GOVERN[1]MENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: June 19, 2020

SUBJECT: Second Draft of Report #35 - Cumulative Update to Sections 201-213 of the Revised Criminal Code

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Second Draft of Report #35, Cumulative Update to Sections 201-213 of the Revised Criminal Code. [1]

COMMENTS ON THE DRAFT REPORT

RCC § 22E-204. Causation Requirement.

Paragraph (c) of RCC § 22E-204[2] defines "Legal Cause." It states:

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any later hearing that the Council may have on any legislation that may result from the Report.

[2] The full text of this provision is:

RCC § 22E-204. Causation Requirement

(a) Causation Requirement. No person may be convicted of an offense that contains a result element unless the person's conduct is the factual cause and legal cause of the result.

(b) Factual Cause Defined. A person's conduct is the factual cause of a result if:

A person's conduct is the legal cause of a result if:
(1) The result is reasonably foreseeable in its manner of occurrence; and
(2) When the result depends on another person's volitional conduct, the actor is justly held responsible for the result. [emphasis added]

The phrase "justly held responsible for the result" does not seem to articulate a discernible standard. This is of significant concern as it establishes a criterion for the presence or absence of criminal liability. It is hard to imagine a trial involving an offense with a coperpetrator who committed an act where the defense would not argue that it would be unjust to hold his or her client responsible for the result of that act. By asking a factfinder to determine what is just in a situation without giving detailed instructions as to what criteria the factfinder should use invites jury nullification. As the Court stated in *Reale v. United States*,573 A.2d 13, 15 (DC 1990)

> The common-law doctrine of jury nullification permits jurors to acquit a defendant on the basis of their own notion of justice, even if they believe he or she is guilty as a matter of law. *Watts v. United States*, 362 A.2d 706, 710 (D.C. 1976). While we cannot reverse such an acquittal, *see Fong Foo v. United States*, 369 U.S. 141, 7 L. Ed. 2d 629, 82 S. Ct. 671 (1962), we do not encourage jurors to engage in such practice. Thus, we have upheld convictions in cases where, as here, the trial court instructs the jury that it is obligated to find the defendant guilty if the government meets all the elements of the charged offense. *Watts, supra*, 362 A.2d at 710-11.

The removal of (c)(2) would not cause an unjust result, as the government must still prove each and every element of an offense beyond a reasonable doubt. An examination of the example in footnote 30 of the Commentary demonstrates this.

> For example, imagine X and D have been in a longstanding competitive basketball rivalry, marked by regular bouts of violence by D perpetrated against his teammates after his losses. Nearing the final few seconds of a championship game, and down by one point, X is about to shoot the game winning shot against D after a game marked

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(1) The result would not have occurred but for the person's conduct; or In a situation where the conduct of 2 or more persons contributes to a result, the conduct of each alone would have been sufficient to produce that result.

(2) In a situation where the conduct of two or more persons contributes to a result, the conduct of each alone would have been sufficient to produce that result.

(c) Legal Cause Defined. A person's conduct is the legal cause of a result if:
(1) The result is reasonably foreseeable in its manner of occurrence; and
(2) When the result depends on another person's volitional conduct, the actor is justly held responsible for the result.

(d) Other Definitions. "Result element" has the meaning specified in RCC § 22E-201(c)(2).

by many missteps by X's teammate V, at which point X realizes that D will almost certainly (and in fact appears to be preparing to) assault V once the loss is formalized. Nevertheless, D decides to disregard this risk and score the final two points necessary for the win. Immediately thereafter, D does as expected: he becomes enraged and viciously beats V on the court. In this scenario, X is the factual cause of V's injuries: but for X's scoring the game-winning basket, D would not have gone on to assault V. Under these circumstances, D's violent response to X's game winning basket was entirely foreseeable…

As noted in the Commentary, this example demonstrates that D's response was foreseeable. However, that is not the end of the inquiry. As X did not commit an assault, the only theory for which he could be prosecuted is as an accomplice. However, RCC § 22E-210 would foreclose that possibility. It states in relevant part:

(a) *Definition of accomplice liability.* A person is an accomplice in the commission of an offense by another when, acting with the culpability required for that offense, the person:
    (1) Purposely assists another person with the planning or commission of conduct constituting that offense; or
    (2) Encourages another person to engage in specific conduct constituting that offense.
(b) *Principle of Culpable Mental State Elevation Applicable to Circumstances of Target Offense.* Notwithstanding subsection (a) of this section, to be an accomplice in the commission of an offense, a person must intend for all circumstance elements required by that offense to exist.
(c) *Grading distinctions based on culpability as to result elements.* An accomplice in the commission of an offense that is graded by distinctions in culpability as to result elements is liable for any grade for which he or she has the required culpability.

