Report #78 - Gambling Offenses

(First Draft)

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This Report contains draft revisions to as well as draft repeal recommendations for certain District criminal statutes. These draft revisions and repeal recommendations are part of the D.C. Criminal Code Reform Commission's (CCRC) efforts to issue recommendations for comprehensive reform of District criminal statutes.

Written comments on the revision and repeal recommendations in this report are welcome from government agencies, criminal justice stakeholders, and the public. Comments should be submitted via email to ccrc@dc.gov with the subject line "Comments on Report #78." The Commission will review all written comments that are timely received. The deadline for the written comments on this Report #78 – Gambling Offenses is July 19, 2022 (four weeks from the date of issue). Written comments received after July 19, 2022 may not be reviewed or considered in the agency's next draft (if another draft is deemed necessary) or final recommendations.

This Report is comprised of draft statutory text for inclusion in the Revised Criminal Code Act (RCCA) as submitted to the D.C. Council on October 1, 2021, commentary on the draft statutory text, and the repeal commentary for two statutes. Appendix A presents a black letter text of the draft revised statutes with no commentary.

The Report's commentary on the revisions explains the meaning of each provision, considers whether existing District law would be changed by the provision (and if so, why this change is being recommended), and may address the provision's relationship to code reforms in other jurisdictions, as well as recommendations by the American Law Institute and other experts. The Report's commentary on the repeal recommendations explains the reasoning behind the recommendation for repeal and addresses the ways in which the described offenses are covered by other RCC statutes.

Appendices to this report are:

- Appendix A – Black Letter Text of Draft Revised Statutes. (No commentary.)

A copy of this document and other work by the CCRC is available on the agency website at www.ccrc.dc.gov.

Report #78 – Gambling Offenses
Draft RCCA Text and Commentary
Corresponding D.C. Code statutes in {}

Statutes Recommends for Repeal

§ 22-1706.	Three-card monte and confidence games.
§ 22-1718.	Immunity of witnesses; record.

§ 22A-101. Definitions.

"Contest official" means any person who acts or expects to act in a publicly exhibited contest as an umpire, referee, or judge, or otherwise to officiate at a publicly exhibited contest.

Explanatory Note: The RCCA definition of "contest official" is new, the term is not currently defined in Title 22 of the D.C. Code. The RCCA definition of "contest official" is used in the revised rigging a publicly exhibited contest offense.[1]

Relation to Current District Law: The RCCA definition of "contest official" is new[2] and does not itself substantively change current District law. This definition formalizes the existing list[3] of roles in the current Code into a succinct defined term to eliminate the need for an exhaustive list of "contest official" roles.

"Contest participant" means any person who participates or expects to participate in a publicly exhibited contest as:

(1) A player, contestant, or member of a team;

(2) A coach, manager, trainer, or owner; or

(3) Another person directly associated with a player, contestant, team, or entry.

Explanatory Note: The RCCA definition of "contest participant" is new, the term is not currently defined in Title 22 of the D.C. Code. The RCCA definition of "contest participant" is used in the revised rigging a publicly exhibited contest offense.[4]

Relation to Current District Law: The RCCA definition of "contest participant" is new[5] and does not itself substantively change current District law. This definition formalizes the existing list of roles in the current corrupt influence in connection with athletic contests statute[6] into a succinct defined term to eliminate the need for an exhaustive list of "contest participant" roles.

"Gambling activity" means:

(1) Any activity where parties mutually agree, explicitly or implicitly, to a gain or loss of property contingent on the outcome of a future event not under the control or influence of the parties; or

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[1] RCCA § 22A-5702.

[2] The phrasing of the definition is nearly identical to the definition of "sports official" in Colorado's criminal code. CO ST § 18-5-403. The RCCA's use of "publicly exhibited contest" instead of "sports contest" is explained in the commentary for the "publicly exhibited contest" definition.

[3] D.C. Code § 22-1713.

[4] RCCA § 22A-5702.

[5] The phrasing of the definition is nearly identical to the definition of "sports participant" in Colorado's criminal code. CO ST § 18-5-403. The RCCA's use of "publicly exhibited contest" instead of "sports contest" is explained in the commentary for the "publicly exhibited contest" definition.

[6] D.C. Code § 22-1713.

(2) Any contest, game, or gaming scheme in which the outcome of a wager or a bet depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor.

Explanatory Note: The RCCA definition of "gambling activity" is new, the term is not currently defined in Title 22 of the D.C. Code. The RCCA definition of "gambling activity" is used in the revised promoting gambling[7] offense and permissible gambling activity[8] statute. The definition includes two types of conduct. First, "gambling activity" includes any mutual agreement between parties, which may be explicit or implicit, to a gain or loss of property contingent on the outcome of a future event not under the control or influence of the parties. For example, two parties agreeing to bet money on the outcome of a sporting event in which neither party is a participant would constitute gambling activity. Second, "gambling activity" includes any contest, game, or gaming scheme in which the outcome of a wager or a bet depends in a material degree upon an element of chance, even when skill also plays some role in determining the outcome. For example, a game of poker constitutes "gambling activity," whereas a game of tennis does not. Although both activities involve a degree of skill, chance plays a larger and material role in determining the outcome in poker.

Relation to Current District Law: The RCCA definition of "gambling activity" is a new term and does not itself substantively change current District law.

"Publicly exhibited contest" means any professional or amateur sport, game, race, or contest, involving persons, animals, or machines, that is viewed by the public. The term "publicly exhibited contest" does not include an exhibition which does not purport to be a publicly exhibited contest and which is not represented as being such a sport, game, race, or contest.

Explanatory Note: The RCCA definition of "publicly exhibited contest" replaces the current definitions of "athletic contest" in D.C. Code § 22-1708 and D.C. Code § 22-1713, applicable to provisions in Chapter 17, Gambling. The RCCA definition of "publicly exhibited contest" is used in the revised definitions[9] of "contest official" and "contest participant," as well as in the revised rigging a publicly exhibited contest offense.[10]

The term "publicly exhibited contest" specifies various forms of competitions or activities, and requires that they are viewed by the public. This definition includes professional- and amateur-league contests. However, events such as pick-up games do not meet the requirements of this definition despite being able to be viewed by the public. Whether a contest constitutes a "publicly exhibited contest" depends on the totality of the circumstances. The degree of publicity is an important factor in determining whether a contest is "publicly exhibited." For example, for all professional contests, including sports, e-sports, and non-athletic contests, there is a widely dispersed or easily accessible schedule that details the expected location and time of each contest. Often, such easily accessibly schedules exist for

[7] RCCA § 22A-5701.
[8] RCCA § 22A-5703.
[9] RCCA § 22A-101.
[10] RCCA § 22A-5702.

many school, college, or travel teams as well. In contrast, recreational leagues or contests with young children often only disseminate the schedule of games to those on the team rather than to the broader public. Similarly, a community center might post the hours it is open for "pick-up" basketball games but one would have no way of knowing if any particular team or participant will be playing on a particular day. Thus, only specific contests that are publicly exhibited *and* purport to be publicly exhibited are addressed in the revised rigging a publicly exhibited contest offense.[11]

Relation to Current District Law: *The revised definition of "publicly exhibited contest" clearly changes the current District law in two main ways.*

First, the revised definition requires that the contest is, purports to be, and is represented as being "publicly exhibited." This is a narrowing of the law from the current definitions[12] of "athletic contest" which only list types of contests but provide no guidance on how public the contest needs to be. As discussed above, the degree to which a schedule of the location and timing of the contest is publicly available is an important factor in determining if a contest constitutes a "publicly exhibited contest." Under this change, games played in major professional sports leagues would fall under the definition of "publicly exhibited contest" whereas a recreational league softball game does not, and is not covered by the revised rigging of a publicly exhibited contest offense.[13] This change improves the proportionality of the revised statutes.

Second, the current[14] definitions for "athletic contest" provide a long, mostly but not completely overlapping list specific activities that qualify as "athletic contests." In contrast, the revised definition generalizes the requirements for the contest and eliminates the need for an exhaustive list of activities. This change improves the clarity of the revised statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.

The revised definition specifies that the "publicly exhibited contest" may be either "professional or amateur." The current sports rigging statute[15] includes in the statutory text that the illegal behavior applies to specific participants in "any professional or amateur athletic contest." However, neither of the definitions[16] for "athletic contest" included this specification. By including this specification in the definition rather than in offense language, the revised definition improves the clarity of the revised statutes.

"Social gambling" means any game, wager, or transaction that is:

(1) Incidental to a bona fide social relationship; and

(2) Organized so that all participants receive only their personal gambling winnings or reimbursement equal to or less than any administrative costs incurred by a participant.

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[11] RCCA § 22A-5702.
[12] D.C. Code §§ 22-1708, 22-1713.
[13] RCCA § 22A-5702.
[14] D.C. Code §§ 22-1708, 22-1713.
[15] D.C. Code § 22-1713.
[16] D.C. Code §§ 22-1708, 22-1713.

Explanatory Note: The RCCA definition of "social gambling" is new, the term is not currently defined in Title 22 of the D.C. Code. The RCCA definition of "social gambling" is used in the revised promoting gambling offense.[17]

The "social gambling" definition has two requirements. First, the gambling activity must be incidental to a bona fide social relationship, and second, the activity must be organized so that all participants receive only their personal gambling winnings or reimbursement equal to or less than any administrative costs incurred by a participant.

As used in this definition, "a bona fide social relationship" is one in which those involved "have some legitimate common relationship to one another other than to engage in gambling."[18] By this definition, friends, relatives, coworkers, congregants, and others with a shared connection and relationship would be considered as having a "bona fide social relationship." However, those who exclusively gather to gamble would not be covered by this definition.

The requirement that each participant receives only their personal winnings helps distinguish the gambling activity from gambling done for financial gain independent of personal winnings. Under social gambling, only personal winnings and administrative costs can be paid out to players. The allowance of a reimbursement for any incurred administrative costs is also included since it results in net-neutral spending rather than a payment for the administrative work.

