



First Draft of Report #38 –
Enlistment of Minors
&
Maintaining Location to Distribute or
Manufacture Controlled Substances

SUBMITTED FOR ADVISORY GROUP REVIEW
July 12, 2019

DISTRICT OF COLUMBIA CRIMINAL CODE REFORM COMMISSION
441 FOURTH STREET, NW, SUITE 1C001 SOUTH
WASHINGTON, DC 20001
PHONE: (202) 442-8715
www.ccrdc.dc.gov

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.ccrdc.dc.gov.

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 #38 – Enlistment of Minors & Maintaining a Place for Distribution or Manufacture Controlled Substances is Monday, September 16, 2019. Oral comments and written comments received after this date 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.

The Commission recommends the repeal of D.C. Code § 48-904.03a, which criminalizes knowingly opening or maintaining a place to manufacture, distribute, or store for the purpose of manufacturing or distributing a narcotic or abusive drug.

COMMENTARY

Explanatory Note and Relation to Current District Law

Current D.C. Code § 48-904.03a, provides: “It shall be unlawful to knowingly open or maintain any place to manufacture, distribute, or store for the purpose of manufacture or distribution a narcotic or abusive drug.”

The effect of repeal of D.C. Code § 48-904.03a depends on the meaning of the statute and the extent to which liability exists under the RCC and other District statutes. The D.C. Court of Appeals (DCCA) does not appear to have any published cases interpreting this statute. Although the statute specifies that a person must “knowingly” open or maintain a place, it is unclear what culpable mental state applies to the following terms, and whether the following terms are inchoate or not—i.e. whether the place must actually be used to manufacture, distribute, or store for the purpose of manufacture or distribution a narcotic or abusive drug, or whether an intent or purpose to manufacture, etc. is sufficient. The statute’s use of the infinitive forms “to manufacture, distribute, or store” suggests¹ that the offense is inchoate and that a person must either open or maintain the place either “with intent to” or “with the purpose of” manufacturing, distributing, or storing a narcotic or abusive drug. It is also unclear whether a person who knows, but does not *desire* that the place be used to manufacture, distribute, or store a drug is guilty of this offense.

If D.C. Code § 48-904.03a requires that the person desires that the place opened or maintained be used to manufacture, distribute, or store for the purposes of manufacture or distribution, an abusive or narcotic drug, repeal of the statute would not decriminalize any conduct because such a person would still be liable as an accomplice to trafficking of a controlled substance.² Under RCC § 22E-210, a person is guilty as an accomplice if that person acts with the culpability required by the underlying offense, and purposely assists another person with the planning or commission of the conduct constituting the offense, or purposely encourages another person to engage in specific conduct constituting the offense.³ The revised trafficking of a controlled substance statute requires that a person knowingly distributes, manufactures, or possesses with intent to distribute or manufacture, a controlled substance. Consequently, a person who knowingly opens or maintains a place, with the *purpose* of assisting another person in distributing, manufacturing, or storing for the purposes of manufacturing or distributing a narcotic or abusive drug could be liable as an accomplice to trafficking of a controlled substance.

If D.C. Code § 48-904.03a only requires *knowledge* as to whether the place will be used to distribute, manufacture, or store drugs, then repeal of the statute would decriminalize some conduct. A person who knows, but does not desire, that the place be used to manufacture, distribute, or store a narcotic or abusive drug would not satisfy the culpable mental state required

¹ In the alternative, the statute could have plainly stated that it applies to “...any place used to manufacture, distribute...” to signal that the offense was not inchoate.

² See Commentary to revised D.C. Code § 48-904.01b.

³ The revised trafficking of a controlled substance statute specifies that the rules governing accomplice liability under RCC § 22E-210 apply to that offense.

for accomplice liability. Requiring knowledge as opposed to purpose, is inconsistent with RCC § 22E-210, and well established principals governing criminal liability for the acts of others.⁴ There is no clear rationale for why, at present, general rules of accomplice liability are inadequate when applied to distribution or manufacturing of abusive or narcotic drugs.⁵ And, as applied to D.C. Code § 48-904.03a, a knowledge standard may lead to disproportionate outcomes in some circumstances. For example, if a parent or spouse is practically certain that his child or spouse will store a narcotic or abusive drug in the family home for later distribution, that parent or spouse likely commits a crime under D.C. Code § 48-904.03a even if the parent genuinely wishes (and/or takes affirmative steps to prevent) the child or spouse from engaging in such conduct.