There is no question that although it was entirely foreseeable that X's game winning basket would result in D's viciously beating V, it is clear that X did not act with the culpability required for the offense nor did he or she encourage D to commit the assault and, therefore, even without the proposed language in (c)(2), X would not be guilty of the offense.[3] To avoid jury nullification and because the removal (c)(2) would not cause unjust convictions in the situation described in the footnote, OAG recommends that the CCRC amend (c) to remove subparagraph (2).

If the Commission does not accept OAG's recommendation then we have two suggestions. First, the phrase "volitional conduct" is not defined either in the text of the provision nor in the Commentary. The closest reference to the definition of "volitional conduct" is found in footnote

[3] In addition, it cannot be said that X intended for all circumstance elements required by the offense to exist. In addition, though D may have committed first degree assault against V, under RCC § 22E-1202, it cannot be said that X had any of the mental states required for him to have culpability in the assault.

32 of the Commentary. There it states, "Intervening volitional conduct may include both acts and omissions of others. For example, if a driver speeds through an intersection and strikes a child, initially causing minor injury. If the child's parent does not seek medical care which causes the child's injury to become much more severe, the driver may argue that the parent's omission negates legal causation as to the degree of injury." Because of the importance of this phrase, OAG recommends that the phrase "volitional conduct" be defined in the statutory text as "acts or omissions that resulted from a choice or decision."

Second, as noted above, the phrase "justly held responsible for the result" must be amended to articulate a discernible standard. This is of significant concern as it establishes a criterion for the presence or absence of criminal liability. OAG believes that a factfinder needs more guidance to determine when, as the Commentary notes, "a person may justly be held liable for a given result that can be attributed to the free, deliberate, and informed conduct of a third party or the victim." [internal footnotes excluded] OAG's concern, in addition to jury nullification, is that without more guidance two factfinders, be they a jury or a judge, may come to inconsistent determinations as to criminal liability when faced with nearly identical fact patterns. It would be unjust in that situation for one person to be found guilty and the other one acquitted.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: June 19, 2020

SUBJECT: First Draft of Report #54, Prostitution and Related Statutes and Related Provisions in Third Draft of Report #41 - Ordinal Ranking of Maximum Imprisonment Penalties

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #54, Prostitution and Related Statutes[1] and Related Provisions in Third Draft of Report #41 - Ordinal Ranking of Maximum Imprisonment Penalties[2]

COMMENTS ON THE DRAFT REPORT

RCC § 22E-4401. PROSTITUTION

Pursuant to RCC § 22E-4401(c)(1) the court, with the defendant's consent, may enter a judgment of guilty and defer further proceedings and place the person on probation.[3] Following a term of pre-adjudicated probation the court is authorized to dismiss the proceedings and retain a nonpublic record for use solely by the court. Subparagraph (c) states:

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[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.
[2] OAG's only comment to the Third Draft of Report #41 - Ordinal Ranking of Maximum Imprisonment Penalties concerns the penalties for Prostitution and Patronizing Prostitution and, so, we have included those comments in this memo.
[3] It appears that this provision is akin to what in some jurisdictions is referred to as probation before judgment.

> (1) When a person is found guilty of violation of RCC § 22E-4401 the court may, without entering a judgment of guilty and with the consent of such person, defer further proceedings and place him or her on probation upon such reasonable conditions as it may require and for such period, not to exceed one year, as the court may prescribe. Upon violation of a condition of the probation, the court may enter an adjudication of guilt and proceed as otherwise provided. The court may, in its discretion, dismiss the proceedings against such person and discharge him or her from probation before the expiration of the maximum period prescribed for such person's probation. If during the period of probation such person does not violate any of the conditions of the probation, then upon expiration of such period the court shall discharge such person and dismiss the proceedings against him or her. Discharge and dismissal under this subsection shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, such person qualifies under this subsection. Such discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime (including the penalties prescribed under RCC § 22E-606 for second or subsequent convictions or other similar provisions) or for any other purpose. [emphasis added]
>
> (2) Upon the dismissal of such person and discharge of the proceedings against him under paragraph (1) of this subsection, such person may apply to the court for an order to expunge from all official records (other than the nonpublic records to be retained under paragraph (1) of this subsection) all recordation relating to his or her arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this subsection. If the court determines, after hearing, that such person was dismissed and the proceedings against him or her discharged, it shall enter such order…