Relation to Current District Law: The RCCA definition of "social gambling" is new and does not itself substantively change current District law.

As applied in the revised gambling offenses, the term "social gambling" changes current District law in one main way.

The RCCA definition of "social gambling," when used in the revised promoting gambling[19] offense, decriminalizes a specific type of gambling that was previously not addressed by the code. Under current law, common place activities such as March Madness brackets or playing squares for the Super Bowl with friends are illegal. As of March 2015, there were more than 20 states[20] that allowed for some degree of social gambling and, since then, there has been a slew of new and pending bills introduced to expand social gambling and sports betting.[21] The addition of a social gambling exclusion improves the proportionality of the revised offenses by decriminalizing social gambling activity.

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[17] RCCA § 22A-5701.

[18] *Leichliter v. State Liquor Licensing Authority, Dept. of Revenue, State of Colorado*, 9 P.3d 1153, 1154 (Col. Ct. App. 2000) (holding that "incidental to a bona fide social relationship," refers to a game or wager which is made available to participants who have some legitimate common relationship to one another other than to engage in gambling).

[19] RCCA § 22A-5701.

[20] FordHarrison. *50-State Survey of Social Gambling Laws*. March 2015. https://www.fordharrison.com/files/30476_50%20State%20Survey%20on%20Gambling%20Laws%20March%202015.pdf

[21] CBS Sports. *Wanna bet? Explaining where all 50 states stand on legalizing sports gambling*. January 7, 2022. https://www.cbssports.com/general/news/wanna-bet-explaining-where-all-50-states-stand-on-legalizing-sports-gambling/.

§ 22A-5701. Promoting Gambling.

(a) *Offense.* An actor commits promoting gambling when the actor:
  (1) Knowingly:
    (A) Induces or attempts to induce another person to engage in any gambling activity; or
    (B) Installs or operates a game of skill machine at any location reckless as to the fact that such installation or operation violates subchapter III of Chapter 6 in Title 36;
  (2) With intent to receive any financial gain; and
  (3) In fact, the actor is not engaging in conduct:
    (A) Solely as a player; or
    (B) Authorized by a District law, regulation, rule, or license.

(b) *Exclusion from liability.* It is an exclusion from liability under this section that the gambling activity in question was, in fact, social gambling as defined in § 22A-101.

(c) *Forfeiture*. Upon conviction under this section, the court may, in addition to the penalties provided by this section, order the forfeiture and destruction or other disposition of any equipment or money used, or attempted to be used, in violation of this section.

(d) *Penalties.* Promoting gambling is a Class B misdemeanor.

(e) *Definitions*. In this section, the term:
  (1) "Player" means a person engaged in gambling activity solely as a contestant or bettor; and
  (2) "Game of skill machine" has the meaning specified in D.C. Code § 36-641.01.

Explanatory Note: *This section establishes the promoting gambling offense for the proposed Revised Criminal Code Act (RCCA). The offense criminalizes inducing or attempting to induce another person to engage in gambling activity as well as installing or operating a game of skill machine in violation of subchapter III of Chapter 6 in Title 36 when done with the intent of receiving financial gain. The RCCA promoting gambling offense has a single grade and replaces the "Lotteries; promotion; sale or possession of tickets" offense in D.C. Code § 22-1701, the "possession of lottery or policy tickets" offense in D.C. Code § 22-1702, the "permitting sale of lottery tickets on premises" offense in D.C. Code § 22-1703, the "gaming; setting up gaming table; inducing play" offense in D.C. Code § 22-1704, the "gambling premises; definition; prohibition against maintaining" offense in D.C. Code § 22-1705, the "'gaming table' defined" statute in D.C. Code § 22-1707, and the "gambling pools and bookmaking; athletic contest defined" offense in D.C. Code § 22-1708.*

Subsection (a) specifies the requirements for the promoting gambling offense.

Paragraph (a)(1) specifies "knowingly," a defined term in RCCA § 22A-206, as the culpable mental state for two conduct elements in subparagraphs (a)(1)(A) and (a)(1)(B).

Subparagraph (a)(1)(A) specifies that one of the two alternative types of prohibited conduct is inducing or attempting to induce another person to engage in any gambling activity. The term "gambling activity" is a defined term under RCCA § 22A-101. Per the rule of interpretation in RCCA § 22A-207, the term "knowingly" in paragraph (a)(1) also applies to this subparagraph. "Knowingly" is a defined term[22] and applied here this means that an actor must be

[22] RCCA § 22A-206(b).

practically certain that by their conduct they are inducing or attempting to induce another person to engage in conduct that the actor is practically certain is gambling activity. The terms "induces" or "attempts to induce" are meant to be interpreted broadly and include indirectly inducing or attempting to induce another person to engage in gambling activity.

Subparagraph (a)(1)(B) specifies that the second of the two alternative types of conduct prohibited is installing or operating a "game of skill machine" at any location reckless as to the fact that such installation or operation violates subchapter III of Chapter 6 in Title 36. "Game of skill machine" is a defined term under D.C. Code § 36-641.01.[23] Per the rule of interpretation in RCCA § 22A-207, the term "knowingly" in paragraph (a)(1) also applies to the phrase "installs or operates a game of skill machine in any location" and the term "recklessly" establishes the culpable mental state for the remainder of the subparagraph. "Knowingly" is a defined term in RCCA § 22A-206 and applied here means that an actor must be practically certain that by their conduct they are installing or operating a device that the actor is practically certain is a game of skill machine. "Recklessly" is a defined term in RCCA § 22A-206 and applied here it means that the actor must have consciously disregarded a substantial risk that the installation or operation of the game of skill machine was in violation of District law and that the risk was of such a nature and degree that, considering the nature and motivation for the actor's conduct and the circumstances the actor was aware of, the actor's conscious disregard of that risk was a gross deviation from the standard of conduct that a reasonable individual would follow in the actor's situation.

Paragraph (a)(2) requires that the person act with intent to receive any financial gain. "Intent" is a defined term in RCCA § 22A-206 that here means the actor was practically certain that their conduct would result in financial gain. Per RCCA § 22A-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor did receive any financial gain for their conduct, only that they were practically certain they would.

Paragraph (a)(3) specifies as additional elements that the government must prove that the actor was not, in fact, engaging in either conduct specified in subparagraphs (a)(3)(A) and (a)(3)(B).

Subparagraph (a)(3)(A) specifies that the government must prove the actor was not, in fact, engaging in conduct prohibited by paragraphs (a)(1) and (a)(2) solely as a player. The term "player" is a defined term under subsection (d) of this section and refers to a person engaged in gambling activity solely as a contestant or bettor.

Subparagraph (a)(3)(B) specifies that the government must prove the actor's conduct in paragraphs (a)(1) and (a)(2) was not, in fact, authorized by a District law, regulation, rule, or license.

[23] "Game of skill machine" means a mechanical or electronic gaming device that rewards the winning player or players with cash, a gift card, or a voucher that can be redeemed for cash. A mechanical or electronic gaming device shall not be considered a game of skill machine if: (A) The ability of a player to succeed at the game is impacted by the number or ratio of prior wins to prior losses of players playing the game; (B) The outcome of the game can be controlled by a source other than a player playing the game; (C) The success of a player is or may be determined by a chance event that cannot be altered by the player's actions; (D) The ability of a player to succeed at the game is impacted by game features not visible or known to a reasonable player; or (E) The ability of a player to succeed at the game is impacted by the exercise of skill that no reasonable player could exercise. D.C. Code § 36-641.01.

Subsection (b) specifies a categorical exclusion to liability for people whose conduct under subsection (a) is not a criminal offense. Under this subsection, an actor whose conduct was, in fact, social gambling is not liable for the promoting gambling offense. "Social gambling" is a defined term under RCCA § 22A-101 and refers to any game, wager, or transaction that is (1) incidental to a bona fide social relationship and (2) organized so that all participants receive only their personal gambling winnings or reimbursement equal to or less than any administrative costs incurred by a participant.

Subsection (c) provides judicial discretion to order the forfeiture and destruction or other disposition of any equipment or money used, or attempted to be used, in violation of this section.

Subsection (d) provides the penalty for the revised offense. [*See* RCCA §§ 22A-603 and 22A-604 for the imprisonment terms and fines for each penalty class.]

Subsection (e) provides a definition of "player" applicable to this section and cross-references a definition for "game of skill machine" located elsewhere in the D.C. Code. Paragraph (e)(1) defines the term "player" for the section as a person engaged in gambling activity solely as a contestant or bettor. "Gambling activity" is a defined term under RCCA § 22A-101. Paragraph (e)(2) specifies that the term "game of skill machine" has the same meaning specified in D.C. Code § 36-641.01.[24]

Relation to Current District Law: *The new promoting gambling offense clearly changes the current District law in seven main ways.*

First, the RCCA promoting gambling offense combines in one offense multiple related and overlapping gambling offenses in the current gambling chapter. Current District law contains numerous statutes[25] that address conduct that can be said to promote gambling or aid in the promotion of prohibited gambling in some way. These offenses overlap in significant degree, use ambiguous, redundant, or outdated language, and have rarely been charged in the last half century.[26] In contrast, the RCCA combines these statutes into a single promoting gambling

[24] "Game of skill machine" means a mechanical or electronic gaming device that rewards the winning player or players with cash, a gift card, or a voucher that can be redeemed for cash. A mechanical or electronic gaming device shall not be considered a game of skill machine if: (A) The ability of a player to succeed at the game is impacted by the number or ratio of prior wins to prior losses of players playing the game; (B) The outcome of the game can be controlled by a source other than a player playing the game; (C) The success of a player is or may be determined by a chance event that cannot be altered by the player's actions; (D) The ability of a player to succeed at the game is impacted by game features not visible or known to a reasonable player; or (E) The ability of a player to succeed at the game is impacted by the exercise of skill that no reasonable player could exercise. D.C. Code § 36-641.01.

