D.C. CRIMINAL CODE REFORM COMMISSION

TESTIMONY OF EXECUTIVE DIRECTOR JINWOO PARK ON B25-0479

THE "ADDRESSING CRIME THROUGH TARGETED INTERVENTIONS AND VIOLENCE ENFORCEMENT AMENDMENT ACT OF 2023"

COMMITTEE ON THE JUDICARY & PUBLIC SAFETY HEARING
November 8, 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 today on behalf of the Criminal Code Reform Commission (CCRC) regarding the "Addressing Crime through Targeted Interventions and Violence Enforcement Amendment Act of 2023" ("ACTIVE Act"). The CCRC submits this written testimony as a supplement to oral testimony provided at the November 8, 2023 hearing held by the Committee on the Judiciary and Public Safety. The CCRC also notes that it has not provided oral or written remarks on every Title within this bill.

II. Comments on Specific Provisions in the ACTIVE AMENDMENT ACT OF 2023

A. Sections 2 and 7. Consent Search Provision for Persons Convicted of Gun Offenses on Probation, Parole, or Supervised Release; and Rebuttal Presumption of Consent to Search as Condition of Release

This portion of the CCRC's testimony discusses the warrantless consent search provision under Section 2 that applies to persons convicted of gun offenses that are on parole, probation, or supervised release, and the separate warrantless search provision under Section 7 that applies to defendants on pre-trial release.

i. Consent Search Provision for Persons Convicted of Gun Offenses on Probation, Parole, or Supervised Release

Section 2 of this bill proposes adding a new provision to Title VII of District law that would require persons who are on probation[1], supervised release, or parole after conviction for a "gun offense" to be "subject to search or seizure by a law enforcement officer at any time of the day or night, with or without a search warrant or with or without cause, when that person is in a place other than the person's dwelling place, place of business, or on other land possessed by the person." Further, the bill provides that the person shall be given written notice by the court or supervising entity that they are subject to terms and conditions of release and that the notice shall include an advisement with respect to the search condition. The provision does not indicate whether the person is subject to a search and seizure only of their person or of their person and property and what standard is required for searching property belonging to or shared by other persons.[2] Finally, the provision includes a paragraph stating that "it is not the intent of the Council to authorize law enforcement officers to conduct searches for the sole purpose of harassment".

[1] The provision does not distinguish between supervised or unsupervised probation.

[2] It is not clear, for example, whether the search and seizure provision would allow search and seizure of a person's automobile at any time and irrespective of the person's presence. Likewise, it is not clear whether the home of another person would be subject to search as a result of the presence of a person subject to the search condition. By the plain terms, the law would seem to permit police to enter the home of a third person in the middle of the night to search a person on probation, parole, or supervised release without cause. However, courts in other jurisdictions have restricted and required probable cause for such entries. *See e.g., United States v. Grandberry*, 730 F.3d 968, 973 (9th Cir. 2013) (stating "before conducting a warrantless search of a residence pursuant to a parolee's parole condition, law enforcement officers must have probable cause to believe that the parolee is a resident of the house to be searched") (internal citations omitted).

The term "gun offense" is defined in D.C. Code § 7-2508.01(3)[3] and includes both violations of misdemeanor statutes "in the nature of police and municipal regulations" prosecuted by the Office of Attorney General and felony gun offenses prosecuted by the Office of the United States Attorney for the District of Columbia.[4] The term "gun offense" also applies to convictions from other jurisdictions for comparable offenses that have an element involving conduct that would be a violation under District law. With respect to those offenses, there is no mechanism in the bill for providing notice to persons convicted and under supervision *in other jurisdictions* that they are subject to search or seizure without cause any time while in the District.[5]

The provision provides a few limited exceptions as to places where a person would be subject to search or seizure. The proposed language "in a place other than the person's dwelling place, place of business, or on other land possessed by the person" mirrors language known as "the dwelling exception" in the carrying a pistol without a license statute.[6] The DCCA has interpreted the dwelling part of the exception to exclude the curtilage of residence such that a person in the backyard of their residence does not fall within the exception unless the person has a "possessory interest in the land" and the right to exclude others.[7] Under this rule, a person residing in a relative's home without the power to exclude others from the yard or common areas of the property would be subject to search and seizure on the property at any time.[8] The DCCA has also required persons to establish "exclusive possession and control" of the premises to come within the dwelling exception. The requirement that the person have exclusive possession and control of the property has excluded places such as common areas and hotel rooms from the exception. Given the similarity in language, the DCCA would likely interpret the language in the proposed provision as intended to permit suspicionless searches of persons in those areas where the dwelling exception to the CPWL statutes does not apply including potentially a relative's backyard, a hotel room, or a place of employment.[9]

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[3] D.C. Code § 7-2508.01(3)("Gun offense" means: (A) A conviction for the sale, purchase, transfer, receipt, acquisition, possession, use, manufacture, carrying, transportation, registration, or licensing of a firearm under Chapter 45 of Title 22, or an attempt or conspiracy to commit any of the foregoing offenses; (B) A conviction for violating § 7-2502.01, § 7-2504.01, § 7-2505.01, § 7-2506.01, or § 7-2509.06, or an attempt or conspiracy to commit any of those offenses; (B-i) A conviction for a firearms-related violation of the provisions in § 22-402 (assault with a dangerous weapon), § 22-2603.02 (unlawful possession of contraband), or § 22-2803(b) (carjacking); or (C) Violations in other jurisdictions of any offense with an element that involves the violations listed in subparagraphs (A), (B), or (B-i) of this paragraph.").

[4] *See* D.C. Code § 23-101(a)-(c).

[5] *See* D.C. Code § 7-2308.01(3)(D)(including out of jurisdiction convictions within the definition of "gun offense").

[6] See D.C. Code § 22-4504(a)(1)(applying felony CPWL statute to carrying "in a place other than the person's dwelling place, place of business, or on other land possessed by the person").

[7] *See Fortune v. United States*, 570 A.2d 809, 810 (D.C. 1990)(finding that the exception does not apply to the curtilage of a resident and holding that a person carrying a pistol in the backyard of the residence did not fall within the exception);

[8] *Id.*

[9] Although argument can be made for a broader interpretation of the language proposed, a different interpretation of the proposed language that provided greater exceptions to the search provisions would create different meanings for identical language within the case law and potentially create constitutional issues with respect to notice. *E.g.*, if identical language of this nature is defined to mean different things, a person would not be given fair notice of what conduct is prohibited under the CPWL statute or what expectations of privacy they have under the proposed

ii. Warrantless Search Provision as Condition of Release for Pre-trial Defendants

Section 7 of this bill changes D.C. Code § 23-1321 such that when there is a rebuttable presumption of detention pursuant to either § 23-1322(c) or § 23-1325(a), there will also be a rebuttable presumption that the judicial officer will require as a condition of release that the person consent to be subject to search anytime the person is outside their home, place of business, or other land possessed by the person. Setting aside potential Fourth Amendment issues, which are discussed below, there is a design flaw in this provision. Under this proposed section, there is a rebuttable presumption that the judicial officer shall order this condition of release, not a rebuttable presumption of *facts that would justify* this condition of release. Therefore, it is unclear what factors a judge should consider in deciding whether to order this condition, and what evidence could rebut the presumption.

To illustrate, compare the proposed rebuttable presumption under this section with the rebuttable presumption under current D.C. Code § 23-1322. Under § 23-1322, a judicial officer shall order that a person be detained pending trial if factual conditions are present, i.e. that there is no condition or combination of conditions that will reasonably assure the safety of any other person and the community.[10] There is no rebuttable presumption *that the person be detained* pending trial. Rather, certain conditions[11] create a rebuttable presumption *of the factual basis*—no conditions will assure the safety of any other person or the community—that justifies pre-trial detention. The defendant can then present evidence to rebut this factual basis, for example by showing that they have no criminal record, to show that they do not present a danger to the community. The factual basis also provides clear guidance to judicial officers as to what factors to consider in making pre-trial detention decisions.

Under the proposed rebuttal presumption under this section, *there is no factual basis* specified to justify the consent to search condition of release. It is unclear then how a defendant can rebut this presumption, or what factors should guide a judicial officer in deciding whether to impose this condition of release.

Setting aside potential Constitutional concerns and the policy merits of this proposal, this provision is unworkable as written. If the Committee wishes to create this condition of release, the CCRC recommends that it specify a factual basis that would guide a judicial officer's decision as to whether to impose this condition and specify circumstances that create a rebuttable presumption that the factual basis exists.

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suspicionless search and seizure provision. Under certain circumstances, dueling interpretations of this identical language could result in an as-applied constitutional challenge to charges under D.C. Code § 22-4504(a)(1) on the grounds that the person was not fairly advised by the statute as to whether their conduct fell within the exception provided by the phrase "other than the person's dwelling place, place of business, or on other land possessed by the person." *Cf. United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) ("Vague laws contravene the "first essential of due process of law" that statutes must give people "of common intelligence" fair notice of what the law demands of them."). For these reasons, the DCCA would likely follow current case law and factor those interpretations into the reasonableness analysis discussed below.

[10] D.C. Code § 23-1321 (b)(1). In addition, the person shall be ordered to be detained pending trial if there is no condition or combination of conditions that will reasonably assure the appearance of the person as required.

