D.C. Criminal Code Reform Commission

Testimony of Executive Director

Jinwoo Park on B25-0345 the "Accountability and Victim Protection Amendment Act of 2023."

COMMITTEE ON THE JUDICARY & PUBLIC SAFETY HEARING
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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 (CCRC) regarding bill B25-345, the "Accountability and Victim Protection Amendment Act of 2023." The CCRC submits this written testimony as a supplement to oral testimony provided at the September 18, 2023 hearing held by the Committee on the Judiciary and Public Safety. The CCRC also notes that is has not provided oral or written remarks on every Title within this bill.

II. Comments on Specific Titles in the Accountability and Victim Protection Amendment Act of 2023

A. Title 2. Changes to Unlawful Possession of a Firearm

Title II amends the unlawful possession of firearm offense under D.C. Code § 22–4503 to criminalize possession of a firearm by persons who have been previously convicted within the prior five years of misdemeanor stalking or attempted stalking. Setting aside the policy merits of this change, the CCRC notes that the proposed changes to § 22-4503 could face a Constitutional challenge under the Second Amendment.

In *New York State Rifle & Pistol Association Inc. v. Bruen*[1]*,* the Supreme Court established a new test for determining whether laws violate the Second Amendment right to bear arms. Under *Bruen*, the Court stated that when a law infringes on a person's right to bear arms, the "government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[2] To satisfy this burden, the government must provide "historical precedent from before, during, and even after the founding [that] evinces a comparable tradition of regulation."[3]

In a recent decision, *United States v. Rahimi*[4], the Fifth Circuit Court of Appeals applied the *Bruen* standard and held that a federal statute criminalizing firearm possession while a person is subject to a domestic violence civil protection order[5] was unconstitutional.[6] The court noted that there is no historical precedent for barring firearm possession for people subject to civil protection orders or who have been convicted of misdemeanors.[7] The CCRC has not been able to research the historical precedent for barring firearm possession for persons convicted of stalking, but given that stalking offenses are relatively modern creations, it's possible there is no historical precedent and the proposed change to the unlawful possession of firearm offense could be deemed unconstitutional.

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[1] 142 S. Ct. 2111 (2022)
[2] *Id.* at 2126.
[3] *Id.* at 2131-32 (internal quotation omitted).
[4] 61 F.4th 443 (5th Cir.), cert. granted, 143 S. Ct. 2688 (2023).
[5] 18 U.S.C. § 922(g)(8).
[6] *Rahimi*, 61 F.4th at 448.
[7] *Id*. at 460 n. 11

The Supreme Court has agreed to hear an appeal of the *Rahimi* decision next term, and that opinion may provide greater clarity about how the *Bruen* standard is applied. But unless the Court makes a significant change to the *Bruen* test, the government will need to find historical precedent to defend this law against Second Amendment claims.

B. Title 3. Changes to Propensity Evidence Rule in Sexual Assault Prosecutions

This title amends rules of evidence to allow what is commonly known as propensity evidence when persons are charged with enumerated sexual assault offenses. I'd like to note two areas of possible concern.

First, the scope of prior conduct for which evidence may be admitted is unclear.[8] Under the proposed statute when a person "is accused of sexual abuse, the court may admit evidence that the defendant committed any other *similar sexual abuse*." It's unclear what would constitute a "similar sexual abuse." Does this mean offenses whose elements would necessarily satisfy the elements of the offense for which the person is currently being charged? Or is it a more flexible standard that includes conduct that inflicts comparable harm or violates comparable interests? By contrast, the analogous Federal Rule of Evidence 413, which allows propensity evidence of prior "sexual assault", describes specific offenses or types of conduct that may be introduced.[9]

In addition, the term "sexual abuse" is defined to include "[c]onduct that, if committed in the District of Columbia, would constitute a violation of an offense enumerated in subsection (d), or conduct that is *substantially similar* to that prosecuted as an offense enumerated in subsection (d)."[10] It is unclear what types of conduct would be "substantially similar" to offenses enumerated in subsection (d).

Second, this title makes a significant change to the general rule of evidence that evidence of prior conduct to show a propensity to engage in the accused conduct is inadmissible. This evidentiary

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[8] Note that proposed section 306, which allows propensity evidence in child sexual abuse cases only allows evidence that the defendant committed "any other child sexual abuse" and does not use the word "similar" as under proposed section 305.