These subparagraphs permit the retention of a nonpublic record to be retained solely for the purpose of use by the courts. It does not, on its face, permit a prosecutor from retaining a copy of the record as a check on the court. In contrast, D.C. Code § 16-803, the District's sealing statute, addresses practical issues concerning the sealing of records and recognizes that law enforcement and prosecutors also need to retain and view nonpublic sealed records. D.C. Code § 16-803 (l) states:

> If the Court grants the motion to seal:
>
> (1) (A) The Court shall order the prosecutor, any law enforcement agency, and any pretrial, corrections, or community supervision agency to remove from their publicly available records all references that identify the movant as having been arrested, prosecuted, or convicted.

(B) The prosecutor's office and agencies shall be entitled to retain any and all records relating to the movant's arrest and conviction in a nonpublic file.

(C) The prosecutor, any law enforcement agency, and any pretrial, corrections, or community supervision agency office shall file a certification with the Court within 90 days that, to the best of its knowledge and belief, all references that identify the movant as having been arrested, prosecuted, or convicted have been removed from its publicly available records.

(2) (A) The Court shall order the Clerk to remove or eliminate all publicly available Court records that identify the movant as having been arrested, prosecuted, or convicted.

(B) The Clerk shall be entitled to retain any and all records relating to the movant's arrest, related court proceedings, or conviction in a nonpublic file.

(3) (A) In a case involving co-defendants in which the Court orders the movant's records sealed, the Court may order that only those records, or portions thereof, relating solely to the movant be redacted.

(B) The Court need not order the redaction of references to the movant that appear in a transcript of court proceedings involving co-defendants.

(4) The Court shall not order the redaction of the movant's name from any published opinion of the trial or appellate courts that refer to the movant.

(5) Unless otherwise ordered by the Court, the Clerk and any other agency shall reply in response to inquiries from the public concerning the existence of records which have been sealed pursuant to this chapter that no records are available.

OAG recommends that the quoted language from subparagraph (c)(1), above, be redrafted to say, "Discharge and dismissal under this subsection shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained. The sealing of the nonpublic record shall be in accordance to, and subject to the limitations of, D.C. Code § 16-803 (l)."[4]

In addition, because these subparagraphs use the term "probation" to describe a defendant's supervision preadjudication, to avoid confusion over the scope of the court's authority, OAG recommends that the Commentary make clear that the court's authority to expunge records pursuant to RCC § 22E-4401 is limited to situations where the person was not sentenced and that

[5]OAG recommends that the same suggestions that we have made thus far concerning RCC § 22E-4401(c)(1) also be applied to RCC § 22E-4401(b)(1). In addition, these recommendations are consistent with the recommendation that OAG made regarding the proposed sealing provision in RCC § 48-904.01a, Possession of a Controlled Substance, in the First Draft of Report #50, Cumulative Update to the Revised Criminal Code Other than Chapter 6.

a person who was sentenced would have to avail themselves of the sealing provisions found in D.C. Code § 16-803.[5]

THE OVERLAP IN ELEMENTS OF RCC § 22E-4401, PROSTITUTION, AND RCC § 22E-4402, PATRONIZING PROSTITUTION.

The offense elements of RCC § 22E-4401, Prostitution, and RCC § 22E-4402, Patronizing Prostitution, though couched in different terms, overlap such that both the prostitute and the person patronizing the prostitute can be charged with either offense.