[11] D.C. Code § 23-1322 (c).

iii. Constitutionality of the Warrantless Consent Search Provisions

CCRC's review of the caselaw shows that Supreme Court jurisprudence on suspicionless searches and seizures of this type is not definitive with respect to the proposed provisions. For suspicionless searches and seizures of parolees, the Supreme Court has used a reasonableness test based on the totality of the circumstances to uphold a search performed under a California law that used similar language to the proposed provision.[12] With respect to probationers, the Supreme Court has applied the "special needs" doctrine to some searches based on reasonable suspicion[13] but has not yet addressed whether suspicionless searches of probationers of this type or persons on supervised release can be analyzed under general balancing test as it allowed in the California case for parolees or how a probationer's heightened expectation of privacy might affect the analysis.[14] Lower courts have diverged on how such cases should be analyzed.[15] This discussion will focus on the less stringent general reasonableness test applied in the California parole case—which balances governmental interests against the privacy intrusion involved with a search—and what factors would affect a court's assessment of reasonableness.

With respect to the pretrial provision, the CCRC has not found similar laws or cases on point with respect to such an expansive search and seizure condition. CCRC notes that pretrial release, which is the constitutional norm for persons presumed innocent, is fundamentally different from post-conviction release that is part of the punishment for a crime. All conditions of release pretrial are imposed in spite of the constitutional presumptions of innocence and liberty as opposed to post-conviction conditions which are imposed as punishment or alternative to imprisonment after a person has been accorded due process and found guilty. Persons on pretrial release are entitled to more protections under the Fourth and Fifth amendment than persons on post-conviction release and the government has a relatively less compelling interest in suspicionless searches and seizures of persons who are released pretrial. Consequently, it will be more difficult to justify a

[12] *Samson v. California*, 547 U.S. 843 (2006).

[13] The special needs doctrine permits some warrantless searches or seizures for "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987).

[14] The Supreme Court has applied the general balance test to probationers in a case where there was reasonable articulable suspicion to uphold a search without establishing a special need but not to a suspicionless search or a probation. *See United States v. Knights*, 534 U.S. 112, 122 (2001).

[15] *See United States v. Amerson*, 483 F.3d 73, 79 (2d Cir. 2007)("While after Samson it can no longer be said that Supreme Court has never applied a general balancing test to a suspicionless-search regime, nothing in Samson suggests that a general balancing test should replace special needs as the primary mode of analysis of suspicionless searches outside the context of the highly diminished expectation of privacy presented in Samson. . . . Because the Supreme Court has not, to date, held that the expectations of privacy of probationers are sufficiently diminished to permit probationer suspicionless searches to be tested by a general balancing test—and, to the contrary, in Samson the Court expressly acknowledged that probationers have a greater expectation of privacy than the parolees—Samson does not require us to reconsider our holding in Lifshitz.") (internal citations omitted); *Nicholas v. Goord*, 430 F.3d 652, 659 (2d Cir. 2005) ("Courts remain divided, however, as to the appropriate test to apply. The Second, Seventh, and Tenth Circuits have applied the special-needs test. The Third, Fourth, Fifth, Ninth, and Eleventh Circuits have applied a general balancing test, although the Third and Ninth Circuit decisions prompted impassioned dissents.") (internal citations omitted).

suspicionless search or seizure of a person on pretrial release than a person on post-conviction release or supervision.[16]

In applying a general reasonableness test, the Supreme Court has "consistently eschewed bright-line rules" and emphasized the fact-specific nature of any inquiry.[17] The constitutionality of any suspicionless search or seizure conducted pursuant to the proposed law will thus be subject to constitutional challenge under a totality of the circumstances analysis of the reasonableness of that particular search or seizure.[18] *Samson* was decided using a totality of the circumstances "reasonableness test" where the Court said reasonableness is "is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."[19] Although the existence of a search or seizure condition imposed by statute is a "salient factor" in the analysis because it provides notice of the diminished expectation of privacy, it will not be dispositive and the constitutionality of a particular search might tilt in either direction based on the specific facts.

In *Samson v. California*, 547 U.S. 842 (2006), the Court upheld a suspicionless search of a parolee performed pursuant to a California law, similar but not identical to the proposed provisions, requiring parolees be subject to search or seizure at any time day or night, with or without a warrant and with or without cause. The Supreme Court cited the fact that parolees are on the "continuum of state-imposed punishments" and distinguished probationers from parolees stating that "parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment."[20] In upholding the search, the Court noted California's statutory scheme in which a person on parole remains in the Department of Corrections' legal custody for the remainder of the term and thus, has a severely diminished expectation of privacy.[21] Citing the additional fact of the search provision providing the parolee of notice of their severely diminished expectation of privacy as a "salient circumstance," the Court found that the parolee in the case did not have a recognized expectation of privacy.[22] On the other side of the ledger, the Court found that California had a substantial interest in supervising parolees to combat

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[16] The proposed provision does require that a person "consent" to the condition of release. However, valid consent must be voluntary and it is not clear that District courts would consider such acquiescence to be voluntary consent given the inherent coerciveness of requiring consent as an alternative to detention. This is especially true because liberty, rather than detention, is the constitutional norm and not the exception for persons not yet convicted.

[17] *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) ("Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances. . . . In applying this test we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry.").

[18] *Samson v. California*, 547 U.S. 843, 848 (2006).

[19] *Id.* at 850.

[20] *Id.* at 850; *see also United States v. Fuller*, No. 5:17-CR-401-H(2), at 11 (E.D.N.C. Oct. 1, 2019) ("Probation, on the other hand, is an alternative to imprisonment, imposed because the probationer 'has satisfied the sentencing court that, notwithstanding his offense, imprisonment in the state prison is not necessary to protect the public.' *California v. Burgener*, 41 Cal. 3d 505, 533, (1986), overruled on other grounds by *California v. Reyes*, 19 Cal. 4th 743, (1998). '[H]is probation is not a period of reintegration into society during which the same degree of surveillance and supervision as that deemed necessary for prison inmates is required.' *Id*.").

[21] *Samson v. California*, 547 U.S. at 851 ("California's system is consistent with these observations. An inmate electing to complete his sentence out of physical custody remains in the Department of Corrections' legal custody for the remainder of his term and must comply with the terms and conditions of his parole. The extent and reach of those conditions demonstrate that parolees have severely diminished privacy expectations by virtue of their status alone.").

[22] *Id.*

recidivism.[23] The Court cited then existing data relating to the recidivism rates in California which had the highest recidivism rate in the country at the time.[24]

Although the proposed provisions are similar to a law in California that the Supreme Court upheld under those specific circumstances, many of the attendant circumstances that will be present for suspicionless searches and seizures performed under the proposed provisions have not been addressed by the Supreme Court. There are both substantial and minor differences between the suspicionless search upheld in *Samson* and suspicionless searches or seizures that might be performed under the proposed law. It is not clear whether these differences will materially alter the analysis with respect to post-conviction suspicionless searches and seizures. But there are some notable differences that courts may use to distinguish a suspicionless search or seizure performed under this proposed provision from the one performed in *Samson* and it is possible some searches or seizures performed pursuant to this provision would be upheld as Constitutional while not others.

The proposed provisions authorize suspicionless searches and seizures of persons in a variety of procedural postures ranging from pretrial release to parole, and for offenses ranging from misdemeanors in the nature of a municipal regulation violation to violent felonies. For example, the proposed post-conviction provision treats probationers (supervised and unsupervised), parolees, and persons on supervised release identically. However, each person and each of these statuses have varying recognized expectations of privacy based on their circumstances and status. The *Samson* Court explicitly stated that there is continuum and "parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment."[25] In California, parolees seem to have a more limited expectation of privacy than persons on probation in the District, and possible supervised release, because in California parolees remain in legal custody and do not have to be in the community for parole.[26] Lower courts have not reached a consensus on how to treat these differences, with some requiring that searches of probationers be based on reasonable suspicion, [27] and the Supreme Court has not expanded on its holding in *Samson*.

Notably, persons on pretrial release are not even on the continuum of punishment discussed in *Samson* because they are presumed innocent and cannot be subject to punishment before conviction. Although the proposed pretrial search and seizure provision applies only to persons subject to a statutory "presumption" of detention, it is not the case that persons released despite being subject to this statutory presumption are being granted a reprieve and would otherwise be detained in jail. As the DCCA recently explained, persons subject to a statutory presumption are required only to meet a burden of production with respect to their release and it is the government's burden to justify detention by clear and convincing evidence even when a statutory presumption

[23] *Samson v. California*, 547 U.S. 843, 853 (2006).
[24] *Id.* at 854.
[25] *Id.* at 850.
[26] *Id.* at 851.
[27] *State v. Cornell*, 146 A.3d 895, 909 (VT 2016) ("We do not join these courts in this extension of Samson, and continue to hold that reasonable suspicion for search and seizure imposed on probationers is required by the Fourth Amendment.").

applies.[28] Accordingly, in the case of a person on pretrial release, release under the least restrictive conditions possible to "reasonably assure the appearance of the person as required and the safety of any other person and the community" is the constitutional norm, irrespective of whether a statutory presumption applied. Both detention and further restrictions on liberty are the carefully delineated exceptions permitted only after the government meets its burden to establish their need.[29]

In addition to the distinctions in the legal and custodial status of persons subject to the proposed provision, the offense for which a person has been convicted might affect the analysis of the government's interest in the suspicionless search or seizure. The proposed provision applies in equal force to first-time offenders on unsupervised probation for misdemeanor offenses and persons convicted of violent felonies with prior convictions. The seriousness of the offense could factor into a court's reasonableness analysis with respect to the government's interest in the suspicionless search or seizure. As a matter of law, any offense for which there is no jury trial right is a "petty" offense meaning that the broadest search and seizure provision possible would be applied to persons convicted of a petty offense deemed insufficiently serious to warrant a jury trial. Even if courts are willing to permit suspicionless searches and seizures without cause for persons convicted of violent felonies, they may not be willing to permit suspicionless searches and seizures without cause of persons convicted of misdemeanors.