[9] Federal Rule of Evidence 413(a) states that "In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant." The term "sexual assault" is defined to mean: "a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving:

(1) any conduct prohibited by 18 U.S.C. chapter 109A;

(2) contact, without consent, between any part of the defendant's body — or an object — and another person's genitals or anus;

(3) contact, without consent, between the defendant's genitals or anus and any part of another person's body;

(4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in subparagraphs (1)–(4)."

[10] Proposed section 306, which allows propensity evidence in child sexual abuse cases also defines "child sexual abuse" to include "[c]onduct that, if committed in the District of Columbia, would constitute a violation of an offense enumerated in subsection (d), or conduct that is *substantially similar* to that prosecuted as an offense enumerated in subsection (d)." The definitions of both "sexual abuse" and "child sexual abuse" share the same ambiguity as to what conduct is "substantially similar" to the enumerated offenses.

rule is based on the risk of unfair prejudice to defendants, and the possibility that jurors will convict the defendant even if they do not believe beyond a reasonable doubt that the defendant committed the offense for which they are currently charged.[11] When applied in federal courts, FRE 413 has even allowed admission of *video* of the defendant engaging in prior criminal acts.[12] The CCRC understands that the title's proposed changes to evidentiary rules are intended to counteract both inherent difficulties in proving sexual assault offenses which often lack third party witnesses, and a general reluctance to believe allegations of sexual assaults. However, the Committee should be aware that the risk of unfair prejudice is significant given the nature of the evidence that will become admissible under this change.

C. Title 4. Changes to HIV Testing Rules of Persons Charged With or Convicted of Sexual Assault Offenses or Offenses that Create Risk of HIV Transmission

This title makes three significant changes to D.C. Code §§ 22–3901 and 22-3902, which currently permit victims to request defendants who have been convicted of certain sexual assault offenses to be subjected to HIV testing. The title would permit testing for a broader array of criminal offenses, for persons charged but not yet convicted of these offenses, and would allow prosecutors to request testing.

It is unclear why the prosecutor should have independent authority to request testing in light of newly proposed subsection (g), which expressly bars the court or the prosecutor from informing the victim of test results when the victim does not want to learn the results. In written testimony, the U.S. Attorney's Office stated that often victims and alleged victims do not have formal legal representation and may not be present in court to request HIV testing.[13] If the proposed change is intended to clarify that prosecutors may request testing *on a victim's behalf*, the statute should be written more narrowly, instead of allowing prosecutors to *independently* request a test regardless of whether the victim desires one.[14]

Broadening the scope of who may request testing and the possible uses of those test results raises Constitutional concerns under the Fourth Amendment's prohibition against unreasonable searches.

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[11] *Michelson v. United States*, 335 U.S. 469, 476 (1948) (noting that propensity evidence "is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge").
§ 4:18. Generally, 1 Wharton's Criminal Evidence § 4:18 (15th ed.) ("The fear is that propensity evidence brings with it the increased risk of a wrongful conviction. Even if the prosecution fails to prove the charged offense beyond a reasonable doubt, jurors may well convict not because they believe the defendant is guilty of the current charges, but because he appears to be a person of bad character.).

[12] *United States v. Schaffer*, 851 F.3d 166 (2d Cir. 2017).

[13] Statement of Elana Suttenberg, Special Counsel to the United States Attorney on Bill 25-0345, the "Accountability and Victim Protection Amendment Act of 2023, at 7.

[14] Relatedly, it is unclear why subsection (c) should be amended to permit prosecutors to notify victims of HIV test results. Under the current statute and the proposed revisions under this title, upon granting a request for HIV testing the Court shall notify the *Mayor,* who will then collects the blood sample and performs the HIV test. Even if prosecutors are granted broader authority to *request* testing, it is unclear why they should be permitted to inform the victim of the results, as this would require the Mayor to divulge those results to the prosecutor.

