D.C. CRIMINAL CODE REFORM COMMISSION

TESTIMONY ON "THE STRONGER SAFER AMENDMENT ACT OF 2023"

COMMITTEE ON THE JUDICARY & PUBLIC SAFETY HEARING
June 27, 2023

DISTRICT OF COLUMBIA CRIMINAL CODE REFORM COMMISSION
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I. Introduction

Good afternoon, Councilmember Pinto, and thank you for allowing me to testify on behalf of the Criminal Code Reform Commission regarding B25-0291, the "Stronger Safer Amendment Act of 2023" ("the bill"). Please note that the CCRC is not providing testimony on all provisions of the bill, including those related to door camera incentives, changes to Sentencing Commission membership, changes related to the Criminal Justice Coordinating Council, DNA collection rules, or extradition for persons charged with misdemeanors.

II. Changes under Title II "Safe Schools and Safe Students."

A. Subtitle A. Changes to the Anti-Sexual Abuse Act of 1994

The bill proposes changes to two current D.C. Code sex offense statutes: 1) The definition of "significant relationship" in D.C. Code § 22-300l; and 2) The first degree sexual abuse of a secondary education student offense in D.C. Code § 22-3009.01. The definition and the offense both specify various individuals that are prohibited from engaging in otherwise consensual sexual activity, either with a minor over the age of 16 years,[1] or with a secondary education student under the age of 20 years.

The revisions ensure that the specified individuals include contractors, consultants, and volunteers are included within the scope of sex offenses relating to sexual acts with students. From a policy standpoint, the revisions have merit, and the RCCA made similar recommendations. However, the proposed drafting maintains ambiguities in the current statutory language as to the scope of the specified individuals. The CCRC will discuss each proposed revision separately, with an emphasis on clarifying scope.

The definition of "significant relationship"

Under current District law, a minor that is at least 16 years of age cannot consent to nonforceful sexual activity if the other person is: 1) At least 18 years of age; and 2) In a "significant relationship" with the minor.[2] Thus, the definition of "significant relationship" determines whether otherwise legal sexual activity is a criminal offense.

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[1] The term "significant relationship" is used in enhancement and misdemeanor sexual abuse of a child or minor; focusing on felony offenses

[2] These are two of the requirements for the current sexual abuse of a minor statutes. D.C. Code §§§ 22-3009.01; 22-3009.02. The third and final requirement is that the minor must be under 18 years of age. D.C. Code § 22-3001(5A) (defining "minor" for the current D.C. Code sexual abuse offenses as a "a person who has not yet attained the age of 18 years.").
Given the definition of "minor" as a person under 18 years of age, the sexual abuse of a minor offenses could theoretically apply to minors under the age of 16. However, the D.C. Code considers such a minor to be a "child" and has separate sexual abuse of a "child" offenses. D.C. Code §§ 22-3001(3) (defining a "child" as "a person who has not yet attained the age of 16 years."); 22-3008 and 22-3009 (first degree and second degree sexual abuse of a child offenses). Thus, in practice, the sexual abuse of a minor statutes will likely never be applied to minors under the age of 16 years.

The current definition of "significant relationship" is several subsections long.[3] The bill proposes replacing the phrase "Any employee or contractor" in current subsection (D) with the phrase "Any employee, contractor, consultant, or volunteer". However, the phrase "Any employee or contractor" doesn't appear in current subsection (D).

It is likely that the recommendation is intended to replace the phrase "Any employee or *volunteer*", which does appear in subsection (D). With this revision, the subsection would read:

> "Any employee*, contractor, consultant,* or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor."

As a policy matter, the Council may wish to clarify that subsection (D) of the definition of "significant relationship" includes contractors and consultants. The current statutory language is unclear on this point, and there is no case law.

However, the proposed drafting maintains an ambiguity that exists in current subsection (D) as to scope. The current statutory language specifies "any" employee or volunteer of the specified institutions, which suggests that having a specific job title is sufficient. However, the subsection then lists specific individuals, such as a teacher or chorus director, that are likely to have authority over a minor, and concludes with "or any other person *in a position of trust with or authority over a minor*" (emphasis added). The latter part of the definition makes it unclear if having a specified job is sufficient, or if the person must actually be in a position of trust or authority over the minor.

Adding contractors and consultants to subsection (D), as the proposed revision seems to do, would maintain this current ambiguity and actually compound it. Even if the current subsection (D) is read broadly to include "any" employee or volunteer of the specified institutions or organizations, these individuals may have at least some contact with a minor in a school setting.

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[3] D.C. Code § 22-3001(10):

> "Significant relationship" includes:
>
> (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption;
>
> (B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim;
>
> (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act; and
>
> (D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.

In contrast, contractors and volunteers could easily have no connection or a fleeting connection to the school setting, such as construction contractors[4] or volunteers for a single event.

The CCRC recommends separating out these different groups of people, as the equivalent definition in the RCCA did. The equivalent RCCA definition[5] specified, in relevant part:

> (E) A religious leader described in § 14-309;[6]
> (F) A coach, not including a coach who is a secondary school student; a teacher, counselor, principal, administrator, nurse, or security officer; provided, that such an actor is an employee, contractor, or volunteer at the school at which the complainant is enrolled or at a school where the complainant receives educational services or attends educational programming;
> (G) Any employee, contractor, or volunteer of a school, religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, that exercises supervisory or disciplinary authority over the complainant; or

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[4] For example, an 18 year old construction contractor who supervises work inside a school building and engages in otherwise consensual sexual contact with a 17 year old student could be convicted of First Degree Sexual Abuse of a Minor regardless of their level of interaction, including if they knew each other from outside the school setting. The offense does not require that the sexual activity occur on school grounds, so any sexual activity would be prohibited, regardless of location.

[5] The equivalent RCCA term was "position of trust with or authority over" and it was defined as:

> "'Position of trust with or authority over' means a relationship to a complainant that is:
> (A) A parent, grandparent, great-grandparent, sibling, or a parent's sibling, or an individual with whom such a person is in a romantic, dating, or sexual relationship, whether related by:
> (i) Blood or adoption; or
> (ii) Marriage, domestic partnership, either while the marriage or domestic partnership creating the relationship exists, or after such marriage or domestic partnership ends;
> (B) A half-sibling related by blood;
> (C) A person acting in the place of a parent under civil law, the current spouse or domestic partner of such a person, or an individual with whom such a person is in a romantic, dating, or sexual relationship;
> (D) Any person, at least 4 years older than the complainant, who resides intermittently or permanently in the same dwelling as the complainant;
> (E) A religious leader described in § 14-309;
> (F) A coach, not including a coach who is a secondary school student; a teacher, counselor, principal, administrator, nurse, or security officer; provided, that such an actor is an employee, contractor, or volunteer at the school at which the complainant is enrolled or at a school where the complainant receives educational services or attends educational programming;
> (G) Any employee, contractor, or volunteer of a school, religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, that exercises supervisory or disciplinary authority over the complainant; or
> (H) A person responsible under civil law for the health, welfare, or supervision of the complainant.

RCCA § 22A-101, definition of "position of trust with or authority over". *See* Revised Criminal Code Act of 2021, Enacted Version, (available at https://lims.dccouncil.gov/Legislation/B24-0416) for more information.

[6] A "religious leader described in § 14-309" is a "priest, clergyman, rabbi, or other duly licensed, ordained, or consecrated minister of a religion authorized to perform a marriage ceremony in the District of Columbia or duly accredited practitioner of Christian Science." D.C. Code § 14-309.

(H) A person responsible under civil law for the health, welfare, or supervision of the complainant.

This, or similar drafting, distinguishes between persons whose roles necessarily involves a degree of authority over students, and those whose roles do not. Within these different categories, the definition specifies contractors and volunteers to ensure that they are included.

The CCRC would be able to assist the Council in revising some or all of the current definition of "significant relationship", as well as advise the Council how any changes interact with the proposed revision to first degree sexual abuse of a secondary education student, discussed next.

First degree sexual abuse of a secondary education student

The current D.C. Code first degree sexual abuse of a secondary education student statute prohibits specified individuals from engaging in sexual activity with a student under 20 years of age that is enrolled in the same school or school system.[7] The current specified individuals are "[a]ny teacher, counselor, principal, coach, or other person of authority" in a secondary school.[8] The proposed new language would add "contractor", "consultant", and "volunteer" to this list so that it reads "[a]ny teacher, counselor, principal, coach, *contractor, consultant, volunteer* or other person of authority" (emphasis added).

As a policy matter, the Council may wish to clarify that contractors, consultants, and volunteers fall within the scope of the current statute. The current statutory language is unclear on this point, and there is no case law. The RCCA made a similar recommendation.[9]

However, the proposed drafting maintains an ambiguity that exists in the current statute as to scope. The current statute specifies "any" teacher, counselor, principal, coach, which suggests that having a specific job title is sufficient. However, the statute then lists "or other person of authority". The latter part of the definition makes it unclear if having a specified job is sufficient, or if the person must actually exercise authority over the minor.

Adding contractors, consultants, and volunteers to the statute, as the bill proposes, would maintain this current ambiguity and actually compound it. Even if the statute is read broadly to include "any" teacher, counselor, principal, or coach, these individuals may have at least some contact with the student in the school setting. In contrast, contractors, consultants, and volunteers could have little or no connection to the school setting, such as construction contractors[10] or volunteers

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[7] D.C. Code § 22-3009.03. The statute in its entirety is:

> Any teacher, counselor, principal, coach, or other person of authority in a secondary level school who engages in a sexual act with a student under the age of 20 years enrolled in that school or school system, or causes that student to engage in a sexual act, shall be imprisoned for not more than 10 years, fined not more than the amount set forth in § 22-3571.01, or both.

[8] D.C. Code § 22-3009.03.