Notice was also a salient factor in the Supreme Court's analysis of what expectation of privacy a person might have. Under the proposed law, there would be distinctions in the level of notice provided to an individual about the requirement. The proposed provisions provide a mechanism for some individuals to receive notice of the suspicionless search and seizure provision but not others as there is no mechanism for providing notice to people convicted of comparable gun offenses in other jurisdictions. As the provision of notice is a salient factor in the reasonableness inquiry, this could affect the constitutionality of the statute as applied to people who did not receive notice that they could be subject to warrantless searches.

With respect to the government's interest in conducting the search, courts will be presented with more recent empirical evidence regarding recidivism, the effectiveness of suspicionless searches and seizures, barriers to reentry and the impact on recidivism, the impact of police encounters, and the potential for police violence. In *Samson*, the Court weighed the parolee's privacy interest against California's interest in preventing recidivism.[30] It did so in 2006 citing empirical data regarding California's highest in the country recidivism rate.[31] In the 17 years since that decision, there has been a better commitment to collecting data relevant to criminal justice reform, such as through the NEAR Act, making more nuanced review of data possible. Given the passage of time, new data with respect to police encounters, including NEAR Act data, variations in the definition of "recidivism", and differences between California and the District, courts will be presented with,

[28] *Johnson v. United States*, slip op., 23-CO-0649 (D.C. Sept. 28, 2023).
[29] *Id.*; D.C. Code §§ 23-1321, 23-1322.
[30] *Samson v. California*, 547 U.S. 843, 856 (2006).
[31] *Id*. at 853.

and must weigh, different empirical evidence pertinent to the District than the evidence presented in *Samson*.[32]

Assuming there are cases where the governmental interest in the proposed suspicionless search and seizure provision is deemed to be substantial, searches and seizures performed under this provision can also be deemed unlawful if arbitrary, capricious, or for the purpose of harassment. Searches and seizures could be subject to a motion to suppress or lawsuit for damages if searches are "made too often," are performed "at an unreasonable hour," are "unreasonably prolonged or for other reasons establishing arbitrary and oppressive conduct," performed for reasons "unrelated to rehabilitative, reformative, or legitimate law enforcement purposes," "motivated by personal animosity," or are performed "at the whim or caprice of a police officer."[33] The statute does not provide guidance with respect to the provisions that make a search or seizure unlawful beyond stating that "it is not the intent of the Council to authorize law enforcement officers to conduct searches for the sole purpose of harassment." Accordingly, many searches seemingly permitted under the plain language of the statute may actually be deemed unconstitutional after a fact-specific inquiry into the officer's conduct and the officer's motivation and conduct may be scrutinized differently than in cases where the search falls into a recognized exception to the warrant requirement.

In sum, the reasonableness, and thus the constitutionality, of each search or seizure will be litigated based on consideration of these distinctions, individual facts, and other evidence introduced in

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[32] *See State v. Grady*, 372 N.C. 509, 540–41, 831 S.E.2d 542, 566 (NC 2019) ("Similarly, in Samson, empirical evidence documented the recidivism rates of California's parolees. Samson, 547 U.S. at 853, 126 S.Ct. 2193. cases make clear that the extent of a problem justifying the need for a warrantless search cannot simply be assumed; instead, the existence of the problem and the efficacy of the solution need to be demonstrated by the government.").

See People v. Reyes, 19 Cal. 4th 743, 753–54 (CA 1998) ("As explained in *People v. Clower*, 16 Cal.App.4th 1737 (CA 1993), "a parole search could become constitutionally 'unreasonable' if made too often, or at an unreasonable hour, or if unreasonably prolonged or for other reasons establishing arbitrary or oppressive conduct by the searching officer." (*Id.* at 1741; *United States v. Follette*, 282 F.Supp. 10, 13 (S.D.N.Y.1968); *see In re Anthony S.*, 4 Cal.App.4th 1000, 1004 (CA 1992)(a search is arbitrary and capricious when the motivation for the search is unrelated to rehabilitative, reformative or legitimate law enforcement purposes, or when the search is motivated by personal animosity toward the parolee]; *People v. Bremmer,* 30 Cal.App.3d 1058, 1062 (CA 1973)(unrestricted search of a probationer or parolee by law enforcement officers at their whim or caprice is a form of harassment).")

United States v. Clark, No. 7:16-CR-32-1H(2), 2017 WL 9485522, at 5 (E.D.N.C. June 27, 2017) ("The Supreme Court's decisions provide no bright-line rules, and application of the Court's precedents is far from straightforward because of the varying state probation, parole, and post-release supervision regimes.").These cases make clear that the extent of a problem justifying the need for a warrantless search cannot simply be assumed; instead, the existence of the problem and the efficacy of the solution need to be demonstrated by the government.").

[33] *See People v. Reyes*, 19 Cal. 4th 743, 753–54 (CA 1998) ("As explained in *People v. Clower*, 16 Cal.App.4th 1737 (CA 1993), "a parole search could become constitutionally 'unreasonable' if made too often, or at an unreasonable hour, or if unreasonably prolonged or for other reasons establishing arbitrary or oppressive conduct by the searching officer." (*Id.* at 1741; *United States v. Follette*, 282 F.Supp. 10, 13 (S.D.N.Y.1968); *see In re Anthony S.*, 4 Cal.App.4th 1000, 1004 (CA 1992)(a search is arbitrary and capricious when the motivation for the search is unrelated to rehabilitative, reformative or legitimate law enforcement purposes, or when the search is motivated by personal animosity toward the parolee]; *People v. Bremmer,* 30 Cal.App.3d 1058, 1062 (CA 1973)(unrestricted search of a probationer or parolee by law enforcement officers at their whim or caprice is a form of harassment).")

litigation with respect to the reasonableness and effectiveness of suspicionless searches.[34] Thus, while there is Supreme Court precedent for upholding searches under a similar provision with respect to parolees in California, that case does not provide definitive guidance here as it does not address many of the circumstances that would be present in searches and seizures conducted pursuant to the proposed statute of a particular person.[35]

B. Sec. 3. Changes the Definitions of "Significant Bodily Injury" and "Serious Bodily Injury"; Broadens Scope of Carjacking Offense.

i. Changes the Definition of "Significant Bodily Injury"

The current D.C. Code has three main assault offenses of increasing severity: 1) Simple assault, which can be satisfied by slight injury,[36] 2) Felony assault, which requires intermediate "significant bodily injury",[37] and 3) Aggravated assault, which requires the highest "serious bodily injury".[38]

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[34] *United States v. Clark*, No. 7:16-CR-32-1H(2), 2017 WL 9485522, at 5 (E.D.N.C. June 27, 2017) ("The Supreme Court's decisions provide no bright-line rules, and application of the Court's precedents is far from straightforward because of the varying state probation, parole, and post-release supervision regimes.").

[35] One court explained in declining to dismiss a federal civil rights action brought after the warrantless entry by law enforcement into a parolee's home:

> While courts in search of easy answers and bright lines may take comfort in such pronouncements, they are plainly inconsistent with the test actually articulated by the Supreme Court: that the search must "reasonable" when considering the "totality of the circumstances." *In many instances the probation and parole systems of the various states may be similar, but this does not mean that a court may blindly assume that they are the same as the California system at issue in Knights and Samson when evaluating the importance of governmental interests in permitting warrantless searches*. Likewise, variations in the specifics of a state laws, including the exact terms of the state's probation and parole regulations and search conditions, are particularly relevant when determining the "degree to which [the search] intrudes upon an individual's privacy" because they directly inform the parolee's legitimate expectations of privacy. *Simply put, reducing the decision in Knights to a [] standard applicable to warrantless searches of probationers under all state systems of supervision is wholly antithetical to the Supreme Court's holding that each search must be evaluated under the totality of its circumstances. Jones v. Lafferty*, 173 F. Supp. 3d 493, 501 (E.D. Ky. 2016) (internal citations omitted).

[36] D.C. Code § 22-404(a)(1). The current D.C. Code 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." 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, 998 (D.C. 20222) (rehearing en banc).

[37] D.C. Code § 22-404(a)(2). The current D.C. Code 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."

[38] D.C. Code § 22-404.01.The current D.C. Code 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

The Active Act proposes a new definition of "significant bodily injury". The definition includes many, but not all, of the requirements under District law for the current definition, as well as several specific "per se" injuries.

a. Injuries Requiring Hospitalization or Medical Treatment

Subsection (3)(A) of the Act's proposed definition defines "significant bodily injury" as an injury that requires "hospitalization or medical treatment beyond what a layperson can personally administer." The CCRC recommends including in subsection (3)(A) a requirement under DCCA case law that medical attention be necessary to "prevent long-term physical damage" or to "abate severe pain".