[25] D.C. Code § 22-1701. Lotteries; promotion; sale or possession of tickets; D.C. Code § 22-1702. Possession of lottery or policy tickets; D.C. Code § 22-1703. permitting sale of lottery tickets on premises; D.C. Code § 22-1704. gaming; setting up gaming table; inducing play; D.C. Code § 22-1705. gambling premises; definition; prohibition against maintaining.

[26] The only gambling offense in title 22 charged in the last decade has been maintaining a gambling premises in violation of D.C. Code § 22-1705. *See* D.C. CRIM. CODE REFORM COMM., REVISED CRIMINAL CODE COMPILATION, App. F. (March 31, 2021) (Comparison of RCCA Offense Penalties and District Charging and Conviction Data). Between 2010-2019, there were fewer than 20 charges for violations of D.C. Code § 22-1705 brought in the District. *Id*. CCRC does not have charging and conviction data for years preceding 2010. However, it is notable that there are no recent DCCA published opinions stemming from convictions under these statutes and few judicial opinions over the last 50 years. For example, the most recent case interpreting D.C. Code § 22-1704 which prohibits gaming, setting up a gaming table, and inducing play was a D.C. Circuit case in 1960. *Silverman v. United States*, 275 F.2d 173 (D.C. Cir. 1960). The last published opinion stemming from violations of D.C. Code § 22-1708, which prohibits bookmaking, was in 1978. *See Davis v. United States*, 390 A.2d 976 (D.C. 1978).

offense that punishes only the most serious conduct, inducing or attempting to induce another to gamble for financial gain, along with violations of District law on in the installation and operation of game of skill machines. The combination of these partially duplicative and rarely used offenses in current law into a single promoting gambling offense simplifies the revised statutes while broadly covering the most serious conduct addressed in current law. This change improves the clarity and consistency of the revised statutes.

Second, the RCCA promoting gambling statute eliminates liability for persons making bets or wagers solely as bettors or participants in lotteries. Current District law expressly prohibits individual persons from purchasing, possessing, owning, or acquiring a chance in an unauthorized lottery and making or placing an unauthorized bet or wager on the result of any athletic contest[27] but does not appear to prohibit participation in a contest of chance or making bets and wagers on things other than athletic contests except when such bets or wagers occur on public property and highways.[28] In contrast, the RCCA promoting gambling offense prohibits promoting gambling activity for financial gain by persons and expressly excludes from liability actors who engage in gambling activity solely as "players", a defined term which encompasses bettors as well as participants in lotteries.[29] The District and other states have recognized, by legalizing sports wagering and operating or authorizing some lotteries, numbers games, raffles, Monte Carlo nights and other forms of gambling,[30] there is nothing inherently harmful or immoral about placing bets or wagers.[31] Given the nature of the conduct and the fact that gambling activity has generally been legalized, it would be inappropriate to continue criminalizing mere betting or participation in a lottery by persons acting solely as players. Additionally, decriminalizing the behavior of potentially addicted individuals and exclusively punishing those who promote illegal gambling is consistent with numerous other statutory

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Similarly, the last published opinion for the lottery offenses in D.C. Code §§ 22-1701 and 1702 was in 1983. *See Mack v. United States*, 464 A.2d 114 (D.C. 1983). As noted, the only gambling offense from Title 22 charged in the last decade has been maintaining a gambling premises under D.C. Code § 22-1705. The last published opinion of an appeal from conviction for violation of D.C. Code § 22-1705 was published more than 30 years ago in 1991. *See Lawson v. United States*, 596 A.2d 504 (D.C. 1991).

[27] *See* D.C. Code § 22-1708.

[28] *See* 19 DCMR § 1309.

[29] Although the RCCA does not punish gambling by persons acting solely as players, gambling on public property, public highways, and vacant or unoccupied lots near public highways is still prohibited under 19 DCMR § 1309.

[30] It should be noted with respect to sports wagering that the District along with the majority of states would have likely been prohibited from partially or completely repealing existing law banning sports gambling prior to 2018 under PASPA. *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1474 (2018) (holding that "when a State completely or partially repeals old laws banning sports gambling, it "authorize[s]" that activity" in violation of the PASPA prohibition on authorizing sports gambling). Prior to *Murphy*, only four states, Delaware, Oregon, Montana and Nevada, satisfied the PASPA's "grandfather clause" which allowed the states to maintain a scheme authorizing sports gambling established prior to the PASPA. *Nat'l Collegiate Athletic Ass'n v. Christie*, 926 F. Supp. 2d 551, 555 (D.N.J.), aff'd sub nom. *Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2013). But since *Murphy* struck down the PASPA, 80% of states have established some form of legalized sports wagering. *See* Legislative Tracker: Sports Betting, Legal Sports Report (last visited June 17, 2022), https://www.legalsportsreport.com/sportsbetting-bill-tracker/.

[31] *See e.g.*, Sports Wagering Lottery Amendment Act of 2018, effective May 3, 2019 (D.C. Law 22-312; 66 DCR 1402). The 2018 law allows for legal sports betting within the District when regulated, licensed, or operated by the Office of Lottery and Gaming. *See also* D.C. Code § 36-621.01. Authorization of sports wagering ("The operation of sports wagering and related activities shall be lawful in the District of Columbia and conducted in accordance with this subchapter, and rules and regulations issued pursuant to this subchapter.")

schemes punishing only the more culpable side of a transaction.[32] As a result of this change, several current offenses that criminalize only the conduct of a player or mere possession without actual gambling are repealed through this statute.[33] This change improves the consistency and proportionality of the revised offenses.

Third, the RCCA promoting gambling offense incorporates an exclusion from liability for those engaging in social gambling. Current law does not include an exception for social gambling and common gambling activities, such as betting on sporting events with friends or coworkers, are illegal. This is true even though sports wagering was partially legalized by the D.C. Council in May 2019.[34] In contrast, the RCCA promoting gambling offense creates an exception that permits social gambling in cases where there is bona fide social relationship and the activity is organized so that all participants receive only personal winnings or reimbursement for administrative costs.[35] The addition of a social gambling exclusion is consistent with trends in other states.[36] This change improves the consistency and proportionality of the revised offenses.

Fourth, the RCCA promoting gambling statute establishes judicial discretion to order limited forfeiture of gambling equipment and money only after conviction. Current D.C. Code § 22-1705 specifies that "all moneys, vehicles, furnishings, fixtures, equipment, stock (including, without limitation, furnishings and fixtures adaptable to nongambling uses, and equipment and stock for printing, recording, computing, transporting, safekeeping, or communication), or other things of value used or to be used" in specified violations of D.C. Code §§ 22-1701, 1704, and

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[32] *E.g.*, decriminalizing purchase or possession of contraband but not sale.

[33] D.C. Code § 22-1702 (Possession of lottery or policy tickets) and D.C. Code § 22-1708 (Gambling pools and bookmaking; athletic contest defined; specifically the possession and wagering (not bookmaking, see below) elements of the offense). The RCCA promoting gambling offense also does not expressly establish an exception in the statute for slot machines manufactured before 1952 as current D.C. Code § 22-1704 does. Expressly excepting such "antique" slot machines from the promoting gambling offense is not necessary because nothing in the promoting gambling offense creates liability for setting up or keeping slot machines manufactured before 1952 in the manner permitted by current D.C. Code § 22-1704.

[34] *See* Sports Wagering Lottery Amendment Act of 2018, effective May 3, 2019 (D.C. Law 22-312; 66 DCR 1402). The 2018 law allows for legal sports betting within the District when regulated, licensed, or operated by the Office of Lottery and Gaming. *See also* D.C. Code § 22-1717. The Supreme Court had previously ruled that federal the Professional and Amateur Sports Protection Act (PASPA), which made it unlawful for a State, or the District of Columbia, or its subdivisions "to sponsor, operate, advertise, promote, license, or authorize by law or compact ... a lottery, sweepstakes, or other betting, gambling, or wagering scheme based ... on" competitive sporting events, was unconstitutional in 2018. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018) (finding 28 U.S.C. § 3702 unconstitutional on the grounds that it violated the anticommandeering doctrine).

[35] *See* RCCA § 22A-101 (definition of "social gambling").

[36] As of March 2015, there were more than 20 states that allowed for some degree of social gambling and, since then, there has been a slew of new and pending bills introduced to expand social gambling and sports betting. *See* FordHarrison. *50-State Survey of Social Gambling Laws*. March 2015. https://www.fordharrison.com/files/30476_50%20State%20Survey%20on%20Gambling%20Laws%20March%202015.pdf; *Carragher v. District of Columbia*, 240 A.3d 321, 322 (D.C. 2020) ("With *Murphy* in the books, many jurisdictions—including the District—raced to launch sports gambling platforms. *See* Legislative Tracker: Sports Betting, Legal Sports Report (visited Sept. 10, 2020), https://www.legalsportsreport.com/sportsbetting-bill-tracker/; https://perma.cc/TU2X-3PDF ("nearly 75% of US states have either legalized sports wagering or introduced legislation to do so" since *Murphy*"); Committee on Finance and Revenue, Report on Bill 22-944, "Sports Wagering Lottery Amendment Act of 2018," November 28, 2018 at 2 (noting that since the Supreme Court's May 2018 decision striking down the Professional and Amateur Sports Protection Act and paving the way for states to legalize sports wagering, states moved rapidly to legalize sports wagering and capitalize on this new stream of revenue.").