[9] RCCA § 22A-2303, Sexual Abuse by Exploitation. *See* Revised Criminal Code Act of 2021, Enacted Version, (available at https://lims.dccouncil.gov/Legislation/B24-0416) for more information.

[10] For example, a construction contractor who supervises work inside a school building or on school grounds would be prohibited from engaging in otherwise consensual sexual activity with a student enrolled at the school or in the same school system regardless of their level of interaction, including if they knew each other from outside the school

for a single event. Given that the statute applies to students that are at least 18 years of age, but under 20 years of age,[11] the proposed language could even prohibit similarly aged student volunteers from engaging in otherwise consensual sexual activity.[12] Such a broad offense arguably infringes on the autonomy of adults who are also secondary education students.

The CCRC recommends removing contractors, consultants, and volunteers as standalone categories and instead requiring that they are persons of authority: "[a]ny teacher, counselor, principal, coach, or other person of authority in a secondary level school, *working as a contractor, consultant, or volunteer*". The CCRC further recommends including "employee" to make clear they are included: "[a]ny teacher, counselor, principal, coach, or other person of authority in a secondary level school, *working as an employee, contractor, consultant, or volunteer*".[13]

In addition, the Council may wish clarify the meaning of "other person of authority" in the current statute. It is undefined, and as discussed, makes the scope of the statute unclear. The RCCA deleted this phrase entirely and expanded the list of specified individuals.[14] This approach avoids fact-specific inquiries into the relationship between the listed individuals and the student.

The CCRC is able to assist the Council with any of the above drafting changes, or others, as well as advise the Council how any changes interact with the proposed revision to the definition of "significant relationship", discussed above.

Finally, the CCRC recommends that, whatever changes the Council makes to first degree sexual abuse of a secondary education student, they also make to second degree sexual abuse of a

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setting. The offense does not require that the sexual activity occur on school grounds, so any sexual activity would be prohibited, regardless of location.

[11] The current sexual abuse of a secondary education student statutes require that the student be "under the age of 20 years". D.C. Code §§ 22-3009.03; 22-3009.04. The current D.C. Code sexual abuse provisions define a "minor" as a person under the age of 18 years, and a "child" as a person under the age of 16 years. D.C. Code §§ 22-3001(5A) (defining "minor" for the current D.C. Code sexual abuse offenses as a "a person who has not yet attained the age of 18 years."); 22-3001(3) (defining a "child" as "a person who has not yet attained the age of 16 years."). Given the definitions of "child" and "minor", it is theoretically possible that the sexual abuse of a secondary education statutes could apply to persons under 18 years of age or under 16 years of age. However, the D.C. Code has separate sexual abuse offenses for a "minor" and a "child", making it highly unlike the secondary education statutes would ever be applied in practice.

[12] For example, a 19 year-old student volunteering in the school library would be prohibited from engaging in otherwise consensual sexual activity with another student at that school that is also 19 years of age. The offense does not require that the sexual activity occur on school grounds, so any sexual activity would be prohibited, regardless of location.

[13] The Council could replace "consultant" with "employee" since it is arguably unclear how they differ, or the Council could include both terms. The equivalent RCCA offense read "working as an employee, contractor, or volunteer". RCCA § 22A-2303, Sexual Abuse by Exploitation. *See* Revised Criminal Code Act of 2021, Enacted Version, (available at https://lims.dccouncil.gov/Legislation/B24-0416) for more information.

[14] The RCCA added administrators, nurses, and security officers to the list of individuals, and also excluded coaches that are also students:

> "[A] coach, not including a coach who is a secondary school student; a teacher, counselor, principal, administrator, nurse, or security officer at a secondary school, working as an employee, contractor, or volunteer".

RCCA § 22A-2303, Sexual Abuse by Exploitation. *See* Revised Criminal Code Act of 2021, Enacted Version, (available at https://lims.dccouncil.gov/Legislation/B24-0416) for more information.

secondary education student (D.C. Code § 22-3009.04). The offenses differ only in the type of conduct prohibited[15] and penalty.

B. Subtitle B, "Criteria for Detaining Children" – Changes to D.C. Code § 16-2310

The bill changes the scope of a presumption that minors in juvenile proceedings should be detained. Current law, states that courts should use "the least restrictive settings necessary, with a preference *at all times* for the preservation of the family[.]" Given that clear purpose *codified in law*, the Council should exercise caution in expanding the use of juvenile detention.

First, the presumption is broadened to include situations in which the *juvenile poses no risk of harm to others,* but where there is concern about harm to the juvenile. For example, if the juvenile is undergoing a mental health crisis, and there is a risk of self-harm. This is beyond the scope of the CCRC's expertise, but the Committee should carefully consider whether detention in juvenile facilities is the best way to treat children who are undergoing these types of mental health crises.

Second, the Bill expands the range of offenses that are subject to the presumption of detention. Under the bill, any dangerous crime or crime of violence is now subject to the presumption. The presumption could apply to: acting as a go-between to distribute a controlled substance; shoplifting (which in almost all instances constitutes burglary); engaging in sex work as a repeat offender; or pickpocketing. These are not inherently violent offenses, and the presumption creates a risk that juveniles who have engaged in this conduct will be inappropriately detained.

III. Changes Under Title III. Illegal Discharge of a Firearm; Possession of Firearm Ammunition and Penalties

Sec. 301 of the bill proposes changes to multiple changes to different sections of the D.C. code that address firearms and ammunition.

D.C. Code § 22-4503 (unlawful possession of a firearm)

The bill would amend the offense definition and penalties for the unlawful possession of a firearm.

First, this bill proposes making it a felony to knowingly possess a firearm where the serial number has been removed, obliterated, or altered. The proposal includes a penalty of 5 years maximum in prison and a soft minimum of 2 years. The same penalty would apply to someone who receives or possesses a firearm or ammunition if they know or having reasonable cause to believe that it was stolen.

[15] First degree sexual abuse of a secondary education student prohibits a "sexual act", and second degree prohibits "sexual conduct". D.C. Code §§ 22-3009.03; 22-3009.04. "Sexual conduct" is not defined and it appears to be a typo. The statute should instead prohibit a "sexual contact" in keeping with the lower gradations of all the other current sexual abuse statutes. It may be possible to fix this typo if revisions are made to the second degree statute.

Undefined Mental States

Although this new offense specifies mental states, these terms are not defined. The language "having reasonable cause to believe" is especially vague. This language could reasonably be interpreted to mean either recklessness (i.e. that the defendant must have been aware of a substantial risk that the firearm was stolen), or negligence (i.e., the defendant was not aware of a substantial risk the firearm was stolen, but *should* have been aware given that they had reasonable cause to believe it was stolen).

The RCCA included an offense that criminalized possessing a ghost gun.[16] That offense required that an actor knowingly possessed the gun, but with *reckless* as to the fact that it was a ghost gun. The CCRC recommends adding a similar mental requirement to the proposed amendment.

Overlap with Existing Offenses

Current law has a number of provisions that address largely overlapping conduct. Under D.C. Code § 22–4512 it is explicitly unlawful to actively change, alter, remove, or obliterate the name of the maker, model, manufacturer's number, or other mark or identification on any pistol, machine gun, or sawed-off shotgun. No mental state exists in this statute which was first implemented in 1932. The statute states that possession of such an altered firearm is prima facie evidence that the possessor was the person who made the alteration. A violation of this provision carries a one year maximum penalty.[17]

Possession of a firearm which has had the serial number removed, obliterated, or altered is already criminalized under the current offense commonly known as possession of a prohibited weapon ("PPW").[18] PPW covers possession of "ghost guns," which are defined to include any "[f]irearm, including a frame or receiver, that lacks a unique serial number engraved or cast on it by a licensed manufacturer or importer in accordance with federal law, assigned by the agency of a State and permanently engraved or cast on the firearm, or otherwise placed on the firearm in compliance with § 7-2502.02."[19] PPW carries a 1 year maximum sentence, or a 10 year sentence if the defendant has a prior felony conviction. Possessing a gun with an altered serial number would constitute possession of a ghost gun, *and* the separate new offense.

Under current law, carrying a pistol outside of a home or place of business without a license ("CPWL") carries the same maximum penalty of 5 years.[20] In all likelihood, persons carrying guns without proper serial numbers would not have a license to carry that firearm and could also be charged with CPWL.

Possession of a firearm by a person with a prior felony, regardless of whether possession occurs in or outside of the home, constitutes a separate offense commonly known as Felon in Possession

[16] RCC § 22A-5103(a)(2)(E).
[17] D.C. Code § 22–4515.
[18] D.C. Code § 22-4514
[19] D.C. Code § 22-4501(2B); 7-2501.01 (9B)(A).
[20] D.C. Code § 22-4504 (a)(1).

("FIP").[21] FIP is punishable by up to 10 years, or 15 years if the prior conviction was for a crime of violence.

Possession of an unregistered firearm, even within a person's home, is also separately criminalized and carries a maximum penalty of 1 year.[22]

Current law also prohibits receiving stolen property, if that person buys, receives, possesses, or obtains control of stolen property, knowing or having reason to believe that the property was stolen.[23] The penalty for the offense is a maximum of 7 years where the property is worth more than $1,000 and 180 days if the property is worth less than that.[24]

With regard to the penalty that is noted in paragraph (c-1) the CCRC recommends more clarity as to whether the intent is a mandatory minimum of 2 years or whether that is a minimum that can be suspended. The language, as written, refers to a soft minimum in D.C. Code § 22-801(b) (Burglary) but it refers to a mandatory minimum with almost identical language in D.C. Code § 22-2104(a) (1st degree murder). This lack of clarity could lead to confusion both with considering plea offers and at sentencing.

D.C. Code. § 22-4503.01 (unlawful discharge of a firearm)

The next section that this bill seeks to amend covers the offense of an unlawful discharge of a firearm.