RCC § 22E-4401(a), pertaining to the elements of the prostitution offense, states:

> *Offense.* An actor commits prostitution when that actor knowingly:
> (1) Pursuant to a prior agreement, express or implicit, engages in or submits to a sexual act or sexual contact in exchange for <u>any person receiving</u> anything of value;
> (2) Agrees, expressly or implicitly, to engage in or submit to a sexual act or sexual contact in exchange for <u>any person receiving</u> anything of value; or
> (3) Commands, requests, or tries to persuade any person to engage in or submit to a sexual act or sexual contact in exchange for <u>any person receiving</u> anything of value. [emphasis added]

RCC § 22E-4402 (a), pertaining to the elements of the patronizing prostitution offense, states:

> Offense. An actor commits patronizing prostitution when that actor knowingly:
> (1) Pursuant to a prior agreement, express or implicit, engages in or submits to a sexual act or sexual contact in exchange <u>for giving any person</u> anything of value;
> (2) Agrees, expressly or implicitly, to <u>give</u> anything of value <u>to any person</u> in exchange for any person engaging in or submitting to a sexual act or sexual contact;
> (3) Commands, requests, or tries to persuade any person to engage in or submit to a sexual act or sexual contact in exchange <u>for giving any person</u> anything of value. [emphasis added]

Because "any person receiving" implies that someone gave, and "for giving" to any person implies that someone received, these offenses are essentially the same. To distinguish between the two offenses, OAG recommends that the word "and" appear after each (a)(3) and that a new (a)(4) be added to each offense.

The new RCC § 22E-4401(a)(4) should read "provided the sexual act or sexual conduct that was performed in exchange for any person receiving anything of value."

The new RCC § 22E-4402(a)(4) should read "was provided the sexual act or sexual conduct that was performed by another person who committed the offense of prostitution pursuant to RCC § 22E-4401."

Because of the reference to RCC § 22E-4401in RCC § 22E-4402(a)(4), the Commentary for Patronizing Prostitution should state that to be convicted of that offense it is not necessary that a person be arrested or convicted for the offense of Prostitution.

RCC § 22E-4403. TRAFFICKING IN COMMERCIAL SEX

Subparagraph (a)(3) states, "Obtains anything of value from the proceeds or earnings of a person who has engaged in or submitted to a commercial sex act..." As drafted it would technically reach the proceeds derived from a person who has engaged in a commercial sex act even though those proceeds where earned at a part time job that was unrelated to prostitution. OAG recommends that subparagraph (a)(3) be redrafted to say, "Obtains anything of value from the proceeds or earnings from a commercial sex act that a person has engaged in or submitted to..."

Subparagraph (b)(2) provides for enhanced penalties. It states, "In addition to the general penalty enhancements under this title, the penalty classification of this offense is increased by one class when the actor is reckless as to the fact that the person trafficked is under 18 years of age." While OAG agrees that there should be an enhancement for recklessly trafficking persons who are under the age of 18, we do not believe that the enhancement goes far enough. Under this provision, a person who was reckless to the fact that they were trafficking a 17 year old girl would be subject to the same penalty as someone who intentionally trafficked an 11 year old girl. We propose that the enhanced penalty be more nuanced by providing for different penalties for knowingly trafficking someone under the age of 18 and for recklessly trafficking someone under the age of 14. We propose that subparagraph (b)(2) be redrafted to say:

> (1) *Enhanced penalties*. In addition to the general penalty enhancements under this title, the penalty classification of this offense is increased by:
> (i) one class when the actor is reckless as to the fact that the person trafficked is under 18 years of age but older than 13 years of age; or
> (ii) two classes when the actor is either reckless to the fact that the trafficked person is under 14 years of age or when the actor knowingly traffics a person who is under 18 years of age.

PENALTIES FOR PROSTITUTION AND PATRONIZING PROSTITUTION PROPOSED IN THE THIRD DRAFT OF REPORT #41 - ORDINAL RANKING OF MAXIMUM IMPRISONMENT PENALTIES

On Page 7 of the Third Draft of Report #41 the Commission recommends that the offense of prostitution be a class D misdemeanor, with a maximum penalty of 30 days in jail. The Commission recommends that Patronizing Prostitution be a class C misdemeanor, with a maximum penalty of 90 days in jail.

Pursuant to D.C. Code § 22-2701 the current penalties for prostitution and patronizing prostitution (soliciting prostitution) are the same. This statute states, in relevant part:

> **(a)** … [I]t is unlawful for any person to engage in prostitution or to solicit for prostitution.

(b) (1) Except as provided in paragraph (2) of this subsection, a person convicted of prostitution or soliciting for prostitution shall be:

(A) Fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 90 days, or both, for the first offense; and

(B) Fined not more than the amount set forth in § 22-3571.01, imprisoned not more than 180 days, or both, for the second offense.