1705 shall be subject to forfeiture pursuant to the provisions of D.C. Code §§ 41-301 *et. seq*.[37] Under the provisions of Title 41, property is subject to forfeiture on a mere preponderance of the evidence standard[38] irrespective of whether any person is actually convicted in relation to violation of a gambling statute.[39] In contrast, the RCCA promoting gambling offenses provides for forfeiture only after conviction and at the discretion of the sentencing judge. Under the RCCA, forfeiture is also limited to equipment and money used or attempted to be used in the commission of the offense no longer includes vehicles, furnishings, fixtures, stock, or other things of value. "Forfeiture is penal in nature and may be a harsh remedy."[40] Additionally, the Supreme Court has held that punitive forfeiture that is grossly disproportional to the gravity of the offense violates the Excessive Fines Clause of the Eighth Amendment.[41] The transfer of forfeiture proceedings from civil proceedings based on a mere preponderance of the evidence standard to sentencing proceedings after a conviction and the limitation of property subject to forfeiture is appropriate given the low level nature of the RCCA promoting gambling offense which can be committed by a single act of inducement and no longer requires an actor to maintain, aid in maintaining, or permit the maintenance of a gambling premises. By limiting the property subject to forfeiture, requiring a criminal conviction before forfeiture, and leaving forfeiture decisions to the discretion of the sentencing court, the revised statute provides better safeguards against grossly disproportional forfeiture. This change improves the consistency and proportionality of the revised offenses.

Fifth, the RCCA promoting gambling offense eliminates the repeat offender penalty provision in the current maintaining a gambling premises statute consistent with other nonviolent revised offenses in the RCCA. Under current law, violations of D.C. Code § 22-1705 are ordinarily punishable by 180 days in jail and/or $1000 fine. However, if the actor has been previously convicted of the offense, the offense is punishable by a minimum term of imprisonment of no more than 5 years and/or a fine of $12,500.[42] In contrast, the RCCA promoting gambling offense does not provide a statute-specific penalty enhancement based on a prior conviction and instead makes the offense subject to a single, standard penalty classification. Additionally, since this offense is outside of Chapter 2 of this Title, the repeat offender penalty enhancement in RCCA § 22A-606 would not apply.[43] The elimination of the penalty enhancement is appropriate given the non-violent nature of the offense and the fact that the revised promoting gambling offense no longer requires the actor to maintain, aid in maintaining, or permit another to maintain a gambling premises for use in another gambling offense. Liability for the RCCA promoting gambling offense can be established based on a single act of inducing (or attempting to induce) another person to engage in a single act of gambling activity and does not require any nexus to a particular premises let alone the maintenance of a premises for

[37] The only gambling offense currently subject to civil forfeiture provisions in Title 41 is maintaining a gambling premises under D.C. Code § 22-1705. *See* D.C. Code § 41-301(4) (defining "forfeitable offense").
[38] If the property is real property or a vehicle, the evidentiary standard is raised to clear and convincing evidence. *See* D.C. Code § 41-308(d)(1)(B).
[39] *See* D.C. Code § 41-302(c) ("Except as provided in § 41-308, a conviction of a forfeitable offense shall not be required for the purpose of establishing that property is subject to forfeiture under this chapter.").
[40] *District of Columbia v. Real Prop. Known as 313 M St.,* 633 A.2d 820, 822 (D.C. 1993) (internal citations omitted).
[41] *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).
[42] D.C. Code § 22-1705(h).
[43] RCCA § 22A-606.

gambling. Such conduct by itself was not previously subject to the penalty enhancement in D.C. Code § 22-1705. It would be overly punitive to include a penalty enhancement for non-violent conduct that was not previously subject to a penalty enhancement. This change improves the consistency and proportionality of the revised offenses.

Sixth, the RCCA promoting gambling offense repeals current D.C. Code § 22-1707 which defines the term "gaming table" for the purposes of D.C. Code §§ 22-1704-1706. The term "gaming table" is not used in the RCCA promoting gambling offense or any other part of the chapter and the definition is no longer pertinent to these sections. This change improves the consistency of the revised statutes.

Seventh, the RCCA promoting gambling offense repeals current D.C. Code § 22-1708 which criminalizes both individual betting, including possession of lottery-related paraphernalia, and bookmaking for wagers on the results of athletic contests. Since the revised offense eliminates criminal punishment for those engaged in gambling activity solely as a player, the first half of the offense, including the possession elements of it, are repealed.[44] Furthermore, the statutes on sports wagering in Chapter 6 in Title 36 provide both civil and criminal penalties in relation to operating sports wagering facilities and accepting sport wagers. These more recently enacted statutes on sports wagering are sufficient to address the bookmaking conduct prohibited by D.C. Code § 22-1708. This change improves the consistency of the revised statutes.

Beyond these seven main changes to current District law, four other aspects of the new promoting gambling statute may constitute substantive changes to current District law.

First, the RCCA promoting gambling statute specifies a "knowingly" culpable mental state for the prohibited conduct – inducing or attempting to induce another person to engage in any gambling activity or installing or operating a game of skill machine at any location. Two of the current District gambling statutes[45] covered by the RCCA promoting gambling offense are silent with respect to the culpable mental state while the remaining statutes[46] specify a "knowingly" culpable mental state with respect to the prohibited conduct. With respect to the former statutes, there does not appear to be any DCCA case law directly on point. To avoid any ambiguity, the RCCA promoting gambling offense requires a knowingly culpable mental state with respect to the prohibited conduct. Applying a knowingly culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[47] This change improves the clarity and consistency of the revised statutes.

Second, the RCCA promoting gambling offense specifies a "reckless" culpable mental state with respect to whether the installation and operation of a game of skill machine violates subchapter II of Chapter 6 in Title 36. Current D.C. Code § 22-1704(b) does not specify a culpable mental state with respect to whether the installation or operation of a game of skill machine was done in violation of governing law and there is no DCCA case law on point. Resolving any ambiguity, the RCCA promoting gambling offense requires a reckless culpable

[44] D.C. Code § 22-1702 ("possession of lottery or policy tickets") is repealed through the same rationale.
[45] *See* D.C. Code §§ 22-1701, 1704.
[46] *See* D.C. Code §§ 22-1702, 1703, 1705.
[47] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

mental state with respect to whether the installation or operation of the game of skill machine was done in violation of applicable law. The reckless culpable mental state is appropriate given that an average person would not likely know to a practically certainty that their conduct violated the particular statutes in Title 36. This change improves the clarity, consistency, and proportionality of the revised offenses.

Third, the RCCA promoting gambling statute requires that the person inducing or attempting to induce another to engage in gambling activity or installing and operating a game of skill machine act with the intent to receive financial gain. Current D.C. Code § 22-1704 prohibits setting up or keeping a gaming table or gambling device and "induc[ing], entic[ing], and permit[ing] any person to bet or play at or upon any such gaming table or gambling device, or on the side of or against the keeper thereof" but does not state what it means to keep or set up a gaming table or gambling device or what it means to permit a person to bet or play at or upon any such a gaming table. Case law interpreting D.C. Code § 22-1704 states that the statute requires something more than the mere taking of a bet but does not clearly specify what connection to a gambling operation is required to establish violations of the statute.[48] Resolving any ambiguity, the RCCA promoting gambling statute requires that the person who induces or attempts to induce another to gamble or who installs or operates a game of skill machine does so for some financial gain independent of the personal winnings of a player. Requiring an intent to receive financial gain clarifies that the government must prove as an additional element an intent to receive financial gain and ensures that persons acting without any intent to obtain financial gain from another person's gambling activity are not held liable for promoting gambling. This change improves the clarity and consistency of the revised offenses.

Fourth, the RCCA promoting gambling offense uses a broad definition of "gambling activity" and does not enumerate specific types of gambling or gambling devices. Current District law relies on detailed enumerated lists and/or catchall provisions to broadly encompass a wide variety of gambling activity.[49] Although Current D.C. Code § 22-1707 calls for liberal construction of the gaming statutes by courts,[50] the enumerated prohibitions in current gambling offenses include common forms of gambling or devices from the 19th century and may not encompass all modern forms of gambling. In contrast, the RCCA promoting gambling offenses uses a newly defined term "gambling activity" that focuses on the conduct and is broad enough to encompass new forms of gambling going forward without specifying them individually in the statutory text. The broad definition of "gambling activity" incorporates all the gambling games, contests, lotteries, and schemes mentioned throughout the current gambling chapter and thus eliminates the need for an exhaustive list of games, contests, devices, or paraphernalia related to gambling and lotteries as well as a separate statute specifying that courts should construe the

[48] *Plummer v. United States*, 189 F.2d 19, 20 (D.C. Cir. 1951) (stating "[a]n accused cannot be guilty of keeping a gaming table if he merely took a bet").

[49] *E.g.*, D.C. Code § 22-1704 prohibits setting up or keeping "any gaming table, or an house, vessel, or place, on lang or water, for the purpose of gaming, or gambling device commonly called A B C, faro bank, E O, roulette, equality, keno, thimbles, or little joker, or any kind of gaming table or gambling device adapted, devised, and designed for the purpose of playing any game of chance for money or property" and "inducing, enticing, and permitting any person to bet or play at or upon any such gaming table or gambling device, or on the side of or against the keeper thereof."

[50] D.C. Code § 22-1707 ("All games, devices, or contrivances at which money or any other thing shall be bet or wagered shall be deemed a gaming table within the meaning of §§ 22-1704 to 22-1706; and the courts shall construe said sections liberally, so as to prevent the mischief intended to be guarded against.").

language of the gambling statutes liberally. This change improves the clarity of the revised offenses.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.

The RCCA promoting gambling statute specifies that the government must establish that those who engage in conduct constituting the offense are not authorized to do so by a District law, regulation, rule, or license. District law currently authorizes and regulates various forms of gambling and D.C. Code § 22-1717 provides that nothing in the gambling statutes contained in Title 22 should be construed to prohibit operation or participation in legalized forms of gambling.[51] Similarly, D.C. Code § 22-1718 provides that nothing in the gambling statutes in Title 22 should be construed to prohibit the advertising and promotion of excepted permissible gambling activities pursuant to § 22-1717. Consistent with these provisions (which have been revised as § 22A-5703), the revised statute codifies in the text of the promoting gambling offense itself a requirement that the actor's conduct not be authorized by any District law, regulation, rule, or license. This change improves the clarity and consistency of the statute without changing current District law.