This bill proposes making the unlawful discharge of a firearm a felony that carries a 2 year maximum penalty. Legitimate self defense and other lawful conduct is excepted from the offense but there is no mental state that must be proven in order to be convicted under this statute. Under current law, a violation of current D.C. Code § 22-4503.01 is subject to a maximum penalty of 1 year of incarceration and a $2,500 fine.[25] A violation of 24 DCMR §§ 2300.1 – 2300.3 is subject to a fine of $300 and is not punishable by jail time. This proposed change switches this offense from a misdemeanor to a felony. As a result, it would be prosecuted by the U.S. Attorney's Office. Currently it is prosecuted by the Office of the Attorney General. No changes are being made to the definition of the offense.

The RCCA included an analogous reckless endangerment with a firearm offense. This offense specified relevant culpable mental states, and defined specific locations and circumstances in which discharging a firearm constitutes the offense. The Committee should consider adopting the RCCA's reckless endangerment with a firearm offense as an alternative to the penalty change proposed in the bill.

[21] D.C. Code § 22-4503.
[22] D.C. Code § 7–2507.06(a)(2)(B).
[23] D.C. Code § 22–3232.
[24] D.C. Code § 22–3232 (c)(1) and (2).
[25] D.C. Code §§ 22-4515; 22-3571.01.

D.C. Code. § 22-4514 (possession of dangerous weapons)

The next section that this bill seeks to amend covers the offense and penalty for possession of dangerous weapons.

The bill proposes the increase of penalties for the possession of machine guns, sawed-off shot guns, and ghost guns from 1 year to 5 years. All of these terms are currently defined in D.C. Code § 7–2501.01 and no changes are being made to those definitions in this bill. No change is being sought to the elements of the offense either, only to the penalty.

The RCCA included an offense that criminalized possession of these types of firearms, and was subject to a four year maximum penalty.[26] The proposed offense included machine guns, sawed-off shotguns, and ghost guns but also included assault weapons and restricted explosives in its list of weapons that qualified for the first degree version of the offense that was eligible for the four year maximum. That offense required a mental state that the actor knowingly possessed the prohibited item and that they did so, reckless to the fact of what the item was. The CCRC would recommend a similar change to the offense listed in this statute as well.

Sec. 302. 7-2502.07 (Penalties for miscellaneous ammunition and firearm offenses)

The next section that this bill seeks to change penalties for multiple offenses related to firearms control.

Amendment to Subsection (a)(3)(A)

The first change seeks to amend D.C. Code § 7-2507.06(a)(3)(A) to apparently clarify that penalties under subsection (a)(3)(A) would not be affected be the penalty provision under subsection (a)(4). However, it is unclear why this new language is necessary. Subsection (a)(3)(A) addresses the penalty for possessing multiple restricted pistol bullets while subsection (a)(4) addresses the penalty for possessing a large capacity ammunition feeding device. Given that they address different offenses there would not be any relation between these two subsections as they are currently written. While it is possible that both offenses could be charged in the same case, a judge would decide whether or not to run sentences concurrently or consecutively. Overall it does not appear that this change will have any effect on the outcome of any cases.

New Subsection (a)(5)

The section of the bill also would add a new subsection (a)(5) to D.C. Code § 7-2507.06. This addition seeks to create a felony offense for possessing a firearm with the intent to sell it or to make it available for sale. The proposal includes a penalty of 10 years maximum in prison and a soft minimum of 2 years. Under current law, the simple possession of an unregistered firearm carries a maximum penalty of 1 year.[27] The actual sale of a firearm to a minor carries a maximum

[26] RCCA § 22-5103.
[27] D.C. Code § 7–2507.06(a)(2)(B).

penalty of 10 years under current law.[28] The proposed paragraph 5 references section 501 of the act which includes the regulations for lawful transfers or sale of a firearm. The act it is referring to is the Firearms Control Regulations Act of 1975. Rules on the lawful sale and transfer of firearms are now codified in D.C. Code § 7–2505.02.

The proposed change with the new subsection (a)(5) would affect cases where a person did not have a prior felony conviction that would have already subjected them to a 10 year maximum sentence. This change would increase the maximum penalty for the highest charge for a non-felon who carried their firearms with intent to sell outside of a home or place of business. For someone who possessed a single firearm with an intent to sell it but was inside their home, this change would allow the government to charge this person with a ten year felony instead of a one year misdemeanor offense.

The RCCA included an offense for the unlawful sale of a pistol that included a 2 year maximum sentence.[29] In that offense an actor could be convicted if it was proven that they knowingly sold a pistol and were reckless to the fact that the person was either of unsound mind, a minor, or a convicted felon.

The RCCA included an offense for the unlawful transfer of a firearm that included a 2 year maximum sentence.[30] In that offense an actor could be convicted if it was proven that they knowingly transferred a firearm to another person without following any other regulations about the transfer of a firearm. The proposed RCCA section had an exclusion for a licensed firearm dealer.

The RCCA included an offense for the sale of a firearm without a license that included a 2 year maximum sentence.[31] In that offense an actor could be convicted if it was proven that they knowingly sold, exposed for sale, or possessed with intent to sell a firearm when they did not have a license to do so. Similarly, the CCRC recommends including mental state of knowing for the new illegal sale offense created under the bill.

With regard to the penalty that is noted at the end of the proposed new subsection (a)(5), the CCRC recommends more clarity as to whether the intent is a mandatory minimum of 2 years or whether that is a minimum that can be suspended. The language, as written, refers to a soft minimum in D.C. Code § 22-801(b) (Burglary) but it refers to a mandatory minimum with almost identical language in D.C. Code § 22-2104(a) (1st degree murder). This lack of clarity could lead to confusion both with considering plea offers and at sentencing.

New Subsection (a)(6)

The section of the bill also seeks to add a new subsection (a)(6) to D.C. Code § 7-2507.06 (a). This addition appears to attempt to increase the penalty for the possession of ammunition when the person has a prior felony conviction. However, this new subsection does not change penalties

[28] D.C. Code § 7-2507.06 (a)(1).
[29] RCCA § 22-5113.
[30] RCCA § 22-5114.
[31] RCCA § 22-5115.

as compared to current law. The proposed subsection (a)(6) sets a maximum penalty of one year when the defendant has a prior felony conviction. The current maximum penalty for the possession of ammunition with or without a prior felony conviction is already one year.

New Subsection (b)(1A)

This bill also adds a paragraph (b)(1A) to D.C. Code § 7-2507.06 that removes the discretion of the United States Attorney's Office and the Office of the Attorney General from offering administrative remedies to firearms offenses in cases where the defendant has a prior felony conviction. The listed offenses are currently prosecuted by the Office of the Attorney General when there is no additional charge that would make it the purview of the United States Attorney. CCRC takes no position on this change.

IV. Title IV. Penalty Enhancements.

The bill proposes three new penalty enhancements for certain crimes: 1) When the victim is a vulnerable adult; 2) When the victim is a passenger on a mass transit vehicle; and 3) When the victim is located on property administered by the Director of the Department of Parks and Recreation. Each proposed enhancement permits up to 1½ times the maximum fine otherwise authorized, 1½ times the maximum term of imprisonment otherwise authorized, or both, consistent with several current penalty enhancements.[32] The bill also expands the existing penalty enhancement for taxicab drivers[33] to include additional transportation providers, and the existing penalty enhancement for operators of a mass transit vehicle or Metrorail station manager[34] to include any Metrorail station employee.

The CCRC discusses each proposed penalty enhancement below, with a focus on clarifying the drafting for individual enhancements should the Council move forward. However, many of the CCRC recommendations are best done as part of a wholistic revision of what this testimony will refer to as the "Subtitle II penalty enhancements"—the existing penalty enhancements in Subtitle II of Title 22 for victims that are: 1) senior citizens;[35] 2) minors;[36] 3) taxicab drivers;[37] and 4) transit operators or Metrorail station managers.[38] The bill revises the existing penalty enhancements for taxicab drivers and transit operators or Metrorail station managers and introduces new penalty enhancements to Subtitle II, but does not revise the existing penalty enhancements for senior citizens or minors. This piecemeal approach leads to several inconsistencies that are discussed below. The CCRC recommends revising the Subtitle II penalty enhancements and, as a part of that revision, incorporating many of the bill's proposed penalty enhancements. Wholistic revision would improve the clarity, consistency, and proportionality of the proposed and existing Subtitle II penalty enhancements. The CCRC would be able to assist the Council in such a wholistic revision.

[32] E.g., D.C. Code § 22-3751.01.
[33] D.C. Code § 22-3751.
[34] D.C. Code § 22-3751.01.
[35] D.C. Code § 22-3601.
[36] D.C. Code § 22-3611.
[37] D.C. Code § 22-3751.
[38] D.C. Code § 22-3751.01.

The CCRC notes as a general matter that the absence of a penalty enhancement for a class of victims should not be construed as a lack of concern for that class of victims. For example, under the bill or current law, there are no enhancements for assaulting nurses in the emergency room. This does not mean that the Council believes it is acceptable to assault nurses in the ER, as this conduct is still criminalized. Enhancements should identify cases that are particularly heinous, culpable, or dangerous, and especially when the penalties for the *unenhanced* version of the offense are insufficiently severe.

It is unclear if the proposed penalty enhancements will have any significant effect on actual sentences imposed. The CCRC analyzed seven similar penalty enhancements under current law. These enhancements include bias-motivated crimes, and crimes when the victim was a minor, a metro transit officer, a senior citizen, a taxi cab driver, or was vulnerable due to age or mental or physical infirmity. The CCRC reviewed every case from 2010-2019 in which a person was charged with one or more of these enhancements.

These current enhancements are used very infrequently. In most cases, when these enhancements were charged, they were ultimately dismissed. During the 10 year period from 2010-2019, there were about 10 cases per year in which a person was convicted under one of the penalty enhancements.