The current D.C. Code definition of "significant bodily injury" is "an injury that requires hospitalization or immediate medical attention."[39] The DCCA has generally[40] construed medical "attention" to mean medical "treatment" necessary to "prevent long-term physical damage" or to "abate severe pain,"[41] beyond what a layperson could administer.[42]

While subsection (3)(A) of the proposed definition of "significant bodily injury" requires medical treatment beyond a layperson's capabilities, it omits the DCCA requirement that the treatment be necessary to prevent long-term physical damage or to abate severe pain. It is arguable that the DCCA requirement is unnecessary because the proposed definition requires medical treatment beyond a layperson's capabilities. However, without medical expertise, it is difficult to state that every injury that requires medical treatment beyond a layperson's capabilities is also necessary to prevent long-term physical damage or to abate severe pain.

Given this difficulty, omitting the DCCA requirement risks lowering the severity for "significant bodily injury", and, by extension, for felony assault. The CCRC recommends adding the DCCA

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(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.

[39] D.C. Code § 22-404(a)(2).

[40] As is discussed later in this testimony, DCCA case law recognizes that sometimes medical "attention" consists of examination or testing, regardless of whether treatment results.

[41] *See, e.g.*, *Belt v. United States*, 149 A.3d 1048, 1055 (D.C. 2016) ("In other words, there are two independent bases for a fact finder to conclude that a victim has suffered a significant bodily injury: (1) where the injury requires medical treatment to prevent "longterm physical damage" or "potentially permanent injuries"; or (2) where the injury requires medical treatment to abate the victim's "severe" pain."); *Wilson v. United States*, 140 A.3d 1212, 1218 (D.C. 2016) ("However bad the injuries, may seem, the government's combined evidence fails to show that immediate medical attention was required to prevent longterm [sic] physical damage and other potentially permanent injuries or abate pain that is severe instead of lesser, short-term hurts." (internal quotation marks omitted).

[42] *See, e.g.*, *Quintanilla v. United States*, 62 A.3d 1261, 1265 (D.C. 2013) ("And we may infer, accordingly, that everyday remedies such as ice packs, bandages, and self-administered over-the-counter medications, are not sufficiently medical to qualify under the statute, whether administered by a medical professional or with self-help. Treatment of a higher order, requiring true medical expertise, is required.") (internal quotation marks omitted); *Teneyck v. United States*, 112 A.3d 906, 910 (D.C. 2015) ("The focus here is not, however, whether [the complaining witness] needed to remove the glass to prevent long-term damage, but whether a medical professional was required to remove the glass because [the complaining witness] could not have safely removed it himself—for example, with tweezers or another self-administered remedy.").

requirement that treatment be necessary to prevent long-term physical damage or to abate severe pain. With this revision, subsection (3)(A) of the definition would read "An injury that, to prevent long-term physical damage or to abate severe pain, requires hospitalization or medical treatment beyond what a layperson can personally administer".

Finally, subsection (3)(A) of the proposed definition omits the statutory requirement that medical attention or treatment be "immediate."[43] The CCRC supports this deletion. The "immediate" requirement excludes from the current definition injuries that do not require hospitalization or "immediate" medical attention or treatment,[44] but that are still comparably serious, such as internal injuries or concussions.

b. Injuries that are per se Significant Bodily Injuries

The Act's proposed definition of "significant bodily injury" contains a list of "per se" injuries. The CCRC supports codifying a "per se" list of injuries. In addition, the CCRC supports including "a fracture of bone" (subsection (3)(B)), "a burn of at least second degree severity" (subsection (3)(D)), and "any loss of consciousness" (subsection (3)(E)). These injuries are identical or similar to the RCCA definition of "significant bodily injury"[45] and are consistent with the distinction between felony assault and simple assault.

The written testimony below makes suggestions for the remaining "per se" injuries in the proposed definition. These suggestions will maintain the threshold for "significant bodily injury" and the distinction between simple assault and felony assault.

1. Lacerations

Subsection (3)(C) of the Act's proposed definition lists as a "per se" injury: "A laceration for which the victim required or received stitches, sutures, staples, or closed-skin adhesives; or a laceration that is at least one inch in length and at least one quarter of an inch in depth."

The CCRC supports including a laceration that is "at least one inch in length and at least one quarter of an inch in depth". The RCCA definition of "significant bodily injury" had an identical provision.

However, the Act's proposed definition also includes any laceration "for which the victim required or received stitches, sutures, staples, or closed-skin adhesives". The CCRC recommends: 1) deleting "received", and 2) requiring that the stitches, etc., be "beyond what a layperson can personally administer". With these revisions, subsection (3)(C) would read:

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[43] D.C. Code § 22-404(a)(2).

[44] *See, e.g.*, *Quintanilla v. United States*, 62 A.3d 1261, 1264 n.17 (D.C. 2013) ("[T]here is no provision in the statute for latent injuries that do not require hospitalization, even if they do ultimately require medical attention. It follows that, for injuries not requiring immediate medical attention, the injury will not be significant unless it does eventually require hospitalization.").

[45] The RCCA definition of "significant bodily injury" included a fracture of bone and burns of at least second-degree severity as "per se" injuries. The RCCA definition included a "brief" loss of consciousness as opposed to "any" loss of consciousness due to DCCA case law. The DCCA has held that a loss of consciousness, for a minute or less, that did not require medical treatment, was insufficient for "significant bodily injury". *In re D.P.*, 122 A.3d 903, 913 (D.C. 2015). However, given the difficulty in quantifying a "brief" loss of consciousness, the CCRC supports including "any" loss of consciousness as a "per se" significant bodily injury.

"A laceration for which the victim required ~~or received~~ stitches, sutures, staples, or closed-skin adhesives*, beyond what a layperson can personally administer*; or a laceration that is at least one inch in length and at least one quarter of an inch in depth."

Narrowing the provision to lacerations which "required" stitches, etc., ensures that lacerations that are "per se" significant bodily injury are of comparable severity. For example, it would exclude relatively minor wounds where a health care provider opts to use stitches, etc., out of an abundance of caution. "Requires" is also consistent with subsection (3)(A) of the proposed definition ("requires" hospitalization or medical treatment).

Similarly, requiring "beyond what a layperson can personally administer" ensures that lacerations that are a "per se" significant bodily injury are of comparable severity. Stitches, sutures, and staples are unlikely to be administered outside of a professional medical setting, but closed-skin adhesives may be sold over-the-counter.[46] "Beyond what a layperson can personally administer" language is also consistent with subsection (3)(A) of the proposed definition for hospitalization or medical treatment.

Limiting subsection (3)(C) of the definition to lacerations that "require" stitches, etc., "beyond what a layperson can personally administer" maintains the threshold for "significant bodily injury" and the distinction between simple assault and felony assault.

2. Traumatic Brain Injury

The CCRC recommends including "traumatic brain injury" as a "per se" injury in the definition of "significant bodily injury", as opposed to the definition of "serious bodily injury". The CCRC's written testimony for "serious bodily injury" below discusses this further.

c. Medical Testing Beyond a Layperson's Capabilities

Subsection (3)(F) of the Act's proposed definition of "significant bodily injury" states: "An injury where medical testing, beyond what a layperson can personally administer, was performed to ascertain whether there was an injury described in subparagraphs (A)-(E) of this subsection."

The CCRC generally supports this provision, but recommends replacing "performed" with "required".

The current felony assault statute defines "significant bodily injury", in part, as an injury that requires "immediate medical attention."[47] As was discussed above, the DCCA has construed medical "attention" to generally mean medical "treatment" necessary to prevent long-term physical damage or to abate severe pain, beyond what a layperson could administer. However, DCCA case law recognizes that sometimes medical "attention" consists of examination or testing,

[46] "Beyond what a layperson can personally administer" would not exclude from the definition injuries where a layperson sutured, stitched, stapled, or used closed-skin adhesives, or attempted to do so. Such an injury could still be deemed to *require* professional stitches, etc., and would satisfy the definition.

[47] D.C. Code § 22-404(a)(2) (defining "significant bodily injury" as "an injury that requires hospitalization or immediate medical attention.").

regardless of whether treatment results. This case law still imposes a "required" standard.[48] The fact that testing was performed is not dispositive.

Replacing "performed" with "required" maintains the threshold for "significant bodily injury" and the distinction between simple assault and felony assault. The word "received" would include injuries that may have been comparably minor, but received medical testing due to an overzealous or overly cautious health care provider.

ii. Changes to Definition of "Serious Bodily Injury"

Although the current D.C. Code aggravated assault statute requires "serious bodily injury", the statute does not define the term. DCCA case law[49] uses the definition of "serious bodily injury" which is defined for use in current D.C. Code sexual abuse offenses:

> "'Serious bodily injury' means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty."[50]

This section proposes a new definition of "serious bodily injury" for the aggravated assault statute. The CCRC generally supports this section's proposed definition. The written testimony below addresses each provision in the proposed definition and makes suggestions to maintain the threshold for "serious bodily injury", which meaningfully distinguishes between aggravated assault and felony assault.

