

[12] *Tann v. United States*, 127 A.3d 400, 444-45 (D.C. 2015).

[13] Although *Pinkerton* requires that the actor was negligent as to the additional offense, nearly all criminal offenses in the RCC require at least recklessness. *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[14] RCC § 22E-303.

[15] MPC § 2.06. Commentary specifically states that "The most important point at which the Model Code formulation diverges from the language of many courts is that it does not make 'conspiracy' as such a basis of complicity in substantive offenses committed in furtherance of its aims." MPC Commentary at 295.

[16] Proposed New Federal Criminal Code § 401.

fifteen[17] of the twenty-nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code (MPC) and have a general part,[18] abolish the *Pinkerton* doctrine.

[17] Code of Ala. § 13A-4-3(a); Alaska Stat. § 11.16.110; *State ex rel. Woods v. Cohen*, 844 P.2d 1147, 1151 (Ariz. 1992); Ark. Code Ann. § 5-2-402; Colo. Rev. Stat. Ann. § 18-1-602; Del. Code Ann. tit. 11, § 271; Haw. Rev. Stat. Ann. § 702-221; Mo. Ann. Stat. § 562.041; Mont. Code Ann. § 45-2-302; N.H. Rev. Stat. Ann. § 626:8; People v. McGee, 399 N.E.2d 1177, 1182 (N.Y. 1979); N.D. Cent. Code Ann. § 12.1-03-01; State v. Lind, 322 N.W.2d 826, 841-42 (N.D. 1982); Or. Rev. Stat. Ann. § 161.155; S.D. Codified Laws §§ 22-3-3, 22-3-3.1, 22-3-5 and 22-3-8; *State v. Stein*, 27 P.3d 184, 189 (Wash. 2001) (*en banc*).

[18] *See* Paul H. Robinson & Markus D. Dubber, The American Model Penal Code: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.