The data show that even when current enhancements were used, the resulting sentences are almost always lower than the maximum allowable sentence for the unenhanced offense.[39] The data do show an effect on the *median* sentence. The effect varies depending on the enhancement and the underlying offense, but generally the median sentenced for an enhanced offense is roughly 3 months to 4 years higher than the median for an unenhanced offense. Overall, the median sentence when a conviction applies to any given offense increases by roughly 22% of the unenhanced maximum sentence for that offense.[40]

However, it's unclear exactly whether and how the enhancements are causing this change. Sample sizes are small and there may be other factors, such as the defendants' criminal history scores, that caused the difference in sentences. Even if there were no statutory enhancements, committing a crime against a minor, a vulnerable elderly adult, are facts that the government could raise at sentencing, and that a judge could take into consideration. It is possible that the higher median

[39] There was one exception across the entire decade in which the resulting sentence was slightly higher than the unenhanced maximum. However, under the data use agreement with D.C. Superior Court, the CCRC is prohibited from publicly sharing details of any individual case.

[40] For example, if the unenhanced maximum sentence for an offense is 10 years, on average the median sentence for that offense when subject to an enhancement increases by roughly 2.2 years as compared to the median sentence for that offense not subject to an enhancement. Similarly, if the maximum sentence for a given offense is 5 years, the median sentence for that offense when subject to an enhancement increases by approximately 1.1 years as compared to the median sentence for that offense not subject to an enhancement.

To reach this figure, the CCRC looked at the median sentences for offenses when subject to an enhancement and not subject to an enhancement. The change in sentence was then translated into a percentage of the unenhanced maximum sentence allowed for that given offense. The CCRC then calculated a weighted average to reach the overall average of 22%.

sentences are due to the greater inherent wrongfulness of these select cases. Finally, there may be a selection bias effect when analyzing cases in which a person was convicted under an enhancement. In most cases, penalty enhancements are dismissed. The cases in which they survive to conviction may be cases that are either especially egregious, or in which the defendants refused more favorable plea terms and received a more serious sentence after being convicted at trial. Therefore, sentences may have been higher in these cases even if there had been no statutory enhancement.

Proposed new penalty enhancement #1: For a "vulnerable adult"

The bill proposes a new penalty enhancement for a "crime of violence"[41] or a "dangerous crime"[42] against a "vulnerable adult". The current D.C. Code has special offenses for criminal abuse of a vulnerable adult,[43] criminal neglect of a vulnerable adult,[44] and financial exploitation of a vulnerable adult,[45] but no broadly applicable penalty enhancement.

As a policy matter, the Council may wish to expand protections for vulnerable adults with a free-standing penalty enhancement. The RCCA recommended including penalty enhancements for a wide array of offenses if the complainant was a vulnerable adult.[46] However, the CCRC recommends several changes to the bill's proposed language to improve its clarity. These changes could be done piecemeal, but as stated above, would be best done as part of a wholistic revision of the Subtitle II penalty enhancements.

First, the CCRC notes that including all offenses that are a "dangerous crime" could make the penalty enhancement overly broad. The bill applies the new penalty enhancement to both a "crime of violence"[47] and a "dangerous crime",[48] as those terms are defined in Title 23. Offenses in the

[41] D.C. Code § 23-1331(4).
[42] D.C. Code § 23-1331(3).
[43] D.C. Code § 22-933.
[44] D.C. Code § 22-934.
[45] D.C. Code § 22-933.01.
[46] The RCCA broadly included as an enhancement that the complainant was a "protected person", a term defined to include "vulnerable adults."
[47] D.C. Code. § 23-1331(4) ("The term 'crime of violence' means aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt, solicitation, or conspiracy to commit any of the foregoing offenses.").
[48] D.C. Code. § 23-1331(3) ("The term 'dangerous crime' means: (A) Any felony offense under Chapter 45 of Title 22 (Weapons) or Unit A of Chapter 25 of Title 7 (Firearms control); (B) Any felony offense under Chapter 27 of Title 22 (Prostitution, Pandering); (C) Any felony offense under Unit A of Chapter 9 of Title 48 (Controlled Substances); (D) Arson or attempted arson of any premises adaptable for overnight accommodation of persons or for carrying on business; (E) Burglary or attempted burglary; (F) Cruelty to children; (G) Robbery or attempted robbery; (H) Sexual abuse in the first degree, or assault with intent to commit first degree sexual abuse; (I) Any

definition of "crime of violence" are inherently violent, or have a high likelihood of violence. In contrast, offenses in the definition of "dangerous crime" often do not, and if they do, they are also included in the definition of "crime of violence."[49] Including all offenses that are a "dangerous crime" in the penalty enhancement would enhance the penalty for offenses that are generally much less serious than a "crime of violence." It would also create ambiguity because it is unclear if many of the "dangerous crime" offenses, such as felony weapon offenses in Chapter 45 of Title 22, felony drug offenses under Chapter 9 of Title 48, and felony fleeing from an officer in a motor vehicle, have an identifiable victim. The Council could address these issues by: 1) Limiting the enhancement to a "crime of violence"; and 2) If it wishes to include any offenses that are a "dangerous crime", adding them in individually. The CCRC makes this recommendation for all proposed penalty enhancements in the bill, and, if there were a wholistic revision, for the existing Subtitle II penalty enhancements.[50]

Second, the proposed affirmative defense seems to contain an error, and, more generally, the CCRC would recommend deleting the defense and instead requiring a culpable mental state for the fact that the victim is a "vulnerable adult". The proposed defense applies if defendant "could not have known or determined the age of the victim because of the manner in which the offense

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felony offense established by the Prohibition Against Human Trafficking Amendment Act of 2010 [D.C. Law 18-239], or any conspiracy to commit such an offense; or (J) Fleeing from an officer in a motor vehicle (felony).").

[49] The following offenses in the definition of "dangerous crime" are included in the definition of "crime of violence": 1) Arson or attempted arson of any premises adaptable for overnight accommodation of persons or for carrying on business; 2) Burglary or attempted burglary; 3) Cruelty to children; 4) Robbery or attempted robbery; 5) Sexual abuse in the first degree, or assault with intent to commit first degree sexual abuse.

[50] The current Subtitle II penalty enhancements apply to different sets of offenses. The senior citizen penalty enhancement applies to:

> Abduction, arson, aggravated assault, assault with a dangerous weapon, assault with intent to kill, commit first degree sexual abuse, or commit second degree sexual abuse, assault with intent to commit any other offense, burglary, carjacking, armed carjacking, extortion or blackmail accompanied by threats of violence, kidnapping, malicious disfigurement, manslaughter, mayhem, murder, robbery, sexual abuse in the first, second, and third degrees, theft, fraud in the first degree, and fraud in the second degree, identity theft, financial exploitation of a vulnerable adult or elderly person, or an attempt or conspiracy to commit any of the foregoing offenses.

The penalty enhancement for minors applies to the offenses that are a "crime of violence", as defined in Title 23:

> The term "crime of violence" means aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt, solicitation, or conspiracy to commit any of the foregoing offenses.

D.C. Code §§ 22-3611(c)(2); 23-1331(4).

Finally, the penalty enhancements for taxicab drivers, transit operators, and Metrorail station managers apply to:

> The provisions of §§ 22-3751 [taxicab driver penalty enhancement] and 22-3751.01 [transit operator and Metrorail station manager penalty enhancement] shall apply to the following offenses or any attempt or conspiracy to commit any of the following offenses: murder, manslaughter, aggravated assault, assault with a dangerous weapon, mayhem or maliciously disfiguring, threats to do bodily harm, first degree sexual abuse, second degree sexual abuse, third degree sexual abuse, fourth degree sexual abuse, misdemeanor sexual abuse, robbery, carjacking, and kidnapping.

was committed". However, the current Title 22 definition of "vulnerable adult",[51] which the bill adopts, requires that the person be at least 18 years *and* have certain physical or mental limitations. As drafted, the defense would essentially create strict liability when the defendant "could not have known or determined" the vulnerable adult's *physical or mental limitations* due to the manner in which the offense was committed,[52] but allow the defense when the defendant "could not have known or determined" the vulnerable adult's *age*.[53] Applying strict liability as to whether the adult has a physical or mental limitation seems contrary to the intent of the defense.[54] The CCRC would recommend revising the text to read:

> (b) It is an affirmative defense that the accused knew or reasonably believed that the victim was not a vulnerable adult at the time of the offense, or could not have known or determined *that* ~~the age of~~ the victim *was a vulnerable adult* because of the manner in which the offense was committed. This defense shall be established by a preponderance of the evidence.

The amended text broadens the scope of the defense, but there are two larger issues. First, it is as an affirmative defense, the bill places the burden on the defendant to prove they believed the victim was not a vulnerable adult, or that they could not have known the victim was a vulnerable adult. The CCRC recommends that in the alternative the enhancement be drafted to require a culpable mental state as to the victim's status as a vulnerable adult. Second, the mental states in the proposed affirmative defense, "knew" and "reasonably believed" are unclear. They are not defined and there are no general definitions for these terms in the current code. If the Subtitle II penalty enhancements were revised wholistically, perhaps standard culpable mental states could be adopted for these and other new penalty enhancements from the bill. The RCCA penalty enhancement required a "reckless" culpable mental state for the fact the victim was a vulnerable adult, but the Council could consider other culpable mental states, including "knowledge" or even "negligence", although negligence is generally disfavored. The CCRC would be able to assist the Council in drafting with culpable mental states.

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[51] Both the proposed bill and the RCCA penalty enhancement maintained the current definition of "vulnerable adult" that applies to the current criminal abuse, criminal neglect, and financial exploitation statutes. [cite] The bill's exact definition is: "a person who is 18 years of age or older and has one or more physical or mental limitations that substantially impairs the person's ability to independently provide for their daily needs or safeguard their person, property, or legal interests."

[52] For example, if the defendant runs down the street towards the victim and snatches the victim's purse, the defendant likely could determine that the victim was at least 18, but, in some instances, would not be able to determine that the victim had the required physical or mental limitations. As currently drafted, the defense would seem to not apply, and the person would be liable.