In addition, the CCRC notes that if the Council codifies a definition of "serious bodily injury" specific to aggravated assault, the current definition will still apply to the sexual abuse statutes. In the sexual abuse statutes, "serious bodily injury" is an aggravator and can increase the penalty of any of the sexual abuse offenses.[51] The CCRC would gladly assist the Council in reviewing the current definition of "serious bodily injury" as it pertains to the sexual abuse offenses.

a. "A Substantial Risk of Death"

Subsection (d)(1) of the Act's proposed definition of "serious bodily injury" requires a "substantial risk of death". The CCRC supports this provision. The current D.C. Code definition of "serious

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[48] *See, e.g., Blair v. United States*, 114 A.3d 960, 980 (D.C. 2015) ("While not every blow to the head in the course of an assault necessarily constitutes significant bodily injury, we conclude that where, as here, the defendant repeatedly struck the victim's head, requiring testing or monitoring to diagnose possible internal head injuries, and also caused injuries all over the victim's body, the assault is sufficiently egregious to constitute significant bodily injury.") (internal citations omitted); *Brown v. United States*, 146 A.3d 110, 115–16 (D.C. 2016) (sustaining a finding of "significant bodily injury when the defendants "repeatedly struck the victim's head, requiring testing or monitoring to diagnose possible internal head injuries".) (internal citations and quotations omitted).

[49] *Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999).

[50] D.C. Code Ann. § 22-3001(7).

[51] D.C. Code § 22-3020(a)(3) ("(a) Any person who is found guilty of an offense under this subchapter may receive a penalty up to 1 1/2 times the maximum penalty prescribed for the particular offense, and may receive a sentence of more than 30 years up to, and including life imprisonment without possibility of release for first degree sexual abuse or first degree child sexual abuse, if any of the following aggravating circumstances exists: . . . (3) The victim sustained serious bodily injury as a result of the offense".).

bodily injury" includes a "substantial risk of death",[52] as did the RCCA definition. An injury that results in a substantial risk of death is proportionate with aggravated assault and should be included in the definition of "serious bodily injury".

b. "Protracted and Obvious Disfigurement"

Subsection (d)(2) of the Act's proposed definition of "serious bodily injury" requires a "protracted and obvious disfigurement". The CCRC supports this provision. The current D.C. Code definition of "serious bodily injury" includes a "protracted and obvious disfigurement",[53] as did the RCCA definition. An injury that results in protracted and obvious disfigurement is proportionate with aggravated assault and should be included in the definition of "serious bodily injury".

c. "Protracted Loss or Impairment of the Function of a Bodily Member, Organ, or Mental Faculty"

Subsection (d)(3) of the proposed definition of "serious bodily injury" is "protracted loss or impairment of the function of a bodily member, organ, or mental faculty". The CCRC generally supports this provision, but the meaning of "mental faculty" is unclear. As discussed below, inclusion of the term "mental faculty" is likely redundant.

The current D.C. Code definition of "serious bodily injury" includes the same provision as the proposed definition—"protracted loss or impairment of the function of a bodily member, organ, or mental faculty".[54] The definition does not further define "mental faculty" and there is no DCCA case law interpreting the term.

To the extent that "mental faculty" refers to impaired brain functioning, this language is redundant as the definition separately includes protracted impairment of the use of an "organ," which can include the brain. The Model Penal Code (MPC) definition of "serious bodily injury" did not include "mental faculty" and defined "serious bodily injury" as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."[55] Of the reformed jurisdictions with

[52] D.C. Code § 22-3001(7) ("'Serious bodily injury' means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.").
[53] D.C. Code § 22-3001(7) ("'Serious bodily injury' means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.").
[54] D.C. Code § 22-3001(7) ("'Serious bodily injury' means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.").
[55] Model Penal Code § 210.0(3).

comprehensively revised criminal codes based on the MPC,[56] only three[57] define "serious bodily injury" or a similar term to specifically include mental impairment.

d. Protracted Loss of Consciousness

The proposed definition of "serious bodily" injury, similar to the definition under the RCCA, includes a "protracted loss of consciousness." However, read alongside other prongs of the serious bodily injury definition, this may suggest that the loss of consciousness must last for several months to suffice. The CCRC recommends editing the serious bodily injury definition to replace the phrase "protracted loss of consciousness" with the phrase "extended loss of consciousness." This updated language will ensure that a loss of consciousness lasting hours or even many minutes will suffice as a serious bodily injury.

Although the term "protracted" does not specify a strict amount of time, DCCA case law suggests that the term "protracted" means a period of at least many months, likely six months or more.[58] In addition, the definition of *significant* bodily injury includes bone fractures. However, even a minor fracture can cause impairment of the broken bone for several weeks or more. Since the fractures are defined as *per se* significant injuries, it is reasonable to interpret the use of the term "protracted" under the serious bodily injury definition to require a longer time than that needed to recover from a minor fracture.

Serious bodily injury should include losses of consciousness that last *much shorter* than the time typically required to constitute a "protracted" period of time. An injury that results in a loss of consciousness lasting hours, or even many minutes, should be considered a serious bodily injury. Using the term "protracted" may confuse courts and juries and lead them to conclude that only losses of consciousness that last weeks or even months suffice as a serious bodily injury.

The CCRC recommends that the definition of serious bodily injury includes an "*extended* loss of consciousness." This will distinguish between brief losses of consciousness, lasting seconds or a few minutes, that constitute a significant bodily injury from longer losses of consciousness, lasting many minutes or hours, that constitute a serious bodily injury. Using the word "extended" will

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[56] Twenty-nine states have comprehensively revised their criminal codes based on the MPC: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. Of these 29 states, 27 have adopted the MPC definition of "serious bodily injury" or a similar definition.

[57] Tenn. Code Ann. § 39-11-106(37)(E) (defining "serious bodily injury" as including "Protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty."); Mont. Code Ann. § 45-2-101(66)(b) (stating that the term "serious bodily injury" includes "serious mental illness or impairment"); Ohio Rev. Code Ann. § 2901.01(5)(a) (defining "serious physical harm to persons" as including "Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment").

[58] See, *Jackson v. United States*, 940 A.2d 981, 991 (D.C. 2008) ("There can be no doubt that Irby suffered a "protracted" disfigurement, as she still had scars on her ear and shins at the time of trial, eight months after the assault"; *Earl v. United States*, 932 A.2d 1122, 1132 (D.C. 2007) (holding a bruised kidney and sprained wrist that required a soft cast were insufficiently severe to constitute a serious bodily injury); In re D.E., 991 A.2d 1205, 1211 (D.C. 2010) (injuries that caused impaired vision more than six months after the commission of the offense sufficient for serious bodily injury).

make it clear that to constitute a serious bodily injury, the loss of consciousness need not last as long as the time period typically required to qualify as "protracted."

e. Traumatic Brain Injury

This section defines the term "serious bodily injury" to include any "traumatic brain injury." In contrast, under the RCCA, traumatic brain injuries qualified as "per se" *significant* bodily injuries. The CCRC recommends that the definition of "serious bodily injury" omit traumatic brain injury as a "per se" serious bodily injury, and instead treat traumatic brain injury as a "per se" significant bodily injury. The definition of "serious bodily injury" will still include traumatic brain injuries that otherwise satisfy another prong of the definition.

The term "serious bodily injury" is intended to capture extremely serious injuries that are life-threatening or cause prolonged disfigurement or loss of function of a body part. "Significant bodily injuries" are less severe, though still require medical care or hospitalization, such as a bone fracture or a "loss of consciousness." These tiers of injury are used to distinguish aggravated assault, which requires inflicting serious bodily injury, and felony assault, a lesser offense that requires inflicting significant bodily injury.

Defining "serious bodily injury" and thereby applying aggravated assault liability to any traumatic brain injury would result in disproportionate penalties. By defining serious bodily injury to include any traumatic brain injury, even a minor concussion would constitute aggravated assault. This is inconsistent with the types of injuries that are defined as *per se* serious and significant bodily injuries. For example, the proposed definition of "significant bodily injury" includes *any* loss of consciousness, while the proposed definition of "serious bodily injury" includes a "protracted loss of consciousness".[59] However, even minor concussions often result in a brief loss of consciousness or no loss of consciousness at all. Under the proposed definition, causing a minor concussion that results in a momentary loss of balance would be treated as the same offense as causing severe head trauma and bodily wounds that result in a prolonged coma.

More serious traumatic brain injuries can constitute a "serious bodily injury" if they satisfy one or more of the other prongs of the definition. For example, traumatic brain injury that results in protracted loss of mental faculty would still constitute a serious bodily injury under proposed subsection (d)(3). Although concussions are far from minor, not all are sufficiently serious to warrant aggravated assault liability with penalties equivalent to inflicting life threatening injuries.

f. "A Burn of at least Third Degree Severity"

Subsection (d)(6) of the Act's proposed definition of "serious bodily injury" includes "a burn of at least third degree severity". The CCRC supports this provision. The current D.C. Code definition

[59] The CCRC recommends replacing the phrase "protracted loss of consciousness" with "extended loss of consciousness" to clarify that loss of consciousness lasting mere hours or even many minutes can suffice as a "serious bodily injury."

of "serious bodily injury" does not include this or any "per se" injury.[60] However, a burn of at least third degree severity is proportionate with aggravated assault.

g. "A Gunshot Wound"

Subsection (d)(7) of the Act's proposed definition of "serious bodily injury" includes any "gunshot wound". The CCRC recommends deleting this provision because: 1) It will lower the required severity of an injury for aggravated assault, and 2) Numerous current D.C. Code offenses provide significant penalties for gunshot wounds, even when they do not satisfy the current definition of "serious bodily injury".