Supreme Court case law is clear that blood testing constitutes a search.[15] Unlike many searches, the HIV testing under § 22-3902 does not serve an investigatory purpose. Rather, this search is analyzed under the "special needs" doctrine, which allows searches "in limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion[.]"[16] In assessing the reasonableness of the search, courts must balance the individual's privacy expectations against the state's important interests.[17]

The Supreme Court has never ruled on whether these types of tests violate the Fourth Amendment, but state supreme courts and federal circuit courts have considered similar testing rules. Courts have upheld HIV testing laws, but have identified several factors that make a given testing law constitutional. In upholding testing laws, courts have noted that the laws in question 1) apply to cases in which the crime or alleged crime was committed "in a manner which creates a risk of transmission of HIV";[18] 2) test results are kept confidential[19]; and 3) the test produce results that "provide information necessary for [the] health of the victim of the alleged offense"[20] Moreover, courts have noted that while persons *charged* of crimes have a diminished expectation of privacy, they still have a greater expectation of privacy than people who have been *convicted* of crimes.[21]

Under the proposed changes, testing could be permitted even when the crime or alleged crime was not committed in a manner that creates a risk of transmission[22], confidentiality of results could be diminished if prosecutors are permitted to broadly share the results, and when prosecutors request testing and are barred from sharing results with the victims, the testing does not provide any information necessary for the health of the victim. The testing would be permitted as to persons who have relatively greater expectation of privacy than people convicted of offenses.

To be clear, the CCRC does not believe that the proposed changes under this title would necessarily be unconstitutional, but at least as applied in certain cases, would raise genuine Fourth Amendment concerns.

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[15] *Schmerber v. California*, 384 U.S. 757, 767 (1966) (blood tests to determine blood alcohol content "plainly constitute searches of 'persons,' and depend antecedently upon seizures of 'persons,' within the meaning of [the Fourth] Amendment").

[16] *Skinner v. Railway Labor Executives' Assn*., 489 U.S. 602, 624 (1989).

[17] *Chandler v. Miller*, 520 U.S. 305, 314 (1997)("When such "special needs"—concerns other than crime detection—are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties.").

[18] *United States v. Ward*, 131 F.3d 335, 341 (3d Cir. 1997)

[19] *Id.* (noting that test results are only divulged to the defendant, victim, and medical staff performing the tests)

[20] *State v. Bemer*, 262 A.3d 1, 26 (Ct. 2021) (quoting *United States v. Ward*, 131 F.3d at 339 n.2).

[21] *Id.*

[22] D.C. Code § 22-3902 authorizes testing of persons convicted of an "offense" as defined under D.C. Code § 22-3901. D.C. Code § 22-3901 defines "offense" to include "any prohibited activity involving a sexual act that includes . . . contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus." However, according to the Center for Disease Control, there is "little to no risk of getting or transmitting HIV from oral sex." https://www.cdc.gov/hiv/pdf/risk/cdc-hiv-oral-sex-fact-sheet.pdf

D. Title 5. Changes to Definition of "Significant Relationship"

This title changes to the definition of "significant relationship" under D.C. Code § 22–3001 to include contractors at a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization. The RCCA defined an analogous term, "Position of trust with or authority over", which also included contractors. Accordingly, the CCRC supports changing the definition of "significant relationship" to include contractors.

However, as we noted in prior testimony for bill B25-0291, the proposed drafting maintains an ambiguity that exists in current § 22–3001. The current statutory language specifies "any" employee or volunteer of the specified institutions, which suggests that having a designated job title is sufficient, regardless of whether the person has any actual relationship with the victim or alleged victim of an offense. The subsection 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). It is unclear if having a specified job is sufficient, or if the person must hold the job title *and* be in a position of trust or authority over the minor.

The changes under this title do not address this ambiguity, and extends it to contractors and volunteers. Contractors and volunteers could easily have no connection or a fleeting connection to the school setting, such as construction contractors or volunteers for a single event. It is ambiguous whether, or under what circumstances, such contractors and volunteers would be barred from engaging in sexual conduct with students who have reached the age of consent. 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 arguably be convicted of First Degree Sexual Abuse of a Minor, even if the contractor does not work at the school at which the 17 year old attends. The Sexual Abuse of a Minor offense does not require that the sexual activity occur on school grounds, so any sexual activity would be prohibited regardless of location.

The CCRC supports changing the definition to include contractors and volunteers, but recommends that the Committee consider amending the definition to require that the contractors and volunteers have an actual relationship with the victim, or at least work or volunteer in the same school in which the student attends.

E. Title 6. Changes to Admission of Detection Device Evidence

This title amends D.C. Code § 23–1303 to state that "[a]ny information obtained from a detection device . . . *shall* be admissible on the issue of guilt in any judicial proceeding." The CCRC reiterates its testimony with respect to a similar provision included in bill B25-0291,[23] and recommends that title 6 use the word "may" in place of "shall." The testimony from the analogous provision in B25-0291 is copied below:

[23] "Safer Stronger Amendment Act of 2023" Title V. Rebuttable Presumption; GPS Data for Prosecution. Sec. 501

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.[24] 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.[25] For example, consider an assault case in which the defendant concedes 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.