[53] For example, if a defendant extorts a vulnerable adult, knowing that the victim is over the age of 18, but with no way of knowing that the adult had any physical or mental limitations, the defendant could not satisfy the requirements of the affirmative defense and the enhancement would apply.

[54] The ambiguity may be due to the entire defense, including this provision, being taken from the existing Subtitle II penalty enhancement for crimes against senior citizens, which is based entirely victim's age. D.C. Code § 22-3601(c) ("It is an affirmative defense that the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed. This defense shall be established by a preponderance of the evidence.").

Proposed new penalty enhancement #2: For a passenger of a mass transit vehicle

The bill adds a new penalty enhancement for a "crime of violence"[55] or a "dangerous crime"[56] against a "passenger of a mass transit vehicle". The bill defines a "passenger" as "a person who is traveling on a mass transit vehicle or waiting at a marked mass transit vehicle boarding location, such as a bus stop or Metrorail station."[57]

The CCRC would repeat two of the recommendations discussed for the bill's other proposed penalty enhancements: 1) Standardize the list of applicable offenses and apply it to the current Subtitle II penalty enhancements and any new enhancements from the bill; and 2) Require a culpable mental state for the fact that the victim is a "passenger" on a mass transit vehicle.

However, more generally, the proposed passenger penalty enhancement is overly broad, and the Council should consider not including this enhancement in final legislation. The proposed passenger penalty enhancement is presumably intended to target crimes of opportunity or crimes that may be particularly dangerous in a mass transit setting. However, as drafted, the penalty enhancement applies to any enumerated offense against a passenger, even if it isn't a crime of opportunity or a crime that is particularly dangerous in a mass transit setting. For example, a felony assault between romantic partners on a Metro train would be subject to this enhancement.

As compared to a victim that is elderly, has a certain job, etc., the facts of an offense in a mass transit setting will vary considerably. Was the train crowded? Was any bystander to the offense injured or threatened? Did the defendant and victim know each other? It is not clear why assaulting someone who is waiting at a bus station is categorically worse than assaulting someone on the sidewalk. A penalty enhancement will not capture these nuances, but sentencing in individual cases can. In the above hypothetical, a domestic felony assault that occurs on a crowded Metro train may warrant a higher sentence than a domestic felony assault on an empty train. The same analysis applies to crimes of opportunity or crimes that are particularly dangerous in a mass

[55] D.C. Code § 23-1331(4).
[56] D.C. Code § 23-1331(3).
[57] The bill's definition of "passenger" conflicts with the plain language of the enhancement. The proposed enhancement reads, in relevant part, "Any person who commits an offense enumerated in D.C. Official Code § 23-1331(3) or 23-1331(4) against a passenger of a mass transit vehicle . . ." The plain language of the proposed enhancement is clear. However, the bill defines "passenger" to include individuals waiting to board, which is broader than the plain language reading "a passenger of a mass transit vehicle". In addition, the proposed enhancement would be included as a new subsection of D.C. Code § 22-3751.01, which codifies the existing penalty enhancement for a transit operator of a "mass transit vehicle". D.C. Code § 22-3751.01 defines "mass transit vehicle" as "any publicly or privately owned or operated commercial vehicle for the carriage of 6 or more passengers, including any Metrobus, Metrorail, Metroaccess, or DC Circulator vehicle or other bus, trolley, or van operating within the District of Columbia." This is a narrowly tailored definition to the actual vehicle, as opposed to a boarding location.
For substantive reasons, the CCRC recommends the Council not move forward with the proposed passenger penalty enhancement, but if the Council did, it seems unnecessary to codify a separate definition of "passenger" that complicates the plain reading of the statute. The proposed penalty enhancement could instead read:

> (a-1) Any person who commits an offense enumerated in D.C. Official Code § 23-1331(3) or 23-1331(4) against a *person who is traveling on a mass transit vehicle or waiting at a marked mass transit vehicle boarding location, such as a bus stop or Metrorail station,* ~~passenger~~ of a mass transit vehicle may be punished by a fine of up to one and 1/2 times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to one and 1/2 times the maximum term of imprisonment otherwise authorized by the offense, or both.".

transit setting. If a stranger robs a passenger on a crowded Metro train, the victim might be unaware of the taking, calling into question whether a categorical penalty enhancement is warranted. A categorical penalty enhancement is not necessary to ensure that sentences capture the severity of a given case.

In addition, as noted above, the current Subtitle II penalty enhancements are rarely, if ever charged, and, when they are, the sentences do not go above the unenhanced maximum. The proposed passenger penalty enhancement would likely be rarely, if ever charged, and would likely not increase the imposed penalties above the unenhanced maximums.

Proposed new penalty enhancement #3: For Department of Parks and Recreation property

The bill adds a new penalty enhancement for a "crime of violence"[58] or a "dangerous crime"[59] against a person that is "located on a property administered by the Director of the Department of Parks and Recreation".

The CCRC would repeat two of the recommendations discussed for the bill's other proposed penalty enhancements: 1) Standardize the list of applicable offenses and apply it to the current Subtitle II penalty enhancements and any new enhancements from the bill; and 2) Require a culpable mental state for the fact that the victim is located on property administered by the Director of DPR.

In addition, the scope of the proposed DPR penalty enhancement is ambiguous, and the Committee should consider narrowing the definition of "property". The bill defines "property" as "any park, field, court, play area, facility, or building, and the associated grounds, parking lot, and adjacent areas in public space, including sidewalks and streets." The enumerated locations—"park, field, court, play area, facility, or building"—are reasonably well-defined locations. The remainder of the definition, however, is ambiguous. First, it is unclear what "associated grounds" encompasses. Is it the land that surrounds one of the enumerated locations? If so, is there a point when such land is so far removed from an enumerated location it is no longer "associated"? Second, "adjacent areas in public space" is unclear. It is unclear what these areas are, other than sidewalks and streets, which the definition specifically includes.

The Committee could improve the clarity of the proposed penalty enhancement by narrowing the definition of "property" to areas that are reasonably well-defined, such as "park, field, court, play area, facility, or building" in the current drafting. To include surrounding areas, the Council could possibly specify "any associated grounds or public space" within some distance of the enumerated locations, similar to the current drug-free school zone offense.[60] This would codify a clear standard as opposed to the vague qualifiers "associated" and "adjacent". The CCRC could assist the Council in revising the definition of "property".

[58] D.C. Code § 23-1331(4).
[59] D.C. Code § 23-1331(3).
[60] D.C. Code § 48-904.07a.

Expanded penalty enhancement #1: For a "transportation provider"

The bill expands the current D.C. Code penalty enhancement for taxicab drivers[61] to include additional transportation providers. Specifically, the bill expands the current penalty enhancement to include persons who operate: 1) A "public vehicle-for-hire", as defined in D.C. Code § 50-301.03;[62] and 2) A "private vehicle-for-hire", as defined in D.C. Code § 50-301.03.[63]

As a policy matter, the Council may wish to expand the current taxicab driver penalty enhancement to include additional public vehicle-for-hire operators, such as limousine drivers, and private vehicle-for-hire operators, such as Uber drivers. Although, as discussed earlier, the current taxicab driver penalty enhancement is rarely charged, the revisions still fill a gap in current law, and the RCCA made similar recommendations.[64]

The CCRC would repeat two of the recommendations discussed for the bill's other proposed penalty enhancements: 1) Standardize the list of applicable offenses and apply it to the current Subtitle II penalty enhancements and any new enhancements from the bill;[65] and 2) Require a culpable mental state for the fact that the victim is a "transportation provider".

In addition, the bill does not appear to incorporate the correct Title 50 definitions for private and public vehicle-for-hire operators. The bill incorporates the definition "private vehicle-for-hire",[66] but that definition details the requirements for "a class of transportation service" and does not

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[61] D.C. Code § 22-3751:

> Any person who commits an offense listed in § 22-3752 against a taxicab driver who, at the time of the offense, has a current license to operate a taxicab in the District of Columbia or any United States jurisdiction and is operating a taxicab in the District of Columbia may be punished by a fine of up to one and 1/2 times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to one and 1/2 times the maximum term of imprisonment otherwise authorized for the offense, or both.

[62] D.C. Code § 50-301.03(17) (defining "public vehicle-for-hire" as "a class of transportation service by motor vehicle for hire in the District, including a taxicab, limousine, or sedan-class vehicle, that provides for-hire service exclusively using operators and vehicles licensed pursuant to this subchapter and § 47-2829.").

[63] D.C. Code § 50-301.03(16A) (defining "private vehicle-for-hire" as "a class of transportation service by which a network of private vehicle-for-hire operators in the District provides transportation to passengers to whom the private vehicle-for-hire operators are connected by digital dispatch.").

[64] RCCA § 22A-101 (142).

[65] The proposed transportation provider penalty enhancement does not revise the list of offenses to which the enhancement applies, leaving it as it is in current law:

> "The provisions of §§ 22-3751 [taxicab driver penalty enhancement] and 22-3751.01 shall apply to the following offenses or any attempt or conspiracy to commit any of the following offenses: murder, manslaughter, aggravated assault, assault with a dangerous weapon, mayhem or maliciously disfiguring, threats to do bodily harm, first degree sexual abuse, second degree sexual abuse, third degree sexual abuse, fourth degree sexual abuse, misdemeanor sexual abuse, robbery, carjacking, and kidnapping."

D.C. Code § 22-3752.
This is inconsistent with other proposed penalty enhancements in the bill, which apply to offenses that are a "crime of violence" or "dangerous crime".