[51] D.C. Code § 22-1717 ("Nothing in subchapter I of this chapter shall be construed to prohibit the operation of or participation in lotteries and/or daily numbers games operated by and for the benefit of the District of Columbia by the Office of Lottery and Gaming, including bingo, raffles, and Monte Carlo night parties organized for educational and charitable purposes, regulated by the Office of Lottery and Gaming, or sports wagering regulated, licensed, or operated by the Office of Lottery and Gaming.").

§ 22A-5702. Rigging a Publicly Exhibited Contest.

(a) *First degree.* An actor commits first degree rigging a publicly exhibited contest when the actor:
  (1) Knowingly:
    (A) Offers or gives anything of value to any person;
    (B) Demands or requests anything of value from any person; or
    (C) Makes an explicit or implicit coercive threat to any person;
  (2) With the purpose of causing a contest participant or contest official in a publicly exhibited contest to engage in conduct that affects:
    (A) The course or outcome of the publicly exhibited contest; and
    (B) The outcome of any wager or bet on the publicly exhibited contest.

(b) *Second degree*. An actor commits second degree rigging a publicly exhibited contest when the actor:
  (1) Knowingly agrees to accept anything of value from another person;
  (2) In exchange for the actor or another person engaging in conduct as a contest participant or contest official in a publicly exhibited contest that affects:
    (A) The course or outcome of the publicly exhibited contest; and
    (B) The outcome of any wager or bet on the publicly exhibited contest.

(c) *Exclusions from liability.* An actor does not commit an offense under this section when, in fact, the actor engages in the conduct constituting the offense with the purpose of encouraging a contest participant or contest official to perform with a higher degree of skill, ability, or diligence in the publicly exhibited contest.

(d) *Penalty*.
  (1) First degree rigging a publicly exhibited contest is a Class 9 felony.
  (2) Second degree rigging a publicly exhibited contest is a Class A misdemeanor.

Explanatory Note: *This section establishes the rigging a publicly exhibited contest offense for the proposed Revised Criminal Code Act (RCCA). The offense has two grades. The penalty gradations are based on whether the actor instigated the rigging of a publicly exhibited contest or merely agreed to accept anything of value in exchange for rigging a publicly exhibited contest. The revised publicly exhibited contest offense replaces the "corrupt influence in connection with athletic contests" offense in D.C. Code § 22-1713.*

Subsection (a) specifies the requirements for the first degree sports rigging offense.

Paragraph (a)(1) requires that a person acts knowingly for one of three types of conduct. "Knowingly" is a defined term in RCCA § 22A-206 and applied here means that the person must be practically certain that their actions were one of the three types of conduct specified in subparagraphs (a)(1)(A), (a)(1)(B), or (a)(1)(C).

Subparagraph (a)(1)(A) specifies that one of the three types of conduct that a person must engage in knowingly is offering or giving anything of value to any person. Per the rule of interpretation in RCCA § 22A-207, the term "knowingly" in paragraph (a)(1) also applies to this subparagraph. Applied here this means that the actor must be aware or practically certain that they are offering or giving anything of value to another person.

Subparagraph (a)(1)(B) specifies that another of the three types of conduct that a person must engage in knowingly is demanding or requesting anything of value from any person. Per the rule of interpretation in RCCA § 22A-207, the term "knowingly" in paragraph (a)(1) also

applies to this subparagraph. Applied here this means that the actor must be aware or practically certain that they are demanding or requesting anything of value from another person.

Subparagraph (a)(1)(C) specifies that the last of the three types of conduct that a person must engage in knowingly is making an explicit or implicit coercive threat to any person. Per the rule of interpretation in RCCA § 22A-207, the term "knowingly" in paragraph (a)(1) also applies to this subparagraph. Applied here this means that the actor must be aware or practically certain that they are making a coercive threat to another person. "Coercive threat" is a defined term in RCCA § 22A-101 and requires some form of communication where the actor takes action to convey a message that is received and understood by another person. No precise words are necessary to convey a threat; it may be bluntly spoken, or done by innuendo or suggestion. The verb "communicates" is intended to be broadly construed, encompassing all speech and other messages, which includes gestures or other conduct, that are received and understood by another person.

Paragraph (a)(2) requires that the conduct in paragraph (a)(1) is done with the purpose of causing a contest participant or contest official in a publicly exhibited contest to engage in conduct that affects the publicly exhibited contest as specified in subparagraphs (a)(2)(A) and (a)(2)(B). "Contest participant,"[52] "contest official,"[53] and "publicly exhibited contest"[54] are defined terms under RCCA § 22A-101. Per RCCA § 22A-205, the object of the phrase "with the purpose of" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. Applied here this means that the government need not prove that the actor actually caused a contest participant or contest official to engage in the specified conduct only that the actor consciously desired by their conduct in paragraph (a)(1) to cause a contest participant or contest official in a publicly exhibited contest to engage in the specified conduct.

Subparagraph (a)(2)(A) specifies as the first element that the actor's conduct must be done with the purpose of causing a contest participant or contest official in a publicly exhibited contest to engage in conduct that would affect the course or outcome of the same publicly exhibited contest. "Publicly exhibited contest" is a defined term under RCCA § 22A-101. Per the rule of interpretation in RCCA § 22A-207, the phrase "with the purpose of" in paragraph (a)(2) also applies to this subparagraph. It is not necessary to prove that the contest participant or contest official actually affected the course or outcome of a publicly exhibited contest, just that the defendant consciously desired to cause the contest participant or contest official in a publicly exhibited contest to engage in conduct that would affect the course or outcome of the publicly exhibited contest through their conduct in paragraph (a)(1).

Subparagraph (a)(2)(B) specifies as the second element that the actor's conduct must be done with the purpose of causing a contest participant or contest official in a publicly exhibited contest to engage in conduct that would affect the outcome of any wager or bet on the same

[52] "Contest participant" means any person who participates or expects to participate in a publicly exhibited contest as: (1) A player, contestant, or member of a team; (2) A coach, manager, trainer, or owner; or (3) Another person directly associated with a player, contestant, team, or entry.

[53] "Contest official" means any person who acts or expects to act in a publicly exhibited contest as an umpire, referee, or judge, or otherwise to officiate at a publicly exhibited contest.

[54] "Publicly exhibited contest" means any professional or amateur sport, game, race, or contest, involving persons, animals, or machines, that is viewed by the public. The term "publicly exhibited contest" does not include an exhibition which does not purport to be a publicly exhibited contest and which is not represented as being such a sport, game, race, or contest.

publicly exhibited contest. "Publicly exhibited contest" is a defined term under RCCA § 22A-101. Per the rule of interpretation in RCCA § 22A-207, the phrase "with the purpose of" in paragraph (a)(2) also applies to this subparagraph. It is not necessary to prove that the contest participant or contest official actually affected the outcome of a wager or bet on the publicly exhibited contest, just that the actor consciously desired to cause the contest participant or contest official in a publicly exhibited contest to engage in conduct that would affect the outcome of any wager or bet on the publicly exhibited contest through their conduct in paragraph (a)(1).

Subsection (b) specifies the requirements for the second degree sports rigging offense.

Paragraph (b)(1) requires that the actor knowingly agrees to accept anything of value from another person. "Knowingly" is a defined term in RCCA § 22A-206 and applied here means that the person must be practically certain that they are agreeing to accept anything of value from another person.

Paragraph (b)(2) requires that the actor engage in the conduct described in paragraph (b)(1) in exchange for the actor or another person engaging in conduct as a contest participant or contest official in a publicly exhibited contest that affects the publicly exhibited contest as specified in subparagraphs (b)(2)(A) and (b)(2)(B). The phrase "in exchange for" specifies the transactional nature of the conduct and is satisfied if the actor receives anything of value or if the actor agrees to accept anything of value in exchange for the actor or another person engaging in certain conduct in relation to a publicly exhibited contest. "Contest participant,"[55] "contest official,"[56] and "publicly exhibited contest"[57] are defined terms under RCCA § 22A-101.

Subparagraph (b)(2)(A) specifies as the first element that the actor's agreement to accept anything of value must be done in exchange for a contest participant or contest official in a publicly exhibited contest engaging in conduct that would affect the course or outcome of the same publicly exhibited contest. "Publicly exhibited contest" is a defined term under RCCA § 22A-101. The prohibited conduct is the transactional agreement to accept anything of value in exchange for the actor or another person engaging in conduct in a publicly exhibited as a contest participant or contest official that affects the course or outcome of the same publicly exhibited contest. It is not necessary to prove that the actor or another person actually engaged in conduct as a contest participant or contest official that could affect the course or outcome of the contest, only that the actor accepted something of value in exchange for an actor or third party engaging in such conduct.

Subparagraph (b)(2)(B) specifies as the second element that the actor's agreement to accept anything of value must be done in exchange for a contest participant or contest official in a publicly exhibited contest engaging in conduct that would affect the outcome of any wager or bet on the same publicly exhibited contest. "Publicly exhibited contest" is a defined term under RCCA § 22A-101. The prohibited conduct is the transactional agreement to accept anything of

[55] "Contest participant" means any person who participates or expects to participate in a publicly exhibited contest as: (1) A player, contestant, or member of a team; (2) A coach, manager, trainer, or owner; or (3) Another person directly associated with a player, contestant, team, or entry.

[56] "Contest official" means any person who acts or expects to act in a publicly exhibited contest as an umpire, referee, or judge, or otherwise to officiate at a publicly exhibited contest.

[57] "Publicly exhibited contest" means any professional or amateur sport, game, race, or contest, involving persons, animals, or machines, that is viewed by the public. The term "publicly exhibited contest" does not include an exhibition which does not purport to be a publicly exhibited contest and which is not represented as being such a sport, game, race, or contest.

value in exchange for the actor or another person engaging in conduct in a publicly exhibited contest as a contest participant or contest official that affects the outcome of a bet or wager on the same publicly exhibited contest. It is not necessary to prove that the actor or another person actually engaged in conduct as a contest participant or contest official that could affect the outcome of a wager or bet on the publicly exhibited contest, only that the actor accepted something of value in exchange for an actor or third party engaging in such conduct.