To the extent that D.C. Code § 48-904.03a requires only knowledge as to all elements of the offense, repeal of the statute would change current District law, but doing so improves the proportionality and consistency of the revised statutes.

Relation to National Legal Trends

Repealing D.C. Code § 48-904.03a has significant support in other states' statutes. Of the twenty-nine states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part,⁶ a slight majority do not have an analogous offense.⁷

⁴ *Wilson-Bey v. United States*, 903 A.2d 818 (D.C. 2006) (noting that *Peoni v. United States*, 100 F.2d 401 (2nd Cir. 1938), which sets forth a purpose-based formulation of accomplice liability has been a “prevailing authority” for nearly 70 years); *See also*, Commentary to RCC § 22E-210.

⁵ But see, e.g., RCC § 22E-1603 (Trafficking in Labor or Services) requires only that a person be practically certain that their transportation, housing or other service to another person will, as a result, cause that person to be forced to provide labor or services—e.g. a taxi driver who knowingly transports a person to a location where they will be forced to provide labor. The lowering of the typical standard for accomplice liability in the context of human trafficking crimes may not, however, be appropriate for less serious crimes.

⁶ *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.

⁷ These states are: Connecticut, Hawaii, Kansas, Kentucky, Maine, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Tennessee, and Texas.

The states that do have an analogous offense are: Alabama, Ala. Code § 20-2-71; Alaska, Alaska Stat. Ann. § 11.71.040; Arkansas, Ark. Code Ann. § 5-64-402; Arizona, Ariz. Rev. Stat. Ann. § 13-3421; Colorado, Colo. Rev. Stat. Ann. § 18-18-411; Delaware, Del. Code Ann. tit. 16, § 4760; Illinois, 720 Ill. Comp. Stat. Ann. 570/406.1; Indiana, Ind. Code Ann. § 35-45-1-5; Missouri, Mo. Ann. Stat. § 579.105; North Dakota, N.D. Cent. Code Ann. § 19-03.1-24; South Dakota, S.D. Codified Laws § 22-42-10; Utah, Utah Code Ann. § 58-37-8; Washington, Wash. Rev. Code Ann. § 69.50.402; and Wisconsin, Wis. Stat. Ann. § 961.42.

The Commission recommends the repeal the enlistment of minors offense, under D.C. Code § 48-904.07, which criminalizes a person who is 21 years of age or older, enlisting, hiring, contracting, or encouraging any person under 18 years of age to sell or distribute any controlled substance.

COMMENTARY

Explanatory Note and Relation to Current District Law

Current D.C. Code § 48-904.07, provides:

Any person who is 21 years of age or over and who enlists, hires, contracts, or encourages any person under 18 years of age to sell or distribute any controlled substance, in violation of § 48-904.01(a), for the profit or benefit of such person who enlists, hires, contracts, or encourages this criminal activity shall be punished for sale or distribution in the same manner as if that person directly sold or distributed the controlled substance.⁸

Repeal of D.C. Code § 48-904.07 may reduce the severity of penalties a person is subject to,⁹ however, it would appear to have little or no effect on the existence of criminal liability because such liability already exists in overlapping statutes in the RCC and existing D.C. Code offenses. A person engaging in conduct constituting enlistment of minors may still be held criminally liable for such conduct: as an accomplice to the minor's trafficking of a controlled substance, or for causing an innocent or irresponsible person to commit the crime; for committing criminal conspiracy to traffic a controlled substance; and/or under the separate offense of contributing to the delinquency of a minor.

First, any conduct covered by the enlistment of minors offense in which the minor actually distributes, or attempts to distribute, a controlled substance would still be criminalized under the rules of accomplice liability set forth in RCC § 22E-210.¹⁰ Accomplice liability requires that a person assists another person with the planning or commission of conduct constituting that offense, or encourages another person to engage in specific conduct constituting that offense. Enlisting, hiring, contracting, or encouraging a minor to distribute a controlled substance satisfies this *actus reus* requirement.¹¹ Accomplice liability also requires that the person had the *purpose* to assist or encourage another person in the planning or commission of the conduct constituting the offense. The enlistment of minors offense requires that the person enlists, hires, contracts, or encourages a minor “for the for the profit or benefit of such

⁸ D.C. Code §48-904.07 (b) specifies penalties for violation of this section: “Anyone found guilty of subsection (a) of this section shall be subject to the following additional penalties: (1) Upon a first conviction the party may be imprisoned for not more than 10 years, fined not more than the amount set forth in § 22-3571.01, or both; (2) Upon a second or subsequent conviction, the party may be imprisoned for not more than 20 years, fined not more than the amount set forth in § 22-3571.01, or both.”