[66] D.C. Code § 50-301.03(16A) (defining "private vehicle-for-hire" as "a class of transportation service by which a network of private vehicle-for-hire operators in the District provides transportation to passengers to whom the private vehicle-for-hire operators are connected by digital dispatch.").

mention individual operators or vehicles. Under the proposed definition, a "transportation provider" would be defined as a person who operates a "a class of transportation service[s]", not a person who operates a *vehicle* used to perform such services. Title 50 separately defines "private vehicle-for-hire operator", and this appears to be the correct definition: "an individual who operates a personal motor vehicle to provide private vehicle-for-hire service in contract with a private vehicle-for-hire company."[67] The new drafting could read:

> "(b) For the purposes of this section, the term "transportation provider" means *a private vehicle-for-hire operator or* a person who operates within the District of Columbia a public vehicle-for-hire ~~or private vehicle-for-hire~~, as those terms are defined in section 4 of the District of Columbia Taxicab Commission Establishment Act of 1985 (D.C. Law 6-97; D.C. Official Code § 50-301.03).".

Expanded penalty enhancement #2: For a "Metrorail station employee"

The bill expands the current penalty enhancement for certain crimes against a "transit operator" operating a "mass transit vehicle" or against a "Metrorail station manager".[68] Specifically, the bill proposes expanding the enhancement to include any "Metrorail station employee", defined as "any person who performs a [sic] services for the Washington Metropolitan Area Transit Authority or works in a Metrorail station." It is unclear whether the definition intends to include all individuals who perform services for WMATA, regardless of location, or it is limited to individuals who perform services for WMATA at a Metrorail station.

The CCRC would repeat two of the recommendations discussed for the bill's other proposed penalty enhancements: 1) Standardize the list of applicable offenses and apply it to the current Subtitle II penalty enhancements and any new enhancements from the bill;[69] and 2) Require a culpable mental state for the fact that the victim is a "Metrorail station employee".

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[67] D.C. Code § 50-301.03(16C).

[68] D.C. Code § 22-3571.01. The current penalty enhancement has the following definitions:

> "(b) For the purposes of this section, the term:
> (1) 'Mass transit vehicle' means any publicly or privately owned or operated commercial vehicle for the carriage of 6 or more passengers, including any Metrobus, Metrorail, Metroaccess, or DC Circulator vehicle or other bus, trolley, or van operating within the District of Columbia.
> (2) 'Metrorail station manager' means any Washington Metropolitan Area Transit Authority employee who is assigned to supervise a Metrorail station from a kiosk at that station.
> (3) 'Transit operator' means a person who is licensed to operate a mass transit vehicle.

D.C. Code § 22-3751.01(b).

[69] The proposed transportation provider penalty enhancement does not revise the list of offenses to which the enhancement applies, leaving it as it is in current law:

> "The provisions of §§ 22-3751 and 22-3751.01 [penalty enhancement for transit operators and Metrorail station managers] shall apply to the following offenses or any attempt or conspiracy to commit any of the following offenses: murder, manslaughter, aggravated assault, assault with a dangerous weapon, mayhem or maliciously disfiguring, threats to do bodily harm, first degree sexual abuse, second degree sexual abuse,

As a policy matter, the Committee may wish to expand the current penalty enhancement beyond mass transit vehicle drivers and Metrorail station managers. However, the proposed definition is overly broad, and the Committee should consider narrowing it or omitting it from a final bill. It would enhance offenses against individuals that may have a tenuous connection, or no connection, to Metro or mass transit and who aren't subject to the same risks as a driver or station manager. For example, would an individual selling flowers at the entrance to a Metro station or a contractor hired to clean a Metro station or fix a fare machine be included? Metropolitan Police Department (MPD) officers, Metro Transit Police Department officers, and other law enforcement officers could potentially be included, even though they have special protection under other offenses in the current Code.[70]

The proposed definition does require, in part, that the person perform services "for" WMATA. However, it is unclear if this means the person must be a WMATA employee, or if a broader relationship, like "for the benefit of" WMATA, would suffice.[71] Regardless, at least for Metrorail station employees, this part of the definition is subsumed by the alternative requirement "or works in a Metrorail station."

The current penalty enhancement appears to cover the most visible and at-risk individuals in mass transit settings. If there are additional individuals the Council wants to include, it would be clearest to list them. If this is not possible, or if the Council wants a categorical inclusion, the CCRC would recommend narrowing the definition to WMATA employees at a Metrorail station: "Metrorail station employee" means any ~~person who performs a services for the~~ Washington Metropolitan Area Transit Authority *employee that* ~~or~~ works in a Metrorail station." This, combined with a culpable mental state required for the employee's status, would improve the proportionality of the penalty enhancement.

V. Title V Rebuttable Presumption for Adult Pre-Trial Detention; GPS Data for Prosecution

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third degree sexual abuse, fourth degree sexual abuse, misdemeanor sexual abuse, robbery, carjacking, and kidnapping."

D.C. Code § 22-3752.

This is inconsistent with other proposed penalty enhancements in the bill, which apply to offenses that are a "crime of violence" or "dangerous crime".

[70] For example, the current D.C. Code assault on a police officer statute defines "law enforcement officer" as "any officer or member of any police force operating and authorized to act in the District of Columbia, including any reserve officer or designated civilian employee of the Metropolitan Police Department, any licensed special police officer, any officer or member of any fire department operating in the District of Columbia, any officer or employee of any penal or correctional institution of the District of Columbia, any officer or employee of the government of the District of Columbia charged with the supervision of juveniles being confined pursuant to law in any facility of the District of Columbia regardless of whether such institution or facility is located within the District, any investigator or code inspector employed by the government of the District of Columbia, or any officer or employee of the Department of Youth Rehabilitation Services, Court Services and Offender Supervision Agency, the Social Services Division of the Superior Court, or Pretrial Services Agency charged with intake, assessment, or community supervision." D.C. Code § 22-405.

[71] In contrast, the current definition of "Metrorail station manager" requires that the person be a WMATA "employee", which would support a plain language reading that "for" WMATA is meant to be broader.

The bill proposes amending D.C. Code § 23-1322(c), the District's pretrial detention statute, to add a rebuttable presumption of future dangerousness when the defendant has a prior conviction for a crime of violence in cases where the person is charged with committing a new "crime of violence" as defined by D.C. Code § 23-1331(4). The stated purpose of this amendment is to: "Provide greater discretion for the Courts to determine who should be held pre-trial, including defendants previously convicted of a violent crime while they await trial for a new violent crime."[72]

The CCRC notes that: (1) judges unquestionably have discretion under current D.C. Code § 23-1322 to order the pretrial detention of all persons falling under the proposed presumption and the new presumption would not establish authority to hold any persons that cannot be held under current law; (2) judges are already required by statute to consider prior criminal history in making hold decisions and uniformly consider prior convictions for crimes of violence along with all other prior convictions in making detention decisions; (3) the proposed presumption will likely have the greatest impact in cases where the prior conviction is least likely to be probative of future dangerousness. If the Council chooses to enact a new presumption, the CCRC recommends that any new presumption based on prior convictions contain a temporal component to ensure the presumption is more rationally related to the question of whether any combination of conditions of release that could be imposed to ensure the safety of the community. Further, the CCRC recommends that any new presumption based on prior convictions be limited to prior convictions where the prior offense or the circumstances of the prior offense would have given rise to a presumption of future dangerousness under § 23-1322(c) if newly charged.

Proposed presumption

The proposed presumption would apply when a person is charged with a "crime of violence" and has a prior conviction for a "crime of violence." The term crime of violence is a defined term in D.C. Code § 23-1331(4).[73] The proposed presumption would apply categorically to all offenses included in the definition of "crime of violence" including those committed under circumstances that would not have previously given rise to a presumption of dangerousness. A categorical approach also means that the proposed presumption would apply irrespective of (1) the nature and facts of the newly charged offense or offense underlying the prior conviction including whether there was actual or threatened violence, and (2) the person's role in the newly charged offense or offense underlying the prior conviction. There is also no temporal component to the proposed presumption meaning that the preposed presumption would apply irrespective of the passage of time since the prior conviction and irrespective of the person's age at the time of conviction. Accordingly, the presumption would broadly establish the same presumption regarding

[72] *See* https://mayor.dc.gov/release/mayor-bowser-announces-new-safer-stronger-dc-legislation.

[73] Crime of violence "means aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt, solicitation, or conspiracy to commit any of the foregoing offenses." D.C. Code § 23-1331(4).

dangerousness for persons convicted of crimes drastically different in terms of seriousness, culpability, and record of rehabilitation.[74]

Current authority to detain based on prior criminal history

Presently, judges have the statutory authority to order pretrial detention of all persons covered by the proposed presumption. At a preventative detention hearing held pursuant to current D.C. Code § 23-1322, a presiding judge is required by statute to "determine whether any condition or combination of conditions set forth in § 23-1321(c) will reasonably assure the appearance of the person as required and the safety of any other person and the community."[75] If at the end of the hearing, "the judicial officer finds by clear and convincing evidence that no condition or combination of conditions will reasonably assure the appearance of the person as required, and the safety of any other person and the community, the judicial officer shall order that the person be detained before trial."[76]

In making the determination as to whether any combination of conditions will reasonably assure the safety of the community and the person's return to court, a judge is not only permitted but *required* by current law to consider evidence on the history and characteristics of the person charged. D.C. Code § 23-1322(e)(3)(A) has an enumerated list of things a just must consider specifically including "past conduct" and "criminal history".[77] In practice, prior criminal convictions, especially convictions for crimes of violence, are given substantial weight by judges and judges universally address the criminal history or lack of criminal history contained in the bail sheet in making detention decisions.[78] The D.C. Court of Appeals has also stated that prior criminal

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[74] For example, the proposed presumption would create the same presumption with respect to dangerousness for a person charged with armed carjacking less than one year after a conviction for robbery as it would for a person charged with second degree burglary more than thirty years after a conviction for felony assault.

[75] D.C. Code § 23-1322(b)(1).

[76] D.C. Code § 23-1322(b)(2).