Subsection (c) specifies a categorical exclusion to liability for people whose conduct under subsection (a) or subsection (b) is not a criminal offense. Under this subsection, a person who engages in the conduct constituting an offense under subsection (a) or subsection (b) with the purpose of encouraging a contest participant or contest official to perform with a higher degree of skill, ability, or diligence in the publicly exhibited contest, is not liable for rigging a publicly exhibited contest. Subsection (c) specifies "in fact," a defined term in RCCA § 22A-207 that indicates there is no culpable mental state requirement for this exclusion from liability.

Subsection (d) provides the penalties for the revised offense. Paragraph (d)(1) provides the penalty for the first degree of the revised offense and paragraph (d)(2) provides the penalty for the second degree of the revised offense. [*See* RCCA §§ 22A-603 and 22A-604 for the imprisonment terms and fines for each penalty class.]

Relation to Current District Law: *The revised rigging a publicly exhibited contest offense clearly changes the current District law in six main ways.*

First, the revised rigging a publicly exhibited contest offense establishes grades based on whether the actor was involved in initiating the rigging of a publicly exhibited contest. Under current D.C. Code § 22-1713, an actor who offers or agrees to bribe a contest participant or contest official is guilty of a five year felony while a contest participant or contest official who solicits or accepts a bribe is guilty of a one year misdemeanor. In contrast, the revised rigging a publicly exhibited contest statute grades the severity of the offense based on whether the actor initiated the rigging or merely accepted or agreed to accept a bribe in exchange for rigging the publicly exhibited contest. Thus, under the revised statutes, an actor who initiates the rigging of a publicly exhibited contests by soliciting a bribe is liable for first degree rigging a publicly exhibited contests. Meanwhile, an actor who merely accepted or agreed to accept a bribe is liable only under second degree rigging a publicly exhibited contest. This distinction is appropriate given that actors who merely accept bribes are less culpable in the rigging of a publicly exhibited contest than actors who initiate the rigging by offering or soliciting a bribe. This change improves the proportionality of the revised statutes.

Second, the revised rigging a publicly exhibited contest statute criminalizes making a "coercive threat"[58] to any person with the purpose of causing a contest participant or contest official to rig a publicly exhibited contest. Current D.C. Code § 22-1713 prohibits offering or giving an individual a bribe with intent to influence the outcome or margin of victory in an athletic contest but does not prohibit attempts to rig athletic contests through coercive threats. In contrast, the revised rigging a publicly exhibited contest offense expressly prohibits making coercive threats with the purpose of causing a contest participant or contest official to engage in conduct that affects a publicly exhibited contest and wagers on the contest. By expanding the scope of this offense beyond bribery-type conduct to include "coercive threats" done with the purpose of rigging a publicly exhibited contest, the revised statute protects the integrity of the

[58] "Coercive threat" is a defined term in RCCA § 22A-101.

publicly exhibited contest from coercion as well as from bribes or solicitations. This change improves the consistency and proportionality of the revised statutes and closes a gap in liability.

Third, the revised rigging a publicly exhibited contest offense does not require that the person bribed, threatened, or soliciting a bribe be an actual contest participant or contest official. Current D.C. Code § 22-1713 prohibits giving or offering a bribe to a person with intent to influence that person to rig an athletic contest and soliciting a bribe by a participant in an athletic contest but does not prohibit offering or giving a non-participant a bribe or solicitation of a bribe by a non-participant with intent to influence the athletic contest. In contrast, the revised rigging a publicly exhibited contest statute prohibits bribery or threats directed at any person including non-participants when done with the purpose of causing a contest participant or contest official to engage in conduct that affects the course or outcome of a publicly exhibited contest.[59] This change improves the clarity and consistency of the revised statutes and closes a gap in liability.

Fourth, the revised rigging a publicly exhibited contest statute prohibits conduct with the purpose of affecting the course or outcome of the publicly exhibited contest in any way. Current D.C. Code § 22-1713 prohibits only intentionally losing or limiting the margin of victory or score in an athletic contest. This means rigging an athletic contest in other ways to manipulate the course or outcome of the contest and affect a wager are not prohibited by current law.[60] In contrast, the revised publicly exhibited contest statute prohibits conduct done with the purpose of affecting any part of the course or outcome of a publicly exhibited contest when also done with the purpose of affecting a bet or wager. This change is appropriate because wagers are routinely made on aspects of a contest other than the two outcomes addressed in current law. This change improves the consistency of the revised statutes and closes a gap in liability.

Fifth, the revised rigging a publicly exhibited contest statute requires that the actor act with the purpose of affecting the outcome of a wager or bet on the publicly exhibited contest. Current D.C. Code § 22-1713 requires only that the actor engage in conduct with intent to cause another person to lose, attempt to lose, or limit the margin of victory in an athletic contest, and does not require the actor to act with the intent affect the outcome of a bet or wager. In contrast, the revised rigging a publicly exhibited contest offense requires that the actor act with the purpose of affecting both the course or outcome of the publicly exhibited contest and the outcome of a wager on the publicly exhibited contest. Requiring that the actor's conduct be done with the purpose of affecting a bet or wager is appropriate given that this is a gambling offense. This change improves the consistency and proportionality of the revised statutes.

Sixth, the revised rigging of a publicly exhibited contest statute applies to all "publicly exhibited contests."[61] Current D.C. Code § 22-1713 applies only to "athletic contests", a defined

[59] *E.g.*, An actor gives money to the spouse of a contest official with the conscious desire that giving the spouse money will result in the contest official engaging in conduct that affects the course or outcome of the contest and a wager on the publicly exhibited contest. In this case, the actor would be liable even though they did not bribe a contest official directly because their purpose in giving the spouse money was still to affect the behavior of an actual contest official.

[60] *E.g.*, An actor bribes an offensive lineman on a football team to allow the opposing team to get a certain number of quarterback sacks and win a wager on the number of sacks allowed in a game. Although the actor's conduct affects the course of the game, undermines the integrity of the competition, and has potential ramifications for players, fans, and teams, it is not prohibited under current law because it is not intended to influence the margin of victory or actual outcome of the game.

[61] RCCA § 22A-101.

term in the statute that includes only certain sporting events.[62] This limitation means that non-athletic publicly exhibited contests[63] that may be bet on are not protected from corrupt influence, even though they may garner widespread public attention and be the subject of large wagers. In contrast, the revised rigging a publicly exhibited contest statute applies broadly to all "publicly exhibited contests", a defined term in RCCA § 22A-101, that includes any professional or amateur sport, game, race, or contest, involving persons, animals, or machines that is viewed by the public and which purports to be a publicly exhibited contest.[64] This change improves the clarity and consistency of the revised statutes and closes a gap in liability.

Beyond these six main changes to current District law, two other aspects of the revised rigging a publicly exhibited contest statute may constitute substantive changes to current District law.

First, the revised rigging a publicly exhibited contest statute requires a "knowingly" culpable mental state for the prohibited conduct – offering or giving anything of value to any person, demanding or requesting anything of value from any person, making an explicit or implicit coercive threat to any person, and agreeing to accept anything of value from another person. Current D.C. Code § 22-1713(a) specifies that an actor must engage in prohibited conduct "with intent" to influence an individual to engage in conduct that would cause the loss of an athletic contest or limit the margin of victory but does not specify a culpable mental state with respect to the prohibited conduct and there is no DCCA case law interpreting D.C. Code § 22-1713(a) to clarify the culpable mental state here.[65] Resolving the ambiguity, the revised rigging a publicly exhibited contest statute specifies a "knowingly" culpable mental state with respect to the prohibited conduct in both first and second degree rigging a publicly exhibited contest. This change improves the clarity and consistency of the revised statutes.

Second, the revised rigging a publicly exhibited contest offense requires a "purposely" culpable mental state with respect to causing a contest participant or contest official to engage in conduct that affects a publicly exhibited conduct and a bet or wager on the same contest. Current D.C. Code § 22-1713(a) specifies that an actor must engage in prohibited conduct "with intent" to influence an individual to engage in conduct that would cause the loss of an athletic contest or

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[62] D.C. Code § 22-1713(f) defines "athletic contest" to mean "any of the following, wherever held or to be held: a football, baseball, softball, basketball, hockey, or polo game, or a tennis or wrestling match, or a prize fight or boxing match, or a horse race or any other athletic or sporting event or contest."

[63] For example, a chess tournament may constitute a publicly exhibited contest, even if it does not constitute an "athletic contest" under current law.

[64] The definition of "publicly exhibited contest" specifies that the contest must be viewed by the public and excludes contests which do not purport to be publicly exhibited contests. *E.g.*, a pickup basketball game that is technically viewable to the public but where the participants do not purport to be playing a publicly exhibited contest. Current law does not expressly require that the contest be viewable by the public or include an exclusion for contests that do not purport to be publicly exhibited contests and there is no DCCA case law interpreting the statute. Thus, it is unclear to what extent athletic contests that do not purport to be publicly exhibited contests would be covered under current law. It is possible, even likely, that the current statute's requirement that the contest be a professional or amateur contest would create a limitation excluding mere pickup games. Nevertheless, the revised definition of "publicly exhibited contest" resolves any ambiguity.

[65] *Carrell v. United States*, 165 A.3d 314, 321 (D.C. 2017) (discussing *Elonis v. United States*, 575 U.S. 723 (2015) and explaining that "in some cases, 'to protect the innocent actor,' courts should infer that the government must prove that the defendant purposely engaged in the prohibited conduct" "[b]ut generally, courts should infer that the government must prove at least that a defendant "know[s] the facts that make his conduct fit the definition of the offense").

limit the margin of victory but does not specify whether the phrase "with intent" requires a knowingly or purposely culpable mental state. The phrase "with intent," has not been clearly defined as requiring knowledge or purpose in District case law generally[66] and there is no DCCA case law interpreting D.C. Code § 22-1713(a) to clarify the meaning here. Resolving the ambiguity, the revised rigging a publicly exhibited contest statute specifies a "purposely" culpable mental state with respect to causing a contest participant or contest official to engage in conduct that affects the course or outcome of, as well as a bet or wager on, the contest. This change improves the clarity and consistency of the revised statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.