(2) A person convicted of prostitution or soliciting for prostitution who has 2 or more prior convictions for prostitution or soliciting for prostitution, not committed on the same occasion, shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 2 years, or both

OAG agrees with the CCRC proposal to decrease the penalty for both of these offenses and to do away with the enhancement for second and subsequent offenses. However, we disagree with the proposal to specify separate penalties for these two offenses. OAG recommends that, like under current law, persons who are sentenced for committing these related offenses continue to face the same maximum jail exposure. Therefore, we suggest that the penalties for both of these offenses be class D misdemeanors, with maximum penalties of 30 days in jail.

GOVERN[1]MENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: June 19, 2020

SUBJECT: First Draft of Report #55 – Failure to Appear and Violation of Conditions of Release Offenses

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #55, Failure to Appear and Violation of Conditions of Release Offenses.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 23-586. FAILURE TO APPEAR AFTER RELEASE ON CITATION OR BENCH WARRANT BOND

Paragraph (c) provides for a defense to this charge. It states, "A person does not commit an offense under this section when, in fact, a releasing official, prosecutor, or judicial officer gives effective consent to the conduct constituting the offense." Footnote 11, pertaining to a prosecutor giving consent, states, "Consider, for example, a prosecutor who confers with defense counsel before the hearing date and notifies defense counsel that no charges will be filed (i.e. the case will be "no papered") and excuses the accused from appearing in court. The arrestee has the effective consent of a prosecutor to not appear." While OAG agrees that a person should not be charged in the limited situation noted in that footnote, we disagree that in other situations that a prosecutor – as opposed to a judge – should have the authority to excuse a defendant from

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

attending a hearing. For example, a prosecutor should not be able to tell a defense attorney that their client does not have to appear at a status, trial, sentencing, or other hearing. Only a judge should have that authority. OAG, therefore, recommends that paragraph (c) be redrafted so that the defense would apply, as to a prosecutor, only when the prosecutor confers with defense counsel (or defendant if he or she is not represented by counsel) before the hearing date and notifies defense counsel (or defendant) that no charges will be filed (i.e. the case will be "no papered") and excuses the defendant from appearing in court. Similarly, OAG recommends that the defense should be limited, as to a releasing official, to the situation noted in footnote 10.[2] In other situations, a releasing official, like a prosecutor, should not be able to excuse a defendant from attending a status, trial, sentencing, or other hearing.

RCC § 16-1005A. CRIMINAL CONTEMPT FOR VIOLATION OF A CIVIL PROTECTION ORDER

An element of this offense is that the person knows that they are subject to a temporary civil protection order, a final civil protection order, or a valid foreign protection order.[3] OAG agrees that this element is consistent with D.C. Code § 16-1005 (f) which states, "Violation of any temporary or final order issued under this subchapter, or violation in the District of Columbia of any valid foreign protection order. In Superior Court practice, orders issued under the temporary civil protection order provision outside of regular court hours are called emergency temporary protection orders. OAG wants to ensure that under the RCC there is no question that violation of these orders would still be covered. Therefore, OAG recommends that the Commentary include a sentence that states, "The reference to temporary civil protection orders includes both orders issued outside of court business hours (termed emergency temporary protection orders) and those issued during regular business hours."

This offense also includes the following element. "Knows they are subject to a protection order that, in fact… Advises the person of the consequences for violating the order, including extension of the order, immediate arrest or the issuance of a warrant for the person's arrest, and the criminal penalties under this section. [emphasis added]. The law requires that an extension of a civil protection order must be separately served on the person and states that any "extension" order is separately appealable. When an order is "extended", the person becomes the subject of a

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[2] Footnote 10 states, "Consider, for example, an officer who issues a citation and decides to withdraw it (e.g., to correct an erroneous date or to dismiss the accusation based on newly discovered evidence). The officer retrieves the citation from the accused and tells her that she is excused from appearing on the date specified."

[3] RCC § 1005A (a) states:

Offense. A person commits criminal contempt for violation of a civil protection order when that person:

(1) Knows they are subject to a protection order that, in fact:

(A) Is one of the following:

(i) A temporary civil protection order issued under D.C. Code § 16-1004;

(ii) A final civil protection order issued under D.C. Code § 16-1005; or

(iii) A valid foreign protection order;

new civil protection order.[4] Therefore, OAG recommends that the phrase "extension of the order" be deleted from the text of the offense. OAG suggests that the point that the Commission was making by including the underlined text be noted in the Commentary.