⁹ The maximum penalties for accomplice liability and crime by an innocent, both under current District law and the RCC are the same as the maximum penalties for the predicate offense. Penalties for conspiracy are half the maximum penalty of the predicate offense in the RCC. The maximum penalty for Contributing to the Delinquency of a Minor under D.C. Code § 22-811 varies from 6 months to 10 years.

¹⁰ The revised trafficking of a controlled substance offense specifies that Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to the offense.

¹¹ *Outlaw v. United States*, 604 A.2d 873, 875 (D.C. 1992) (holding that acting as an aider and abettor to a minor's distribution of a controlled substance is sufficient to satisfy the elements of the enlistment of minors offense).

person[.]”¹² In virtually every case in which a person acts for his or her own profit or benefit, that person would also have purposely assisted or encouraged the minor to distribute a controlled substance.¹³ In addition to accomplice liability, any effort that results in the minor distributing or attempting to distribute a controlled substance may render the principal liable for causing crime by an innocent or irresponsible person, as set forth in RCC § 22E-211.¹⁴

Second, short of the minor actually distributing, or attempting to distribute, a controlled substance, there may be liability for a conspiracy to commit the underlying controlled substance offense. If a person 21 years of age or older agrees with a minor to engage in or aid the planning or commission of conduct which, if carried out, will constitute distribution of a controlled substance or attempted distribution of a controlled substance, and either party engages in an overt act in furtherance, criminal conspiracy liability would apply.

Third, short of the minor actually distributing, or attempting to distribute, a controlled substance, a person who merely encourages or solicits minors to engage in such conduct appears to be liable under the separate contributing to the delinquency of minors offense.¹⁵ D.C. Code § 22-811 makes it a crime for “an adult being 4 or more years older than a minor, to invite, solicit, recruit, assist, support, cause, encourage, enable, induce, advise, incite, facilitate, permit, or allow the minor” to possess a controlled substance¹⁶ or to violate any criminal law of the District of Columbia.¹⁷

Relation to National Legal Trends

Repealing D.C. Code § 48-904.07 is supported by national legal trends. Of the twenty-nine states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part,¹⁸ a slight majority do not have an analogous enlistment of minors to distribute offense.¹⁹

¹² D.C. Code § 48-904.07.

¹³ Under RCC § 22E-210 a person may be convicted as an accomplice even if the principal has not been prosecuted or convicted, has been convicted of a different offense or degree of an offense, or has been acquitted. Even if the minor who distributes the controlled substance is never prosecuted or convicted for a criminal offense due to being a juvenile, accomplice liability may still apply to the person who encourages the minor to distribute a controlled substance.

¹⁴ The revised trafficking of a controlled substance offense specifies that Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to the offense.

¹⁵ D.C. Code § 22-811.

¹⁶ D.C. Code § 22-811 (a)(2).

¹⁷ D.C. Code § 22-811 (a)(5), (7).

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.

¹⁹ These states are: Alaska, Alabama, Arkansas, Colorado, Indiana, Kansas, Maine, Montana, New Hampshire, New Jersey, South Dakota, Tennessee, Texas, Utah, and Washington.

The state that do have an analogous offense are: Arizona, Ariz. Rev. Stat. Ann. § 13-3409; Connecticut, Conn. Gen. Stat. Ann. § 21a-278a; Delaware, Del. Code Ann. tit. 16, § 4751A; Hawaii, Haw. Rev. Stat. Ann. § 712-1249.7; Illinois, 720 Ill. Comp. Stat. Ann. 570/407.1; Kentucky, Ky. Rev. Stat. Ann. § 530.064; Minnesota, Minn. Stat. Ann. § 152.022; Missouri, Mo. Ann. Stat. § 568.045; New York, N.Y. Penal Law § 220.28; North Dakota, N.D. Cent. Code Ann. § 19-03.1-23; Ohio, Ohio Rev. Code Ann. § 2925.02; Oregon, Or. Rev. Stat. Ann. § 167.262; Wisconsin, Wis. Stat. Ann. § 961.455.