The current D.C. Code definition of "serious bodily injury"[61] does not include a "gunshot wound". DCCA case law holds that a gunshot wound does not *necessarily* qualify as a "serious bodily injury"[62] or even "significant bodily injury"[63] for the lower offense of felony assault. Both statutorily and through case law, current District law recognizes that a gunshot wound can be a comparatively minor injury—for example, if the bullet only grazes a person causing minor injury.

Including all gunshot wounds in the definition of "serious bodily injury" would lower the required severity of an injury for aggravated assault when applied to relatively less serious wounds. A gunshot wound, particularly if it merely grazes a person, may not be the same severity as the other injuries in the current or proposed definitions of "serious bodily injury", such as an injury that results in a substantial risk of death.

In addition, a gunshot wound can independently satisfy the current or proposed definitions of "serious bodily injury"—for example, if it results in a substantial risk of death or protracted impairment of use of a body part or member. It is unnecessary to add "gunshot wound" to the definition in order for aggravated assault to cover these more serious gunshot wounds.

h. Non-Life Threatening Gunshot Wounds Subject to Significant Penalties under Current Law

[60] D.C. Code § 22-3001(7) ("'Serious bodily injury' means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.").

[61] D.C. Code § 22-3001(7) ("'Serious bodily injury' means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.").

[62] *See, e.g.*, *Nixon v. United States*, 730 A.2d 145, 150–51 (D.C. 1999) (citing with approval *Williams v. State,* 696 S.W.2d 896 (Tex .Crim. App. 1985) for the proposition that a knife wound or a gunshot wound is not "per se" "serious bodily injury"); *Zeledon v. United States*, 770 A.2d 972, 977 (D.C. 2001) (stating that "even injuries such as knife or gunshot wounds are not per se 'serious bodily injury.'"); *Bolanos v. United States*, 938 A.2d 672, 678 (D.C. 2007) ("For example, the fact that an individual suffered from knife or gunshot wounds does not make that injury a *per se* "serious bodily injury.").

[63] *Nero v. United States*, 73 A.3d 153, 158-59 (D.C. 2013) (holding that a gunshot wound was not "significant bodily injury" when it was unclear whether the bullet penetrated the skin or merely grazed it, the victim did not realize he had been shot until he removed his jacket, and the only medical care the victim received was diagnostic tests, pain medication, and wound care).

The CCRC agrees that inflicting even relatively minor gunshot wounds is extremely serious conduct that warrants significant penalties. Accordingly, numerous current D.C. Code offenses already cover this conduct with proportionate penalties.

If a person shoots at someone with intent to kill and inflicts *any* gunshot wound, or misses completely and causes *no wound*, that person may be convicted of assault with intent to kill while armed, which carries a 30-year maximum penalty.[64] Thirty years is proportionate for a gunshot wound that does not result in a substantial risk of death, protracted disfigurement, or protracted impairment. In addition, multiple D.C. Code weapons offenses would apply.[65] It is unnecessary to add "gunshot wound" to the definition of "serious bodily injury" to proportionately penalize would-be lethal shootings.

If gunshot wounds are added to the definition of "serious bodily injury" a person who shoots with intent to kill but non-fatally wounds a person can be convicted of *both* aggravated assault while armed[66] and assault with intent to kill while armed, which each carry a maximum sentence of 30 years. Under the current DCCA case law, these offenses would *not* merge.[67] A person who shoots at another with intent to kill, but only causes a minor gunshot wound, would be subject to a total of 60 years of incarceration. While not diminishing the severity of this conduct, a 60 year sentence is equivalent to the maximum sentence for *first degree murder*, and greater than the maximum sentence for second degree murder.[68]

Even if a person *accidentally* inflicts a minor gunshot wound without intent to kill, the person can be convicted of assault with a dangerous weapon, which carries a 10 year maximum sentence[69] (equivalent to the maximum sentence for aggravated assault) or a 30 year sentence if the while

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[64] D.C. Code §§ 22-401; 22-4502(a)(1); 22-4501(1A); 23-1331(4).

[65] Weapons penalties would depend on the facts of the case and charging decisions. *See, e.g.*, D.C. Code §§ 22-4504(b) (making possession of a firearm during a crime of violence punishable by a maximum term of imprisonment of 15 years and a 5 year mandatory minimum); 22-4503(a)(1), (b)(1) (prohibiting a person with a felony conviction from possessing a firearm and providing a 10-year maximum penalty and a mandatory minimum sentence of one year, unless the prior conviction is for a crime of violence other than conspiracy, in which case it is an additional 15-year maximum and a 3-year mandatory minimum); 22-4504(a)(1), (a)(2) (providing a 5 year maximum penalty for carrying a pistol without a license outside the defendant's home, business, or land, and a 10 year maximum penalty if the defendant has a prior felony conviction); 7-2502.01 and 7-2507.06(a)) (providing a 1 year penalty for possessing an unregistered firearm; 7-2506.01 and 7-2507.06(a)(3)) (providing a 1 year penalty for possessing one restricted bullet, or an additional 10 years for possessing more than one restricted bullet, including a 1-year mandatory minimum).

[66] Aggravated assault while armed has a thirty-year maximum penalty. D.C. Code §§ 22-404.01; 22-4502(a)(1); 22-4501(1A); 23-1331(4).

[67] The DCCA employs the *Blockburger* elements test to determine if two offenses arising from a single act or course of conduct should merge. Under this test, if the elements of the offenses differ such that a person can theoretically commit one offense without *necessarily* committing the other, the offenses do *not* merge (i.e. the defendant can be convicted and sentenced to both offenses). Assault with intent to kill requires intent to kill, but not an actual infliction of injury. Aggravated assault requires inflicting serious bodily injury, but does not require an intent to kill. Therefore, under the *Blockburger* elements test, convictions for aggravated assault and assault with intent to kill would not merge.

[68] First and second degree murder carry maximum life sentences *only if* the government proves an additional aggravating factor was present. Absent aggravating factors, the maximum sentence for first degree murder is 60 years, and the maximum sentence for second degree murder is 40 years. D.C. Code § 22-2104.

[69] D.C. Code § 22-402.

armed enhancement is applied. Separate charges for weapons offenses, including reckless endangerment with a firearm offense could also be brought.

The CCRC recognizes why it may make intuitive sense to include gunshot wounds in the definition of "serious bodily injury." However, this change is unnecessary as many gunshot wounds will satisfy separate prongs of the serious bodily injury definition, and causing even relatively minor gunshot wounds is already subject to significant penalties under separate felony offenses.

i. "Hospitalization or Medical Treatment Beyond" a Layperson's Capabilities

Subsection (d)(8) of the Act's proposed definition of "serious bodily injury" includes "An injury where hospitalization or medical treatment beyond what a layperson can personally administer prevented an injury set forth in subparagraphs (1)-(6) of this subsection." The current definition of "serious bodily injury"[70] does not include any such provision, nor does it require any amount of hospitalization or medical treatment. The CCRC recommends deleting this provision because it risks conflating serious and significant bodily injuries, and is also redundant or unclear as applied to certain *per se* types of serious bodily injuries.

This provision conflates serious and significant bodily injuries. The definition of "significant bodily injury" includes bone fractures, lacerations requiring stitches, and second-degree burns. However, *absent medical care* these injuries can easily lead to protracted impairment of the function of a body part or life-threatening infection. In addition to the *per se* injuries that qualify as "significant bodily injuries," under this act, the proposed definition of "significant bodily injury" includes any injury that "*requires* hospitalization or medical treatment beyond what a layperson can personally administer." This language is similar to the current definition of "significant bodily injury", which is defined as "an injury that requires hospitalization or immediate medical attention."[71] The DCCA has further held that this language requires that the hospitalization or immediate medical care is necessary "to *prevent long-term physical damage* or to abate severe pain[.]"[72] Under this provision, a large percentage of significant bodily injuries *by definition* will also constitute serious bodily injuries.

One could argue that it is appropriate to apply aggravated assault liability when an injury *would* have been life-threatening had the victim not obtained medical care. However, DCCA case law is not consistent with this view. The DCCA has stated that although "the severity of a victim's injuries should not be understated due to the fact that he was fortunate enough to receive proper medical treatment" there must be "some evidence that a victim's injuries created a substantial risk of death before finding that the victim suffered 'serious bodily injury."[73] This does not mean that life-saving medical care bars aggravated assault liability. The DCCA has sustained findings of "serious bodily injury" when prompt, professional medical attention prevented either death or

[70] D.C. Code § 22-3001(7) ("'Serious bodily injury' means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.").
[71] D.C. Code § 22-404(a)(2).
[72] *Belt v. United States*, 149 A.3d 1048, 1055 (D.C. 2016).
[73] *Terry v. United States*, 114 A.3d 608, 619 (D.C. 2015).

paralysis.[74] For example, injuries that cause substantial and life-threatening blood loss would still constitute a "serious bodily injury" even if medical care prevents loss of life.