[66] *See* RCCA commentary to § 22A-206.

§ 22–5703. Permissible Gambling Activity.

(a) Nothing in this subchapter shall be construed to prohibit the operation, participation, advertising, or promotion of any gambling activity that is authorized by District law, regulation, rule, or license and regulated, licensed, or operated by the Office of Lottery and Gaming.
(b) Nothing in this subchapter shall be construed to prohibit advertising a lottery by the Maryland State Lottery so long as Maryland does not prohibit advertising or otherwise publishing an account of a lottery by the District of Columbia.

Explanatory Note: *This section establishes the permissible gambling activity statute for the proposed Revised Criminal Code Act (RCCA). This statute clarifies that any gambling activity operated through the Office of Lottery and Gaming is legal. Additionally, it allows for reciprocal advertisement of state-run lotteries between D.C. and Maryland. This statute replaces the "statement of purpose" statute in D.C. Code § 22-1716, the "permissible gambling activities" statute in D.C. Code § 22-1717, and the "advertising and promotion; sale and possession of lottery and numbers tickets and slips" statute in D.C. Code § 22-1718.*

Subsection (a) establishes that nothing in the subchapter on gambling prohibits the operation, participation, advertising, or promotion of any gambling activity authorized by a District law, regulation, rule, or license and regulated, licensed, or operated by the Office of Lottery and Gaming. "Gambling activity" is a defined term in RCCA § 22A-101.

Subsection (b) establishes that nothing in the subchapter on gambling prohibits advertising a lottery by the Maryland State Lottery so long as Maryland does not prohibit advertising or otherwise publishing an account of a lottery by the District of Columbia.

Relation to Current District Law: *Any changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.*

First, the revised permissible gambling activity statute combines three statutes[67] in current subchapter II of the gambling chapter that clarify how gambling offenses in Title 22 interact with other District law that legalizes forms of gambling. These statutes regarding permissible gambling activity reference terms used in current gambling statutes and cover separate forms of conduct. In contrast, the revised permissible gambling activity statute makes these clarifications in one statute with reference to "gambling activity," a defined term[68] used in the revised statutes that broadly covers the conduct subject to the revised gambling statutes. This change improves the clarity and consistency of the revised statutes without substantively changing District law.

Second, the revised permissible gambling activity statute does not clarify that lawful possession of certain equipment used in lotteries, Monte Carlo night parties, and sports wagering is not prohibited by statutes in the gambling subchapter. Current D.C. Code § 22-1718 expressly states that nothing in the subchapter of gambling offenses should be construed to prohibit "the possession of tickets, certificates, or slips for lottery and daily numbers games excepted and permissible pursuant to § 22-1717, ..., or possession of tickets, slips, certificates, or cards for

[67] D.C. Code § 22-1716. Statement of Purpose; D.C. Code § 22-1717. Permissible gambling activities; D.C. Code § 22-1718. Advertising and promotion; sale and possession of lottery and numbers tickets and slips.
[68] RCCA § 22A-101.

bingo, raffles, and Monte Carlo night parties, excepted and permissible pursuant to § 22-1717, or . . . .possession of tickets, slips, certificates, or cards for sports wagering excepted and permissible pursuant to § 22-1717." In contrast, the revised permissible gambling activity does not expressly reference possession of any gambling equipment. The RCCA promoting gambling offense[69] repealed D.C. Code § 22-1702 and there are no remaining possessory offenses in the revised gambling subchapter. Consequently, expressly indicating that certain equipment or paraphernalia may be legally possessed in relation to lawful gambling activity is unnecessary. This change improves the clarity and consistency of the revised statutes but does not itself substantively change District law.

[69] *See* RCCA § 22A-5701.

D.C. Code § 22-1706. Three-card monte and confidence games.

The Commission recommends repealing in its entirety D.C. Code § 22-1706. This statute criminalizes dealing, playing, or practicing, or assisting in such action, the confidence game or swindle known as three-card monte and other like confidence games. The offense does not appear to have been prosecuted in decades[70] and the harm addressed by the statute is covered by the revised fraud statute under RCCA § 22A-3301, and the revised promoting gambling statute under RCC § 22A-5701.

Explanatory Note and Relation to Current District Law. The D.C. Code § 22-1706 statutory section recommended for repeal provides:

> Whoever shall in the District deal, play, or practice, or be in any manner accessory to the dealing or practicing, of the confidence game or swindle known as 3-card monte, or of any such game, play, or practice, or any other confidence game, play, or practice, shall be deemed guilty of a misdemeanor, and shall be punished by a fine not more than the amount set forth in § 22-3571.01 and by imprisonment for not more than 180 days.

Three card monte is a card game in which the dealer shows three cards, shuffles them, places them face down, and invites spectators to bet they can identify the location of a particular card.[71] The phrase "any other confidence game, play, or practice" includes confidence games in the nature of three card monte.[72] Although District case law holds that fraud is not a required element of the three card monte and confidence game statute and the mere playing of three card monte or another such confidence game is prohibited,[73] in most instances three card monte or a similar confidence game is, as the statutory text indicates, a "swindle" whereby the person betting is tricked into believing they can win even though the game is rigged. Thus, the chief

[70] *See* D.C. CRIM. CODE REFORM COMM., REVISED CRIMINAL CODE COMPILATION, App. F. (March 31, 2021) (Comparison of RCCA Offense Penalties and District Charging and Conviction Data) (showing no charges brought pursuant to D.C. Code § 22-1706 between 2010-2019). CCRC does not have charging and conviction data for years preceding 2010. However, the last published DCCA opinion stemming from an appeal of conviction of D.C. Code § 22-1706 was in 1982. *See Thorne v. United States*, 452 A.2d 170 (D.C. 1982).

[71] *See Thorne v. United States*, 452 A.2d 170, 171 n.2 (D.C. 1982) (restating jury instruction describing three card monte as a game "employing three cards which are shuffled by the dealer and the players select a card from that group of three and if he selects the predesignated card, he wins, and if he does not, he selects the card that is not predesignated, he loses"); *see also People v. Denson*, 745 N.Y.S.2d 852, 853 (NY Crim. Ct. 2002) ("In the game of three card monte a dealer shows a player three cards or objects, designates one of them as the 'winning' card or object, and then reshuffles or rearranges them. The player prevails if he chooses the 'winning' card or object and the dealer prevails if the player does not.").

[72] In *United States v. Brown*, 309 A.2d 256, 258 (D.C. 1973), the DCCA has held that the language "any other confidence game, play, or practice" in D.C. Code § 22-1706 does not have the same meaning as the confidence game in other parts of the law and instead must be limited in application to gambling activity similar to three-card monte.

[73] *See Thorne v. United States*, 452 A.2d 170, 171 (D.C. 1982) (holding that D.C. Code § 22-1706 is not limited to the fraudulent playing of three-card monte and that the mere playing of the game is prohibited by statute"); *id*. (explaining that the court has "interpreted this statute to distinguish the 'confidence game' of three-card monte from more traditional confidence games requiring fraudulent representations") (citations omitted).

harm against which the three card monte and confidence game statute protects against is fraud rather than the mere playing of a game.

The RCCA fraud statute[74] prohibits taking, obtaining, transferring or exercising control over the property of another when consent of the owner is obtained through deception. The fraud statute would cover the taking, obtaining, transferring or exercising control over the property of another through the fraudulent playing of three card monte or another confidence game. Because any fraudulent playing of three card monte or any other confidence game that results in an actor obtaining the property of another is covered by the RCCA's fraud statute, the stand alone three card monte and confidence game offense in D.C. Code § 22-1706 is redundant with respect to the fraudulent playing of three card monte and other confidence games and can be repealed.

While the RCCA fraud statute would not cover all conduct currently prohibited by D.C. Code § 22-1706 because fraud is not an element of the three card monte and confidence games statute, the mere playing of three card monte or other confidence games *without fraud* does not merit criminalization. Consequently, repeal of D.C. Code § 22-1706 will not result in a gap in liability for conduct where liability is warranted.

[74] *See* RCCA § 22A-3301.

D.C. Code § 22-1714. Immunity of witnesses; record.

The Commission recommends repealing D.C. Code § 22-1714. The statute applies only to gambling offenses, has seldom been used,[75] and is unnecessary in light of federal laws applicable to D.C. Superior Court establishing use immunity for persons compelled to testify or provide information pursuant to an order granting statutory immunity.

Explanatory Note and Relation to Current District Law. The D.C. Code § 22-1714 statutory section recommended for repeal provides:

> (a) Whenever, in the judgment of the United States Attorney for the District of Columbia, the testimony of any witness, or the production of books, papers, or other records or documents, by any witness, in any case or proceeding involving a violation of this subchapter before any grand jury or a court in the District of Columbia, is necessary in the public interest, such witness shall not be excused from testifying or from producing books, papers, and other records and documents on the grounds that the testimony or evidence, documentary or otherwise, required of such witness may tend to incriminate such witness, or subject such witness to penalty or forfeiture; but such witness shall not be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which such witness is compelled, after having claimed his or her privilege against self-incrimination, to testify or produce evidence, documentary or otherwise; except that such witness so testifying shall not be exempt from prosecution and punishment for perjury or contempt committed in so testifying.
>
> (b) The judgment of the United States Attorney for the District of Columbia that any testimony, or the production of any books, papers, or other records or documents, is necessary in the public interest shall be confirmed in a written communication over the signature of the United States Attorney for the District of Columbia, addressed to the grand jury or the court in the District of Columbia concerned, and shall be made a part of the record of the case or proceeding in which such testimony or evidence is given.