F. Title 8. Create Repeat Offender Penalty Enhancement for Misdemeanor Sexual Abuse.

This title adds a repeat offender penalty enhancements to the misdemeanor sexual abuse statute.[26] The new 3 year maximum is similar to the maximum penalty under the RCCA for the analogous nonconsensual sexual conduct offense when subject to penalty enhancements.[27] However, this bill does not address the significant penalty proportionality issues contained within the misdemeanor sexual abuse offense itself, and the new enhancements in some cases may exacerbate penalty disproportionality.

The misdemeanor sexual abuse offense is very broad and authorizes the same maximum penalty to conduct that differs significantly in the nature and degree of the harm inflicted. It includes conduct such as touching a person's rear end, but also much more serious conduct such as engaging in sexual intercourse knowing the other person does not consent (without resorting to force or

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[24] *United States v. Jackson*, 214 A.3d 464, 467 (D.C. 2019).
[25] *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).
[26] D.C. Code § 22-3306.
[27] Under the RCCA § 22A-2307, first degree nonconsensual sexual conduct is a 2 year felony. When subject to a repeat offender enhancement under § 22A-606, the maximum penalty increases to 2 years and 180 days.

threats). The RCCA replaced misdemeanor sexual abuse with a nonconsensual sexual conduct offense, which included two penalty grades. Under this offense nonconsensual sexual conduct offense, nonconsensual *sexual acts*–such as sexual intercourse–were treated as a felony offense. As this bill makes no changes to the misdemeanor sexual abuse offense itself, even egregious conduct such as non-consensual sexual intercourse is still treated as a misdemeanor.

The repeat offender potentially exacerbates this disproportionality. Under the proposed change, a person who touches someone on the rear for a second time is now guilty of a felony offense, punishable *six times* as severely as a first time offender who engages in nonconsensual sexual intercourse.

We would recommend that the Committee consider replacing the misdemeanor sexual abuse offense with the revised nonconsensual sexual assault offense that was included in the RCCA.

The CCRC also notes that the unaddressed issues with the misdemeanor sexual abuse offense demonstrate the enormous need for comprehensive criminal code reform. The reform under this title is well-intentioned and addresses one issue with the current offense but leaves other problems unaddressed and in certain cases can exacerbate disproportionate penalties.

G. Title 12. Creates a Penalty Enhancement for Committing Offenses in the Presence of, or Witnessed By, a Child

This title creates a penalty enhancement for committing intrafamily offenses or crimes of violence "in the presence of a child" or when a child "witnessed the offense." The CCRC does not take a position at this time as to whether this new enhancement should be added to the code, but we raise textual issues and ambiguities in the proposed legislation.

First, the proposed enhancement does not specify any culpable mental state as to whether a child was present or witnessed the offense. The affirmative defense under subsection (b) implies that strict liability applies to this enhancement. If the Committee intends for strict liability to apply, that should be clarified within the statute. However, the CCRC recommends that the Committee consider omitting the affirmative defense and instead require a culpable mental state, such as negligence or recklessness, as to whether a child was in the presence, or witnessed, the offense.[28] Requiring a culpable mental state for this enhancement is consistent with other penalty enhancements under current law that are based on the status of the victim.[29]

Second, it is unclear what qualifies as being "in the presence" of a child. For example, if a person commits a robbery and there is a child across the street or down the block, is that within "the presence" of a child? If the crime occurs inside and a child is in the adjacent room, is that within "the presence" of the child? Defining "presence" using any specific distance may be impractical,

[28] *Cf.* RCCA § 22A-2101(d)(4)(A) (applying penalty enhancement for murder when the actor was "reckless as to the fact that the decedent is a protected person").

[29] E.g., D.C. Code § 22-2106. Murder of a law enforcement officer offense requires that the defendant caused death of another, "with knowledge or reason to know that the victim is a law enforcement officer or public safety employee[.]"

but the statute could be drafted to provide guidance as to what degree of proximity is sufficient. The CCRC had recommended revising the rioting statute to require engaging in riotous behavior when there are other people in "the area reasonably perceptible to the actor."[30] This language was adapted from District caselaw that requires that the defendant engage in riotous conduct with other people in such close proximity that they "could reasonably have been expected to see or to hear" the defendant's actions.[31] The Committee should consider adapting this, or similar, language to provide greater guidance to juries and judges as to the degree of proximity required to be "in the presence" of a child.