Defining "serious bodily injury" to include harms that would occur absent medical care is inconsistent with how other serious offenses are defined. For example, murder requires that the defendant causes the death of another. Murder does not include inflicting injuries that would be fatal, but that did not result in death due to medical care. In general, criminal offenses are defined to require a specific harmful result and these offenses are not consummated if an intervening factor prevents that harmful result from occurring. This does not absolve the defendant of any wrongdoing. Rather, *attempt liability* is the appropriate mechanism to hold the defendant accountable.

iii. CCRC Recommended Definitions of "Significant Bodily Injury" and "Serious Bodily Injury"

Based on the rationales discussed above, the CCRC recommends defining the terms "significant bodily injury" and "serious bodily injury" as follows. Changes from the definitions included in the introduced version of the bill are marked in red-ink.

a. Recommended Significant Bodily Injury Definition

(3) For the purposes of this section, "significant bodily injury" means:

(A) An injury that, to prevent long-term physical damage or to abate severe pain, requires hospitalization or medical treatment beyond what a layperson can personally administer;

(B) A fracture of a bone;

(C) A laceration for which the victim required ~~or received~~ stitches, sutures, staples, or closed-skin adhesives; or a laceration that is at least one inch in length and at least one quarter of an inch in depth;

(D) A burn of at least second degree severity;

(E) Any loss of consciousness; ~~or~~

(F) A traumatic brain injury; or

~~(F)~~ (G) An injury where medical testing, beyond what a layperson can personally administer, was performed to ascertain whether there was an injury described in subparagraphs (A)-(F) of this subsection.

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[74] *See, e.g.*, *Riddick v. United States*, 806 A.2d 631, 641 (D.C. 2002) ("From this evidence, the jury could have reasonably concluded that . . . [the victim] might have died as a result of her injuries had the officers at the scene not intervened to control her bleeding."); *Zeledon v. United States*, 770 A.2d 972, 974 (D.C. 2001) ("[T]here was medical testimony that the bleeding was severe enough to have resulted in death if left untreated. . . Regarding the substantial risk of death, appellant points to the fact that the victim received timely treatment for her wounds, but we think it unlikely—in the extreme—that the legislature intended the 'substantial risk' of death to depend on whether or not the victim was fortunate enough to receive medical care."); *Freeman v. United States*, 912 A.2d 1213, 1222 (D.C. 2006) ("As the government correctly points out, the fact that Mr. Tolbert was not in critical condition, was not paralyzed, and did not receive emergency surgery 'in no way mitigates the seriousness of his wounds.' Officer Battle's prompt assistance at the scene of the shooting, coupled with the work of the paramedics in the ambulance on the way to the hospital, likely contributed to Mr. Tolbert's stability by the time he reached the hospital. This does not mean that his injuries were not severe; it merely shows that he had the good fortune to receive proper care.").

b. Recommended "Serious Bodily Injury" Definition

(d) For the purposes of this section, "serious bodily injury" means an injury or significant bodily injury (as that term is defined in § 22-404(a)(3)) that involves:

(1) A substantial risk of death;

(2) Protracted and obvious disfigurement;

(3) Protracted loss or impairment of the function of a bodily member, organ, or mental faculty;

(4) ~~Protracted~~ Extended loss of consciousness; or

~~(5) A traumatic brain injury;~~

~~(6)~~ (5) A burn of at least third degree severity~~;~~.

~~(7) A gunshot wound; or~~

~~(8) An injury where hospitalization or medical treatment beyond what a layperson can personally administer prevented an injury set forth in subparagraphs (1) (6) of this subsection."~~

iv. Amend Carjacking to Include Taking Keys by Force

This section amends the carjacking statute to include knowingly or recklessly, by force, violence, or by putting in fear, taking a key to a motor vehicle, from the immediate actual possession of another, with the purpose and effect of taking the motor vehicle of another. The CCRC opposes this revision because it expands the scope of the offense beyond the core interest that the offense is designed to protect. In addition, this conduct is already criminalized under two separate felony offenses, which in combination provide proportionate penalties.

Carjacking is a "robbery of a motor vehicle"[75] as opposed to robberies in which other types of property are taken. When the Council first created the carjacking offense, this Committee's report stated that "carjacking is an especially traumatic experience" because "most feel that being inside of their car offers some protection from the outside world. Carjacking invades their zone of privacy in a way that perhaps is similar only to burglary."[76] At a public meeting on April 5, 2022 with the 2nd District Citizens' Advisory Council, U.S. Attorney Matthew Graves echoed this sentiment arguing that carjacking is substantially more harmful than robbery because it violates an expectation of privacy and safety that people have within their vehicles.

The proposed revision under this section expands the carjacking offense to cover situations in which a person's sense of privacy and safety within their vehicles is not implicated. Under this revision, carjacking would include stealing a motor vehicle regardless of whether the owner is anywhere near the vehicle or if a substantial amount of time passes between the initial robbery of keys and the taking of the vehicle. A person's sense of privacy and safety *while inside their vehicle* is not implicated in these situations any more so than in a typical case of auto-theft.

[75] Committee on the Judiciary Report on Bill 10-16, the "Carjacking Prevention Amendment Act of 1993" at 2.
[76] Id.

The conduct constituting this proposed version of carjacking undoubtedly violates a person's sense of personal safety and property rights. However, those interests are adequately criminalized under two separate felony offenses. A defendant who uses force or threats to take a person's car keys and subsequently steals their car has committed both robbery and theft.[77] These offenses provide for an aggregate maximum of 25 years of incarceration,[78] and 40 years if the initial robbery of the car keys was committed while armed.[79]

The current carjacking statute already includes any taking of a motor vehicle from the immediate possession of another. A vehicle can be in the immediate possession of another even if that person is not operating or inside the vehicle. For example, carjacking includes sneaking into an idling car while the owner is nearby. If a person were to take car keys by force, and then use the keys to drive off with a car that was nearby, this would constitute carjacking under the current statute.

Regarding sentencing, the most important difference between robbery and carjacking is the use of mandatory minimum sentences. While robbery has no mandatory minimum sentence, unarmed carjacking has a mandatory minimum 7-year sentence and armed carjacking has a mandatory minimum 15-year sentence. These minimums are putatively justified by the violation of the expectation of privacy and safety people have within a motor vehicle, *not* by the use of force or threats more generally or the loss of an inherently valuable motor vehicle.[80] Other offenses that involve threats or violence, such as threats to do bodily harm[81], robbery[82], felony assault[83], aggravated assault[84], or theft of a motor vehicle[85], do not have mandatory minimum sentences. The CCRC has recommended, and continues to recommend, eliminating the mandatory minimum sentences for carjacking. But to the extent the minima are justified by the violation of an expectation of privacy and safety within a vehicle, it is unjust to apply them to cases in which that violation does not occur.

v. Additional Textual Consideration for Amended Carjacking Mental States

The proposed change to the carjacking statute includes knowingly *or recklessly* taking a key to a motor vehicle. Including a reckless mental state is unnecessary as the offense also requires that the taking be done *with the purpose* of taking the motor vehicle of another. If a person acts with

[77] First degree theft requires that the property taken be valued at $1,000 or more. D.C. Code § 22-3212. Some vehicles are valued at less than $1,000, and theft of such vehicles constitutes second degree theft, a misdemeanor punishable by up to 180 days. Under the Revised Criminal Code Act, theft of a motor vehicle would be treated *categorically* as a felony offense, regardless of the value of the vehicle.
[78] Unarmed Robbery carries a 15 year max, D.C. Code § 22-2801. First degree theft carries a 10 year maximum sentence. D.C. Code § 22-3212.
[79] D.C. Code § 22-4502.
[80] The committee report on the "Carjacking Prevention Amendment Act of 1993" did also note that in addition to violating a sense of privacy and safety people have within their motor vehicles, carjacking also deprives people of mobility, and what may be the owner's most valuable piece of property. However, these separate interests are equally violated by auto-theft, which is not subject to any mandatory minimum sentence.
[81] D.C. Code § 22-407.
[82] D.C. Code § 22-1801.
[83] D.C. Code § 22-404.
[84] D.C. Code §22-404.01.
[85] D.C. Code § 22-3211, 3212. The current theft provision does not specifically address theft of a motor vehicle. However, neither first nor second degree theft has a mandatory minimum sentence.

the purpose of using the key to take a motor vehicle, they will have had to at least knowingly taken the keys from another. If the Committee adopts the expansion of the carjacking statute, the reckless mental state should be omitted.

C. Sec. 6. Unlawful Discarding of Firearms and Ammunition and Reckless Endangerment Offenses

i. Creates New Unlawful Discarding of Firearms and Ammunition Offense

This section creates a new offense of unlawful discarding of firearms and ammunition ("unlawful discard offense"). This offense makes it a crime to knowingly discard, throw, or deposit any firearm or ammunition in any location except the person's dwelling place, place of business, or on other land possessed by the person. The CCRC raises two objections to this proposed offense: first, the conduct covered by this offense is likely covered by other felony weapon offenses under current law; and second, the law is overbroad and applies to conduct that is beyond the scope of the proposed law's purpose as described in the bill's accompanying introduction letter.

The bill's introductory letter states that this offense is intended to address cases in which an individual being pursued by law enforcement throws a firearm or ammunition away to avoid being caught with an illegal weapon or ammunition.[86] However, to be convicted of the unlawful discard offense, the government must still prove that the defendant possessed a firearm or ammunition and discarded, threw, or deposited it. In addition, while technically not required as an element of the offense, successful conviction under this offense will very likely require that the police recover the firearm or ammunition to be used as evidence at trial. In these cases, the government will have also proven that that the defendant possessed the firearm or ammunition as required under separate felony weapon possession offenses under current law.