Pursuant to this statute, the United States Attorney's Office for the District of Columbia (USAO-DC)[76] may compel a witness to testify or provide information in a prosecution of a

[75] There has been only one published decision applying this statute to date and that case pre-dates the Home Rule Act. *See In re Flanagan*, 350 F.2d 746 (D.C. Cir. 1965). In addition, gambling offenses are rarely charged in the District. CCRC data on charging and convictions in Superior Court from 2010-2019 show fewer than 20 charges brought pursuant to Title 22's chapter on gambling in a 10 year period. D.C. CRIM. CODE REFORM COMM., REVISED CRIMINAL CODE COMPILATION, App. F. (March 31, 2021) (District Charging and Conviction Data: 2010-2019, 2015-2019, and 2018-2019).

[76] Current D.C. Code § 22-1714 applies only to the United States Attorney for the District. The Office of Attorney General for the District of Columbia may use the procedures provided in D.C. Code § 16-2339 to confer immunity on children in delinquency proceedings and compel testimony or the production of other information. Repeal of D.C. Code § 22-1714 has no impact on D.C. Code § 16-2339.

gambling offense under D.C. Code §§ 22-1701-1715[77] even if such testimony or information would incriminate the witness. If the witness is compelled to testify after invoking their privilege against self-incrimination, however, the witness is given "transactional immunity" and the government may not prosecute the witness "for or on account of any transaction, matter, or thing concerning which such witness is compelled." The statute does not apply to offenses outside subchapter I of the gambling offense chapter and is rarely, if ever, used today.[78]

Under current federal law, USAO-DC can, with permission from the Department of Justice, seek a court order pursuant to 18 U.S.C. § 6003 to compel a witness to testify in or provide information in relation to any court proceeding if the witness has invoked or is likely to invoke their privilege against self-incrimination and refuse to testify. The USAO-DC may seek statutory immunity under 18 U.S.C. 6003 in relation to any proceeding before or ancillary to a court of District of Columbia, including any proceeding in which a gambling offense under D.C. Code §§ 22-1701-1715 is charged and D.C. Code § 22-1714 could be used.

Any witness who is compelled to testify or provide information pursuant to an order obtained pursuant to 18 U.S.C. § 6003 is given "use immunity" with respect to any testimony or information they provide.[79] "Use immunity" differs from the "transactional immunity" conferred in D.C. Code § 22-1714 in that it allows prosecution of transactions related to the witness's testimony or information provided as long as the government can establish that its evidence is derived from a wholly independent source. Nonetheless, use immunity extends to "derivative use" such that no testimony or other information compelled by the court order (or any information directly or indirectly derived from such testimony or other information) can be used against the witness in any criminal case.[80] "This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead,' and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures."[81] If the government does seek to charge a witness who has provided testimony or information pursuant to a grant of immunity under 18 U.S.C. 6003, the government bears the burden of "establishing that they had an independent, legitimate source for the disputed evidence" and "document or account for each step of the investigative chain by which the evidence presented was obtained."[82]

The relevant statutes, which are applicable to D.C. Superior Court under 18 U.S.C. § 6001(4),[83] provide:

18 U.S.C. § 6002. Immunity generally.

[77] The immunity of witnesses statute, if not repealed, would apply to the following RCCA recommended offenses: § 22A-5701. Promoting Gambling; and § 22A-5702. Rigging a Publicly Exhibited Contest.
[78] *See supra* note 75.
[79] 18 U.S.C. § 6002.
[80] 18 U.S.C. § 6002.
[81] *Kastigar v. United States*, 406 U.S. 441, 460 (1972).
[82] *Kastigar v. United States*, 406 U.S. 441, 460 (1972); *Aiken v. United States*, 30 A.3d 127, 133 (D.C. 2011) (internal citations omitted).
[83] 18 U.S.C. § 6001(4) states that "court of the United States" in the federal immunity statutes includes the District of Columbia Court of Appeals and the Superior Court of the District of Columbia.

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,
(2) an agency of the United States, or
(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C. § 6003. Court and grand jury proceedings.

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this title.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any designated Assistant Attorney General or Deputy Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and
(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

Because 18 U.S.C. §§ 6001-6003 apply to Superior Court cases,[84] USAO-DC may currently choose to obtain a court order that would grant use immunity rather the transactional immunity conferred in D.C. Code § 22-1714 by following the procedures laid out in the federal statute. Consequently, while D.C. Code § 22-1714 provides for transactional immunity rather than use immunity, repeal of the immunity of witnesses statute specific to gambling offenses will

[84] *Id.*

not preclude the government from obtaining a grant of statutory use immunity rather than transactional immunity when it seeks to compel a person to testify or provide evidence after the person has invoked their privilege against self-incrimination. Additionally, repeal of the D.C. Code § 22-1714 will not impact the ability of USAO-DC to informally grant either use or transactional immunity by agreement with a potential witness in a gambling case.[85] Given the scope of the protection provided by a grant of statutory immunity under 18 U.S.C. 6003, the fact that the government can already seek statutory immunity under 18 U.S.C. 6003 rather than D.C. Code § 22-1713, and the fact that gambling offenses are rarely charged, repeal of D.C. Code § 22-1714 will have no impact on prosecutions in the District.

[85] A potential witness is not required to accept an offer of informal immunity. However, it is well-established that informal immunity agreements are enforceable by the person providing testimony or evidence pursuant to such an agreement. *See United States v. Warren*, 373 A.2d 874, 877 (D.C. 1977) (stating "is a constitutional principle of long standing that evidence of guilt induced from a person under a governmental promise of immunity must be excluded under the Self-Incrimination Clause of the Fifth Amendment").

Appendix A – Black Letter Text of Draft Revised Statutes.

RCCA § 22A-101. Definitions. [To be incorporated with other definitions in RCCA § 22A-101.]

"Contest official" means any person who acts or expects to act in a publicly exhibited contest as an umpire, referee, or judge, or otherwise to officiate at a publicly exhibited contest.

"Contest participant" means any person who participates or expects to participate in a publicly exhibited contest as:

(1) A player, contestant, or member of a team;
(2) A coach, manager, trainer, or owner; or
(3) Another person directly associated with a player, contestant, team, or entry.

"Gambling activity" means:

(1) Any activity where parties mutually agree, explicitly or implicitly, to a gain or loss of property contingent on the outcome of a future event not under the control or influence of the parties; or
(2) Any contest, game, or gaming scheme in which the outcome of a wager or a bet depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor.

"Publicly exhibited contest" means any professional or amateur sport, game, race, or contest, involving persons, animals, or machines, that is viewed by the public. The term "publicly exhibited contest" does not include an exhibition which does not purport to be a publicly exhibited contest and which is not represented as being such a sport, game, race, or contest.

"Social gambling" means any game, wager, or transaction that is:

(1) Incidental to a bona fide social relationship; and
(2) Organized so that all participants receive only their personal gambling winnings or reimbursement equal to or less than any administrative costs incurred by a participant.

RCCA § 22A-5701. Promoting Gambling.

(a) *Offense.* An actor commits promoting gambling when the actor:
  (1) Knowingly:
    (A) Induces or attempts to induce another person to engage in any gambling activity; or
    (B) Installs or operates a game of skill machine at any location reckless as to the fact that such installation or operation violates subchapter III of Chapter 6 in Title 36;
  (2) With intent to receive any financial gain; and
  (3) In fact, the actor is not engaging in conduct:

(A) Solely as a player; or
(B) Authorized by a District law, regulation, rule, or license.

(b) *Exclusion from liability.* It is an exclusion from liability under this section that the gambling activity in question was, in fact, social gambling as defined in § 22A-101.
(c) *Forfeiture*. Upon conviction under this section, the court may, in addition to the penalties provided by this section, order the forfeiture and destruction or other disposition of any equipment or money used, or attempted to be used, in violation of this section.
(d) *Penalties.* Promoting gambling is a Class B misdemeanor.
(e) *Definitions*. In this section, the term:
(1) "Player" means a person engaged in gambling activity solely as a contestant or bettor; and
(2) "Game of skill machine" has the meaning specified in D.C. Code § 36-641.01.

RCCA § 22A-5702. Rigging a Publicly Exhibited Contest.

(a) *First degree.* An actor commits first degree rigging a publicly exhibited contest when the actor:
(1) Knowingly:
(A) Offers or gives anything of value to any person;
(B) Demands or requests anything of value from any person; or
(C) Makes an explicit or implicit coercive threat to any person;
(2) With the purpose of causing a contest participant or contest official in a publicly exhibited contest to engage in conduct that affects:
(A) The course or outcome of the publicly exhibited contest; and
(B) The outcome of any wager or bet on the publicly exhibited contest.
(b) *Second degree*. An actor commits second degree rigging a publicly exhibited contest when the actor:
(1) Knowingly agrees to accept anything of value from another person;
(2) In exchange for the actor or another person engaging in conduct as a contest participant or contest official in a publicly exhibited contest that affects:
(A) The course or outcome of the publicly exhibited contest; and
(B) The outcome of any wager or bet on the publicly exhibited contest.
(c) *Exclusions from liability.* An actor does not commit an offense under this section when, in fact, the actor engages in the conduct constituting the offense with the purpose of encouraging a contest participant or contest official to perform with a higher degree of skill, ability, or diligence in the publicly exhibited contest.
(d) *Penalty*.
(1) First degree rigging a publicly exhibited contest is a Class 9 felony.
(2) Second degree rigging a publicly exhibited contest is a Class A misdemeanor.

RCCA § 22–5703. Permissible Gambling Activity.

(a) Nothing in this subchapter shall be construed to prohibit the operation, participation, advertising, or promotion of any gambling activity that is authorized by District law,

regulation, rule, or license and regulated, licensed, or operated by the Office of Lottery and Gaming.

(b) Nothing in this subchapter shall be construed to prohibit advertising a lottery by the Maryland State Lottery so long as Maryland does not prohibit advertising or otherwise publishing an account of a lottery by the District of Columbia.