[77] Current D.C. Code § 23-1322(e) reads:

> (e) The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account information available concerning:
>
> (1) The nature and circumstances of the offense charged, including whether the offense is a crime of violence or dangerous crime as these terms are defined in § 23-1331, or involves obstruction of justice as defined in § 22-722;
>
> (2) The weight of the evidence against the person;
>
> (3) The history and characteristics of the person, including:
>
> (A) The person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
>
> (B) Whether, at the time of the current offense or arrest, the person was on probation, on parole, on supervised release, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under local, state, or federal law; and
>
> (4) The nature and seriousness of the danger to any person or the community that would be posed by the person's release.

[78] In every case, the Pretrial Services Agency produces what is known as a "bail sheet" listing, *inter alia*, any pending charges of the person, prior convictions, and bench warrant history. The bail sheet is always given to the judge for review at the detention hearing and is given substantial weight by judges.

history "must be given substantial weight" because of its importance to the question of future dangerousness.[79]

Although current § 23-1322(c) contains numerous statutory presumptions pertaining to the nature of the offense or a person's criminal history while on pretrial release, none of those presumptions are prerequisites to detention. Pursuant to current § 23-1322(b)(2), a judge presiding over a detention hearing has the discretion to order pretrial detention if, after taking into account all the evidence, the judge finds "by clear and convincing evidence that no condition or combination of conditions will reasonably assure the appearance of the person as required, and the safety of any other person and the community" regardless of whether a statutory presumption applies. In practice, persons with prior convictions for crimes of violence who are charged with a new crime of violence are held pending trial in many, if not most, cases and even misdemeanor or non-crime of violence convictions are relied upon by judges in hold decisions.[80] Therefore, the creation of the proposed presumption would not create discretion to detain any persons who are not already subject to pretrial detention under the current statute.

The role of the presumption in § 23-1322 detention hearings

To evaluate how the proposed presumption might affect detention hearings, it is also important to understand exactly what a presumption does and does not do. The existence of a presumption does not compel detention and, as noted above, the absence of a presumption does not compel release. In most serious cases, a presumption will make no difference in a detention decision because the facts and history of the person are such that the judge will detain the person with or without a presumption. Presumptions in cases with low-risk defendants, however, can tip the balance in favor of detention even where the presumption is of marginal predictive value.[81]

The current and proposed presumptions are rebuttable presumptions. As a matter of law, when the statutory rebuttable presumption is triggered, the presumption temporarily shifts a burden of *production* to the defense to rebut the presumption by offering some credible evidence contrary to the statutory presumption. Once some evidence is presented, the burden of *persuasion* is on the government to establish that despite the presumption being rebutted, clear and convincing evidence demonstrates that no conditions of release will reasonably assure the appearance of the person as required and the safety of any other person and the community. Even when the presumption is rebutted, the judge is supposed to consider the fact of the presumption along with the other

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[79] *See Pope v. United States*, 739 A.2d 819, 827 (D.C. 1999) (stating "A defendant's past conduct is important evidence—perhaps the most important—in predicting his probable future conduct. Substantial weight must therefore be accorded to the presence in (or absence from) the defendant's record of convictions of dangerous crimes or a history of violent conduct.") (internal citations omitted).

[80] It is also worth noting that the rearrest rate for persons released on pretrial supervision is very low. In 2022, the re-arrest rate in D.C. of person's released under pretrial supervision by the Pretrial Services Agency was 7%. *See* Pretrial Services Agency for the District of Columbia, *FY 2018-2022 – Fact Sheet-Arrest-Free Rates for DC Defendants Under Pretrial Supervision*, available at https://www.psa.gov/?q=FactsFigures. The target rate for Pretrial Services is 12% meaning that fewer people were rearrested than expected in 2022. The mid-year report for 2023 indicates that the re-arrest rate is even lower at 5%. *See* Pretrial Services Agency for the District of Columbia, *FY 2023 Mid-year Key Performance Indicators*, available at www.psa.gov.

[81] *See generally*, Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates,* FED. PROBATION, September 2017.

statutory factors in D.C. Code § 23-1322(e) in determining whether there is any combination of conditions of release that would ensure the safety of the community.[82] As a matter of law, the critical question for preventative detention is not whether there is a presumption but whether the judge believes the evidence establishes that there are no conditions of release that will ensure the safety of a person or the community. Ultimately, a statutory presumption can be given as much weight as the judge deems appropriate.

Persons likely to be affected by the proposed presumption

There are currently eight presumptions in D.C. Code § 23-1322(c) with respect to future dangerousness. As noted, the proposed presumption would create a ninth paragraph in § 23-1322(c) to establish a presumption for persons charged with a crime of violence who have one or more previous convictions for a crime of violence. Due to substantial overlap between the proposed presumption and the existing presumptions, a large number of persons covered by the new proposed presumption will be covered by a presumption in existing law.

As an initial matter, current law already establishes presumptions for the most serious crimes of violence. For example, the first presumption in § 23-1322(c)(1) applies whenever a person is charged with a crime of violence while armed. This means the proposed presumption would establish a presumption that did not otherwise exist only for *unarmed* crimes of violence. Generally, though not always, unarmed crimes of violence are less serious and less probative of future dangerousness than armed crimes of violence. Several other presumptions are triggered based on the nature of circumstances of the charges. Many firearms offenses, including carrying a pistol without a license and felon in possession offenses, already trigger a presumption. Since all persons with prior convictions for crimes of violence charged with these firearms offenses and other enumerated offenses already fall within the § 23-1322(c) presumptions, the proposed presumption would have a lesser, or negligible, impact on those cases. Because presumptions already exist for some of the most serious cases, the proposed presumption's greatest impact would be seen in less serious cases or cases without aggravating factors.

Ultimately, the only persons who would be covered solely by the new presumption are those who (1) are charged with *unarmed* crimes of violence not otherwise covered by the statute based on the serious nature of the offense, and (2) have a prior conviction for a crime of violence that was not committed while on release pending trial. The cases arising where a presumption in current law does not already come into play will most often be cases with less serious charges where the person's prior conviction has no direct nexus to compliance with conditions of release. Consequently, the proposed presumptions most profound impact could be in cases where detention is less likely to be necessary to ensure the safety of the community.

[82] *Cf. In re D.R.J.,* 734 A.2d 162 (D.C. 1999) (discussing *United States v. Jessup*, 757 F.2d 378, 381 (1st Cir.1985) (Breyer, J.)).

Addition of temporal component

In federal law, there is an analogous "previous violator presumption" in the pretrial detention statute.[83] Similar to the proposed presumption, the federal "previous violator presumption" applies to prior convictions for certain offenses. Unlike the proposed presumption, however, the presumption has two additional requirements that must be established before a presumption is triggered. First, the federal previous violator presumption requires that the prior offense have been committed while on release pending trial.[84] Second, the federal previous violator presumption requires that a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, whichever is later.[85]

Both current District law and the proposed bill are broader than the federal law with respect to the timing of the offense and convictions that the criteria. Like federal law, current District law creates a presumption for prior convictions for crimes of violence only when committed on release pending trial. Unlike federal law, however, neither current District law nor the proposed presumption contains a temporal requirement to establish a nexus between the past conviction and current or future dangerousness. This means that dated convictions where a person may have lived in the community without incident for years or even decades post release from supervision would establish a presumption of future dangerousness despite the fact that the person had an established track record of living in the community without incident post-conviction. This is true even when the past conviction did not involve actual violence. Such a case is in stark contrast to someone who may have been released from supervision recently (within months or a few years) and had already been rearrested for a new crime of violence.

If the Council proceeds with a new presumption for prior convictions, the Council may consider adding a temporal component linked to the date of conviction or release from imprisonment similar to the one in federal law to ensure that the new presumption has clear relationship to *future* dangerousness. A temporal component linked to the date of conviction or release from imprisonment would expand the scope of § 23-1322(c)(4) which does not currently cover offenses committed while under supervision post-conviction to cover such offense.[86] While this would constitute a smaller expansion than the proposed presumption, it would remove prior convictions that may be too attenuated in time to be truly probative of future dangerousness from the presumption. For the reasons explained above, this change would not impact a judge's obligation to consider dated prior convictions or authority to rely on them in finding future dangerousness in cases where the judge deems the prior convictions probative of future dangerousness despite the passage of time.

[83] 18 U.S.C. § 3142(e)(2).
[84] 18 U.S.C. § 3142(e)(2)(B).
[85] 18 U.S.C. § 3142(e)(2)(C).
[86] The maximum term of supervised release under D.C. Code § 24-403.01 is five years, or if applicable, the length of the sex offender registration period.

Other technical considerations

In § 501(b)(1)-(2), the proposed amendment deletes the word "or" and replaces it in the following paragraph with the word "and." Currently, the use of the word "or" makes the provisions in (b)(1)-(b)(8) alternative triggers of the presumption. The use of the word "and" here would mean that all nine of the triggers would have to be met to trigger the presumption, something unlikely to occur. The change from "or" to "and" thus appears unintentional.

GPS Data for Prosecution

The bill would add language stating that judges *shall* admit GPS data for the purposes of determining guilt. Under current law, judges already can admit such data. The DCCA has clearly held that data from a GPS monitor that is worn as a condition of probation, even when it is not specifically court ordered, is not an unreasonable search and is therefore admissible.[87]

The CCRC agrees the DCCA case law should be codified in statute, but the CCRC recommends that this provision be amended to state that GPS data *may* be admitted, as this is a more accurate description of current law, and avoids confusion in cases in which the data should *not* be admitted.