Because conviction for the unlawful discard offense will require proof that the defendant first possessed a firearm or ammunition, the offense does not increase the scope of liability, but merely the severity of penalties. While the goal of reducing the rates of illegal weapon possession is laudable, it is doubtful that increasing penalties will meaningfully increase deterrence. Criminologists have repeatedly stated that it is the certainty of punishment, not the severity, that effectively deters criminal behavior. Even to the extent that severity of penalties has a deterrent effect, there are multiple felony weapon offenses that could apply in these cases. These felony weapons offenses already provide judges discretion to impose lengthier sentences. Carrying a pistol without a license is punishable by up to 5 years, or up to 10 years if the person has a prior conviction for any felony offense.[87] Based on Superior Court data from 2010-2019, the 97.5th percentile sentence for the carrying a pistol without a license offense was approximately 3 years, and 2 years when the defendant had a prior felony conviction.[88] Unlawful possession of a firearm carries a 10 year maximum sentence, and a 15 year maximum sentence if the person has a prior conviction for a crime of violence.[89] The 97.5th percentile sentence for unlawful possession of a

[86] Letter from Councilmember Brooke Pinto to Secretary Nayasha Smith, Sept. 18, 2023 at pg. 1-2.
[87] D.C. Code § 22-4504.
[88] Criminal Code Reform Commission Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions, Appendix D.
[89] D.C. Code § 22-4503.

firearm was approximately 4.5 years, and 6 years when the defendant had a prior conviction for a crime of violence.[90] Therefore, existing felony possession offenses already allow for significantly higher sentences than even the longest sentences issued under current law. Moreover, although this new offense will increase the maximum statutorily authorized cumulative sentence, under the current Sentencing Guidelines, sentences for this offense would run *concurrently* with other weapons offenses.[91] It is extremely unlikely that further increases to the statutory maximum penalties will have a meaningful deterrent effect on illegal weapon possession.

ii. Overbreadth of the Unlawful Discard Offense

As discussed above, the conduct criminalized under this offense is covered by current felony weapons offenses. The stated goal of the new offense is to prevent people who are fleeing from law enforcement from discarding firearms or ammunition in order to avoid being caught with illegal weapons or ammunition. However, as drafted the proposed offense is significantly broader and criminalizes conduct unrelated to attempts to conceal contraband weapons.

As drafted, the offense covers discarding, throwing, or depositing a firearm *for almost any reason*, outside of the person's dwelling, place of business, or land possessed by the person. Although the bill's introduction letter states that this offense would address cases in which a person fleeing law enforcement discards a weapon to prevent being caught with the firearm, the offense does not include an element that the defendant was fleeing from law enforcement or acted with intent to avoid being caught with the firearm. In addition, the terms "discard," "throw," and "deposit" are undefined, but under their plain meaning would encompass a broad range of conduct. For example, the word "deposit" means "to set or place down."[92] Arguably a person who carries a pistol without a license to his friend's home and sets the gun down would have committed the unlawful discard offense, regardless of whether the defendant was fleeing from law enforcement or had intent to avoid being caught with the firearm.

iii. Reckless Endangerment with a Firearm and Penalty Changes

This section would make the reckless endangerment offense—which was added as part of a prior piece of temporary legislation—a permanent offense under the D.C. Code. In addition, this section would increase the maximum penalty for this offense from 2 years to 5 years, and add an aggravated version of the offense that would carry a 10 year maximum sentence. The CCRC had recommended inclusion of a reckless endangerment with a firearm offense as part of the RCCA, and continues to support its inclusion in the District's criminal code. However, given that the offense was so recently added to the code, it is unclear if any penalty change is warranted at this time.

The proposed 5 year maximum sentence for the reckless endangerment offense is 66% higher than the maximum sentence for felony assault, which requires the *actual infliction* of a significant

[90] Criminal Code Reform Commission Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions, Appendix D.
[91] 2023 Voluntary Sentencing Guidelines Manual, at 6.2, District of Columbia Sentencing Commission.
[92] https://www.merriam-webster.com/dictionary/deposit

bodily injury and is subject to a maximum 3 year sentence.[93] This higher sentence is disproportionate since reckless endangerment does not require any actual injury or intent to cause injury. In more serious cases, such as when a person is injured or killed, or when the defendant acted with intent to cause injury or death, but failed to do so, separate felony offenses would apply to increase the maximum penalties proportionately. If any injury occurs or if the defendant fired the gun with intent to injure or frighten anyone, the defendant can be charged with assault with a dangerous weapon, subject to a maximum 10 year sentence.[94] If the defendant acted with intent to kill, the defendant may be charged with assault with intent to kill, subject to a maximum 15 year sentence.[95]

This section also creates an aggravated version of the offense, subject to a 10 year maximum sentence, if the defendant has a prior conviction for a felony or discharged 5 or more rounds in a single course of conduct. It is unclear why the repeat-offender provision is necessary as current law contains other mechanisms to increase the maximum sentence for defendants with prior convictions. First, the general repeat felony offender provision allows for a maximum 30 year sentence for the commission of any felony when the defendant has two or more prior felony convictions.[96] In cases in which the defendant has only one prior felony conviction, the defendant may also be charged with unlawful possession of a firearm (commonly known as "felon in possession" or "FIP"), which is subject to a maximum sentence of 10 years, or 15 years if the prior conviction was for a crime of violence. In addition, since a person with a prior felony is highly unlikely to have a license to carry a firearm, a separate charge of carrying a pistol without a license can be brought, which carries a maximum sentence of 5 years.[97]

While not diminishing the seriousness of the aggravated form of reckless endangerment with a firearm, the CCRC cautions that a 10-year maximum sentence is disproportionately severe. Even the aggravated form of the offense does not require any infliction of injury or intent to cause injury. Yet, this offense would apply the same 10 year maximum sentence as aggravated assault, which requires inflicting *serious bodily injury* (i.e. injuries that are life-threatening or that cause protracted impairment of use of a body part or protracted disfigurement).

iv. Creates Consecutive Sentencing Mandate for Possession of a Machine Gun

This section amends D.C. Code § 22-4514 to require that any sentence for violation of that section that involves a machine gun be served consecutively to any other sentence. Consistent with the RCCA, the CCRC continues to support felony liability for simple possession of such weapons. However, although the increased danger that can result from committing an offense with a machine gun is clear, CCRC cautions the Council against adopting *ad hoc* consecutive sentencing rules unless it is clearly necessary to ensure proportionate penalties.

Current law allows judges to impose significant penalties for possession of machine guns, especially when used to commit other offenses. Under current law, judges have discretion to order

[93] D.C. Code § 22-404(a)(2).
[94] D.C. Code § 22-402.
[95] D.C. Code § 22-401.
[96] D.C. Code § 22-1804a.
[97] D.C. Code § 22-4504 (a)(1).

violations of § 22-4514 to run consecutive to any other sentence, and in the absence of clear direction, sentences are presumed to be consecutive.[98] Judges can take the heightened danger of machine guns into account to impose a higher sentence and order sentences be consecutive if needed to ensure a proportionately severe total period of incarceration. For example, all else being equal, a robbery committed with a machine gun is more dangerous than one committed with an ordinary firearm. However, the 97.5th percentile sentence for robbery is 9 years[99], *6 years lower* than the 15 year statutory maximum for that offense. Even looking solely at robbery convictions that were subject to a penalty enhancement, the 97.5th percentile sentence for was roughly 10.5 years, more than *4 years lower* than the *unenhanced* robbery maximum, and nearly *20 years* lower than the maximum for armed robbery.[100]

The results are similar when analyzing felony weapons offenses that have lower maxima than crimes of violence such as robbery. Consider someone with a prior felony who possesses a machine gun. That person can be charged with both unlawful possession of a firearm (commonly referred to as "felon in possession" or "FIP") and possession of a machine gun under § 22-4514. The unlawful possession of a firearm charge has a 10 year maximum sentence, or a 15 year maximum sentence if the prior felony was a crime of violence. The 97.5th percentile sentence for unlawful possession of a firearm is 4.75 years, and 6 years when there is a prior conviction for a crime of violence.

The sentencing data show that District judges have ample room within current statutory maximums to impose longer sentences in those cases in which a machine gun is possessed or used. It is therefore unclear what effect this mandatory consecutive sentencing rule will have on total aggregate sentences imposed. For example, consider a case in which a person commits a robbery by using a machine gun. The defendant would face a total of 15 years for the robbery (or 30 if the while armed enhancement is applied), and an additional 5 years for possession of the machine gun. If the sentencing judge deems it appropriate that the defendant be imprisoned for 10 years, the consecutive sentencing rule may have no effect on time served. Under current law, the judge could issue a 10 year sentence for robbery, and a lesser sentence for possession of a machine gun to be served concurrently. Under the proposed change, the judge could order an 8 year sentence for robbery and a 2 year sentence for possession of a machine gun to be served consecutively. In both cases, the defendant would have a total of 10 years of incarceration. To the extent that sentencing judges impose terms of incarceration that *in the aggregate* they find appropriate, the proposed consecutive sentencing rule will not change the total amount of time to serve.

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.

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[98] D.C. Code § 23-112.
[99] Criminal Code Reform Commission Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions, Appendix D.
[100] D.C. Code 22-4502.