Third, it is unclear what it means to "witness" an offense. This could be interpreted narrowly to require that the child *sees* the crime occur, or more broadly to include a child *perceiving* the crime using their other senses.[32] For example, if a child is just outside the door while an intrafamily offense occurs and can *hear* the crime occurring, it is unclear if the enhancement would apply. The Committee should consider using a different term than "witness" to clarify this ambiguity. Under the RCCA, the revised first degree burglary offense required that a person inside the burgled dwelling "perceives" the defendant, a term that broadly included perceiving the defendant by sight or sound or touch.

Fourth, when the enhancement is based on commission of an "intrafamily offenses" there is no requirement that the child also be part of the domestic unit or otherwise related to either the defendant or victim. If a person commits simple assault in public in front of a child, the enhancement would not apply, as the term "crime of violence" does not include simple assault.[33] However, the term "intrafamily offense" includes "[a]n offense punishable as a criminal offense against an intimate partner, a family member, or a household member."[34] If a person commits simple assault against a member of their family in front of an *unrelated child,* the enhancement would apply. The harm to child in witnessing these offenses seems the same, but the penalties would differ.

Finally, there is possible overbreadth due to the breadth of offenses that are included within the definitions of "intrafamily offense" and "crime of violence." The U.S. Attorney's Office noted in its testimony in support of this enhancement that "[f]amily *violence* has an adverse impact, often deep and profound, on a child's physical, cognitive, emotional, and social development" and that "[c]hildren who witness domestic *violence* can suffer severe emotional and developmental difficulties[.]"[35] However both "intrafamily offense" and "crime of violence" include *non-violent* conduct. "Intrafamily offense" is defined as *any* "offense punishable as a criminal offense against an intimate partner, a family member, or a household member"[36] including non-violent property crimes. "Crime of violence" includes offenses such as robbery, carjacking, and burglary which

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[30] The revised rioting offense was not included in the final version of the RCCA.
[31] *United States v. Matthews*, 419 F.2d 1177, 1185 (D.C. Cir. 1969).
[32] Under the RCCA's revised burglary statute, first degree burglary requires that a person within the building "perceives" the actor, which includes both seeing or hearing the actor.
[33] D.C. Code § 23-1331(4).
[34] D.C. Code § 16-1001(8).
[35] Statement of Elana Suttenberg, Special Counsel to the United States Attorney on Bill 25-0345, the "Accountability and Victim Protection Amendment Act of 2023, at 13 (emphasis added).
[36] D.C. Code § 16-1001(8)

are broadly defined to include non-violent conduct. For example, non-violent pickpocketing constitutes robbery, and if committed on a crowded metro while a child is onboard, would be subject to this penalty enhancement even if the child was unaware that a crime had been committed. To the extent that the Committee is concerned with exposing children to *violence*, the scope of offenses to which this enhancement would apply should be narrowed to those crimes that actually involve some degree of violent conduct.

F. Title 13. Creates a New Strangulation Offense

This title creates a new felony strangulation offense when a person knowingly, intentionally, or recklessly restricts the normal circulation of the blood or breathing of another person, either by applying pressure on the throat, neck, or chest of another person, or by blocking the nose or mouth of another person. The CCRC had recommended as part of the RCCA that strangulation be treated as a "significant bodily injury" as required for felony assault. The CCRC agrees in principle that this use of force should be treated as a felony. However, the changes included under this title differ from the RCCA's recommendation. The RCCA included injuries from strangulation within the definition of "significant bodily injury", which ensured that strangulation would be criminalized as a felony under the revised assault statute. By contrast this title would create a new standalone strangulation offense.

Merger and Penalty Proportionality

Creating a separate offense raises the issue of whether the new strangulation offense merges with assault offenses; that is, can a person can be convicted of strangulation and other related assault offenses on the basis of a single act. Whether strangulation merges with assault offenses has significant implications for the maximum penalties and penalty proportionality. For example, a person who causes significant bodily injury by strangulation could be charged of both felony assault and strangulation. If the offenses *do* merge then a person who commits strangulation that results in significant injury would only be guilty of strangulation[37], punishable by a maximum of 5 years, or roughly 66% more than the maximum for felony assault alone. If the offenses do not merge, a person can be convicted of both offenses for a combined maximum sentence of 8 years, or more than 2.5 times the maximum for felony assault alone.