There may be situations in which a judge would still deem GPS data inadmissible. A judge could rule GPS data inadmissible if there were reliability concerns. In addition, under the law of evidence judges may deny admission of relevant evidence if unfair prejudicial effect substantially outweighs the relevance.[88] For example, if based on other evidence in the case, there is no question that the defendant was at the scene of the alleged crime, then the prejudicial effect of introducing GPS data may outweigh its probative value. For example, consider an assault case in which the defendant agrees that he was at the scene of the crime, but was acting in self defense. In that case as there is no dispute as to whether the defendant was at the scene of the alleged crime, the GPS data has limited probative value. In such a case, a trial judge could deem that admitting GPS data, which would inform the jury that the defendant was under supervision at the time would have an unfair prejudicial effect that substantially outweighs the minimal probative value.

These cases may be rare, and in most cases, the GPS data will be admissible. But the word "shall" may change current law or at least create a tension with evidence law, and create confusion for judges about when to admit the data.

[87] *United States v. Jackson*, 214 A.3d 464, 467 (D.C. 2019).

[88] *Johnson v. United States*, 683 A.2d 1087, 1099 (D.C. 1996) (*en banc*) (adopting Federal Rule of Evidence 403, under which relevant evidence may be excluded if the danger of unfair prejudice substantially outweighs the probative value).

VI. Title VII. Updated Definition of "Significant Bodily Injury" to Include Strangulation

The current D.C. Code has three main assault offenses of increasing severity: 1) Simple assault, which can be satisfied by slight injury;[89] 2) Felony assault, which requires intermediate "significant bodily injury";[90] and 3) Aggravated assault, which requires the highest "serious bodily injury".[91]

The bill codifies a definition of "significant bodily injury" that includes: 1) injury from strangulation or suffocation;[92] 2) any loss of consciousness; and 3) For injuries other than strangulation, suffocation, or loss of consciousness, lowers the severity required under DCCA case law.

The RCCA also defined "significant bodily injury" to include injuries resulting from strangulation and suffocation, and brief loss of consciousness. The CCRC supports amending the provision in the bill to modify the definition of "significant bodily injury" in a similar fashion.

VI. Title XI. Incarceration Reduction Amendment Act

The bill proposes several changes to the Incarceration Reduction Act, (or "IRAA"). The CCRC included its own set of revisions to IRAA as part of the RCCA, and the CCRC still supports those

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[89] The current simple assault statute states "Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 180 days, or both." D.C. Code § 22-404(a)(1). An extensive body of District case law establishes the different types of prohibited conduct for an "assault", including unwanted touchings that do not result in pain or physical impairment. *See, e.g., Perez Hernandez v. United States*, 286 A.3d 990 (D.C. 20222) (rehearing en banc).
However, most relevant for this discussion, the District of Columbia Court of Appeals has stated "[i]t is firmly established in our case law that the injury resulting from or threatened by an assault may be extremely slight. There need be no physical pain, no bruises, no breaking of the skin, no loss of blood, no medical treatment." *Dunn v. United States*, 976 A.2d 217, 220 (D.C. 2009).

[90] The current felony assault statute states:

> "Whoever unlawfully assaults, or threatens another in a menacing manner, and intentionally, knowingly, or recklessly causes significant bodily injury to another shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 3 years, or both. For the purposes of this paragraph, the term "significant bodily injury" means an injury that requires hospitalization or immediate medical attention."

D.C. Code § 22-404(a)(2).

[91] The current aggravated assault statute states:

> (a) A person commits the offense of aggravated assault if:
> (1) By any means, that person knowingly or purposely causes serious bodily injury to another person; or
> (2) Under circumstances manifesting extreme indifference to human life, that person intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person, and thereby causes serious bodily injury.
> (b) Any person convicted of aggravated assault shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned for not more than 10 years, or both.
> (c) Any person convicted of attempted aggravated assault shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned for not more than 5 years, or both.

D.C. Code § 22-404.01.
Ignoring mayhem/disfigurement

[92] The letter accompanying the bill states that the bill "enhances protections for domestic violence survivors with the creation of a felony offense of strangulation". It would be more accurate to say that the bill ensures that strangulation satisfies the existing felony assault offense.

changes. The changes to IRAA under the RCCA did not include the changes proposed under this bill, and CCRC opposes changing IRAA as proposed under the bill.

As we understand, the goal of the changes to IRAA are intended to increase judicial discretion in both *whether* to modify a sentence, and *which types of information* the judge may consider in making IRAA determinations. However, under current law, judges already have immense discretion both as to whether to grant applications, and what types of information they may consider. The current IRAA statute lists factors that judges must consider when reviewing IRAA applications, and includes a catch-all provision directing judges to consider "*[a]ny other information* the court deems relevant to its decision."[93] Even when judges do decide that a sentence should be modified, they also have complete discretion to determine *how and to what degree* the sentence should be modified.

Therefore, it does not appear that the proposed changes to IRAA meaningfully increase judicial discretion, and may lead to increased confusion.

"May" vs. "Shall"

Under current law, if a judge finds that the applicant does not pose a danger to any person and that the interests of justice warrant a sentence modification, then the judge *shall* modify the applicant's sentence.[94] The bill would change the word "shall" to "may." However, this only arises *if judges first find that the applicant is not a danger to any person and the interest of justice* warrant a modification. Under current law, judges have complete discretion to find that an applicant is a danger to another person or that the interests of justice do *not* warrant a sentence modification, and reject the IRAA application. It would be bizarre, and under the terms of the statute *unjust* for a judge to decline to modify a sentence when they have already found the interest of justice warrant a modification.

The use of the word "may" could also create confusion. The IRAA statute provides detailed guidance as to factors judges should consider in determining whether the interests of justice warrant a sentence modification. However, under this revision, there is no guidance as to whether a judge, having made that finding, should actually modify a sentence.

Because this revision does not meaningfully increase judicial discretion, but does create the possibility for confusion, the CCRC recommends retaining the current language.

Nature of the Offense

The bill would change the IRAA statute to allow judges to consider the nature of the offense when making their determinations. However, under the catch-all provision under current law judges are already permitted to consider the nature of the offense. Under current law, it is very common in IRAA applications for the government to raise the nature of the offense as a relevant factor, and that judges take it into account. This change is unnecessary in order to allow judges to consider this information.

[93] D.C. Code § 24-403.03 (c)(11).
[94] D.C. Code § 24-403.03 (a)(2).

Although judges may already consider the nature of the offense, changing the statute to include it as an enumerated factor could signal to judges that the nature of the offense should be given larger importance than under current law.

Omitting "brutal or cold blooded nature" of the Offense

Under current law, a factor judges must consider is the "[t]he diminished culpability of juveniles and persons under age 25" . . . "despite the brutality or cold-blooded nature of any particular crime[.]"[95] The bill would remove this "brutality or cold-blooded nature" language. In drafting the IRAA statute, the Council did not come up with this language on its own; rather this language is taken from the Supreme Court's opinion in *Roper v. Simmons*, in which the court held that the death penalty could not be imposed for crimes committed while the defendant was a minor.[96] The Court stated that "[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth [.]"[97]. The Court recognized that due to human emotion and biases, the brutality or cold-blooded nature of the offense could lead judges to inappropriately disregard the diminished culpability of youth. The current statute adopts the wisdom articulated by the Court and provides guidance to judges that allows them to exercise their discretion.

This is particularly important, because due to the 15 year minimum requirement before eligibility, most IRAA applicants will have been convicted of brutal offenses, such as forms of homicide. Changing the statute may indicate to judges that their discretion should be limited to cases in which the offense was *not* brutal or cold-blooded, and that despite an applicants' rehabilitation, that they should not modify a sentence in such cases.

Adding "Remorse" as a factor

Under current law, judges are guided to consider whether the IRAA applicant is not a danger to the safety of any person or the community and that the interests of justice warrant a sentence modification. The bill would add as a factor whether the applicant expresses "remorse." Under current law, judges already can and do consider remorse in deciding whether an applicant is a danger to the community and if the interests of justice warrant modification.

However, adding remorse as an independent factor, apart from how it relates to rehabilitation, may create significant problems in some cases. Some IRAA applicants may claim actual innocence, and these applicants would express *no remorse*. Other applicants may have been convicted under unduly harsh laws in effect at the time of their trials. One rationale for IRAA is that attitudes change, and what may have been considered a just sentence at the time it was imposed will no longer be considered just decades into the future. For example, some IRAA applicants have been convicted of first degree murder under the felony murder doctrine, even when the government concedes that they did not kill anyone, know anyone would be killed, or

[95] D.C. Code § 24-403.03 (c)(10).
[96] *Roper v. Simmons*, 543 U.S. 551 (2005).
[97] *Id.* at 573.

help anyone kill anyone. In these cases, an applicants may feel a degree or remorse, though not remorse typically commensurate with the offense of which they were convicted.

Community Impact Statements

The bill would allow judges to consider community impact statements. Under current law, judges already can take community impact statements into account, though it's unclear how often community impact statements are actually offered.

This revision to the bill creates the potential for confusion. The bill cites to DC Code statute that governs community impact statements at *sentencing*.[98] The term "community" is defined as "a formal or informal association or group of people living, working, or attending school in the same place or neighborhood and sharing common interests arising from social, business, religious, governmental, scholastic, or recreational associations."[99] A member of a community affected by a crime can introduce a statement for consideration by a sentencing judge. In those cases, the offense would've occurred fairly recently; for example a person who attends school where a crime was committed could submit a community impact statement on behalf of the school as a "community."

In the context of IRAA applications, it may be less clear who constitutes a member of a community affected by a crime. IRAA applicants are required to serve at least 15 years of their sentence before they are eligible to apply. Given passage of time between the offense and conviction and time needed to prepare an IRAA application, many applications will be made nearly 20 years or more after the original offense. If a crime is committed at a school, can a school official who wasn't even employed at the time of the offense still submit a community impact statement on behalf of the school? If the Committee wishes to include community impact statements as a factor in IRAA cases, the Committee should consider clarifying who constitutes a member of the community given the lengthy passage of time.

This concludes my testimony, and I am happy to answer any questions you may have.

[98] D.C. Code § 23-1904 (f)(1).
[99] D.C. Code § 23-1905 (1).