Under DCCA and Supreme Court case law, legislative intent determines when a person may be convicted of multiple offenses arising from a single act.[38] Absent any clear statement of legislative intent, courts rely on what is known as the elements test to determine if multiple convictions are permitted.[39] Under the elements test, courts analyze the elements of each offense in the abstract,

[37] When offenses merge, typically the more serious offense (i.e. the offense with the longer maximum sentence) remains in effect. The proposed strangulation offense has a five year maximum sentence, and felony assault has a three year maximum sentence.

[38] *Byrd v. United States*, 598 A.2d 386, 388 (D.C. 1991) (en banc) ("The role of the constitutional guarantee [against double jeopardy] is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.") (quoting *Albernaz v. United States*, 450 U.S. 333, 334 (1981)).

[39] This test was first enunciated by the Supreme Court in *Blockburger v. United States*, 284 U.S. 299 (1932), and has been adopted by the D.C. Court of Appeals in *Byrd v. United States*, 598 A.2d 386, 398 (D.C. 1991) (recognizing that

without consideration for the specific facts of an individual case. If the elements match such that the elements of one offense *necessarily* satisfy the elements of the other, then convictions for the two offenses merge, and the defendant may only be *convicted* of one offense.

Under the elements test, it is likely that multiple convictions for strangulation and some forms of assault would be permitted. For example, felony assault requires infliction of significant bodily injury[40] but does not require use of strangulation, while strangulation does not require inflicting significant bodily injury. Since it is possible to commit one offense without *necessarily* committing the other, under the elements test the two offenses would not merge.[41] However, it is *legislative intent* that governs whether offenses merge. The elements test is just a means of determining legislative intent, and the statute can be drafted to clarify that offenses merge, regardless of whether their elements match.

Lack of Mental State for Serious Bodily Injury Penalty Enhancement

The proposed strangulation offense includes a penalty enhancement if the strangulation results in "serious bodily injury" but does not specify any culpable mental state as to this enhancement. The strangulation offense itself requires that the person acts "knowingly, intentionally, or recklessly." However, the penalty enhancement under paragraph (c)(1) applies if the "victim sustained serious bodily injury . . . as a result of the offense[.]" It is unclear which mental state, if any, applies to causing serious bodily injury. The CCRC recommends that at least a recklessness mental state be required with respect to the causing serious bodily injury under this penalty enhancement. Applying a lower culpable mental state[42] or strict liability risks unduly criminalizing purely accidental injuries.[43]

The lack of mental state makes it unclear if this enhanced form of strangulation would merge with aggravated assault. Under current law aggravated assault requires "malice," a composite mental state that incorporates several distinct mental states.[44] Because no mental state is specified in the enhancement, it is unclear if strangulation that results in serious bodily injury necessarily satisfies

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the *Blockburger* test had been codified under D.C. Code § 23-112 for determining whether concurrent or consecutive sentences are permitted).

[40] D.C. Code § 22-404(a)(2).

[41] As noted below, the penalty enhancement for causing *serious* bodily injury does not specify any culpable mental state. Because no mental state is specified, it is unclear whether this enhanced form of strangulation would merge with aggravated assault, which also requires causing serious bodily injury. Under current law aggravated assault requires "malice," a composite mental state that incorporates several distinct mental states. If the serious bodily injury enhancement under the proposed strangulation offense has a mental state requirement that would not suffice as "malice," then aggravated assault and enhanced strangulation would not merge.

[42] Applying mere negligence would be preferable to strict liability, but would still mark a major departure from current District law. Current law, the RCCA, and the law of most jurisdictions criminalize negligently *causing death* of another. However, even though death results due to the minimal culpable mental state, the RCCA and nearly all states treat negligent homicide as a low level felony or even a misdemeanor. Negligently causing *injury* is not criminalized under current District law. Applying negligence as to this enhancement would be a drastic departure from current law, and would impose disproportionately severe penalties to conduct that was only minimally culpable.

[43] While uncommon, consensual combat sports involving chokeholds can result in serious bodily injuries. *E.g.* https://www.espn.com/mma/story/_/id/8660482/sean-entin-life-choke

[44] *Comber v. United States*, 584 A.2d 26 (D.C. 1990) (en banc).

the elements of aggravated assault. If the serious bodily injury enhancement under the proposed strangulation offense has a mental state requirement that would not suffice as "malice," then aggravated assault and enhanced strangulation would not merge.

Lack of Applicable Defenses

The proposed strangulation offense does not include any specific defenses, and the current D.C. Code does not codify any general defenses. It is unclear whether self-defense, consent, duress, or any other potential defenses are available, and under what circumstances. For example, if two people agree to practice martial arts and one person places the other in a chokehold, is that person guilty of the proposed strangulation offense? And if so, are there any circumstances in which the defense is not available?

The RCCA criminalized strangulation under the revised assault statute, which included detailed defenses that address injuries that arise from consensually agreed upon and lawful sporting activities. In addition, generally applicable defenses such as self-defense or defense-of-others also apply the assault offense.

To ensure that the strangulation offense does not create unjust and inappropriate criminal liability, the Committee should consider adopting defenses similar to those included in the RCCA.

G. Title 14. Non-Consensual Pornography.

This title changes the unlawful disclosure and first-degree unlawful publication offenses to require that the defendant distributed or published sexual images without consent of the person depicted. As currently drafted, the offense requires that the "[t]here was an agreement or understanding between the person depicted and the person disclosing that the sexual image would not be disclosed."[45] The CCRC agrees that these offenses should only require lack of consent instead of an actual agreement or understanding that the images would not be disclosed.

However, under the proposed revisions to the non-consensual pornography offenses, it is unclear what constitutes "consent." By contrast, under the RCCA, the term "consent" was defined to require words or conduct that *affirmatively* demonstrate agreement. In addition, it is unclear whether "consent" as used in the proposed revisions excludes consent obtained through certain coercive or wrongful means. The RCCA used the term "effective consent" which was defined as consent not obtained by designated coercive or deceptive means. The Committee should consider adopting the definitions of consent and effective consent for use in the revised non-consensual pornography statute.

The CCRC also notes that, although not part of the proposed changes under this title, the current non-consensual pornography offenses require "intent to harm the person depicted or to receive financial gain."[46] Given that the offense requires an agreement not to distribute the images (or a lack of consent under the proposed revisions), it is unclear why the offense should require a further intent to harm the person depicted or to receive financial gain. Distributing or publishing sexual

[45] D.C. Code § 22-3052.
[46] D.C. Code §§ 22-3052 (a)(3); 22–3053 (a)(3); 22–3054(a)(2).

images of a person is inherently wrongful when the person *knows* that they lack consent to do so. The role of this element is unclear as the phrase "with intent" as used in the non-consensual pornography offenses is undefined. Under the RCCA, the term "with intent" was defined to mean "being practically certain" that a particular outcome would occur, regardless of whether the defendant *desired* that outcome. If "intent" as used in the current statute only require practical certainty, but not conscious desire, including this element is less problematic, as it is quite likely that a person who non-consensually shares sexual images would also know that doing so will inflict psychological or reputational harm. However, if "intent" is interpreted to require conscious desire, this element may inappropriately narrow the scope of this offense.[47]

H. Title 15. Applies Senior Citizen Penalty Enhancement to Felony Assault.

This title amends D.C. Code § 22-3601, which provides a penalty enhancement for committing enumerated offenses against a person 65 years or older. The title adds assault with significant bodily injury, also known as "felony assault," to the enumerated offenses. This is generally consistent with the RCCA, which included a penalty enhancement for committing the analogous form of assault against a "protected person," which is defined to include persons 65 years of age or older. The CCRC supports this change under Title 15.

Unrelatedly, the CCRC notes that D.C. Code § 22-3601's enumerated offenses currently include "abduction." There is no "abduction" offense under current law, and § 22-3601 makes separate reference to "kidnapping." The CCRC recommends that the word "abduction" be deleted from the statute.

III. CONCLUSION.

This concludes my prepared remarks for this hearing. I look forward to answering any questions you may have, and as always the CCRC is happy to work with the Committee in proposing any alternate drafting to address the concerns I've raised today.

[47] For example, Person A non-consensually shares a sexual image of Person B with several of their peers. Person A shared the image merely to prove to others that he had engaged in sexual activities with Person B. If "intent" requires desire, then Person A would not be guilty of an offense even if Person B suffers significant psychological and reputational harm, and even if Person A *knew but did not desire* that Person B would suffer such harm.