The Explanatory Note at the beginning of the Commentary includes the statement that "*It replaces subsections (f), (g), (g-1), (h), and (i) of D.C. Code § 16-1005, Hearing, evidence, protection order.* [internal footnotes omitted] [italics in original text]

The Commentary as to paragraph (g-1) states:

> First, the revised statute does not specify that children must be prosecuted as children. Current D.C. Code § 16-1005(g-1) states, "Enforcement proceedings under subsections (f) and (g) of this section in which the respondent is a child as defined by § 16-2301(3) shall be governed by subchapter I of Chapter 23 of this title." This language appears to be superfluous and potentially confusing, as no other criminal offense definition includes a similar cross-reference. This change clarifies the revised statute.

Paragraph (g-1) was added to the D.C. Code because defense counsel argued, at times successfully, that violations of CPOs where not prosecutable as delinquent acts under Chapter 13 of Title 22. While OAG does not object to the Commission recommending that paragraph (g-1) being stricken, we suggest one tweak to the above language to avoid any arguments as to how violations of CPOs by those under 18 years of age should be prosecuted. We recommend that the phrase "This change clarifies the revised statutes and does not change District law" be substituted for the phrase "This change clarifies the revised statute."

RCC § 16-1005A does not include the provision in D.C. Code § 1605 (g) that states, "Orders entered with the consent of the respondent but without an admission that the conduct occurred shall be punishable under subsection (f), (g), or (g-1) of this section." While the Explanatory note, quoted above states that RCC § 16-1005A "*replaces subsection[s]… (i*) of *D.C. Code § 16-1005"* the Commentary does not address the reason for its removal.[5] Similarly to the inclusion of paragraph (g-1), paragraph (i) was added to the D.C. Code because defense counsel argued, at times successfully, that because there was no admission of guilt, a person who entered a consent order without having admitted the underlining conduct could not be prosecuted under paragraphs (f), (g), and (g-1). To avoid any arguments that a person who consents but does not admit guilt

[4] OAG acknowledges that D.C. Code § 16-1005(d) states, "A protection order issued pursuant to this section shall be effective for such period up to one year as the judicial officer may specify, but the judicial officer may, upon motion of any party to the original proceeding, extend, rescind, or modify the order for good cause shown." However, because the person has to be separately served, a hearing must take place, and an appealable order must be issued (see paragraph (e) "Any final order issued pursuant to this section and any order granting or denying extension, modification, or rescission of such order shall be appealable."), the extension mentioned in paragraph (d) is a new order.

[5] Footnote 2 in the Commentary states, "These orders include orders entered by consent without admission of guilt. *See* D.C. Code § 16-1005(i)" (i.e., consent orders).

may be prosecuted for a violation of this offense, OAG recommends that the substance of paragraph (i) be retained.[6]

[6] If the Commission does not accept this recommendation, OAG requests that the Commentary specifically address this issue and affirmatively state that no change in District law is intended and that a person who consents to an order but does not admit the underlying conduct is treated no differently than a person who admits the underlying conduct.

GOVERN[1]MENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: June 19, 2020

SUBJECT: First Draft of Report #57 - Second Look

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #57 - Second Look.[1]

COMMENTS ON THE DRAFT REPORT

As the Commentary notes "The only changes in the revised statute as compared to the current D.C. Code provision are replacement of the phrases 'offense committed before the defendant's 18th birthday' with 'offense' in subsection (a) and paragraph (b)(1) of the current statute, and omitting "for violations of law committed before 18 years of age" from the statute's title." While OAG is favorably inclined to extending eligibility for second look procedures to older defendants or eliminating the age requirement altogether in D.C. Code § 24-403.03, we are still researching the status of second look legislation around the country, including the qualifying age of the defendant at the time of the offense, the criteria for judicial review, and the resentencing options available to the judge. OAG will communicate our position as soon as this research is completed.

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: June 19, 2020

SUBJECT: First Draft of Report #58- Developmental Incapacity Defense.

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #58, Developmental Incapacity Defense. [1]

COMMENTS ON THE DRAFT REPORT

The RCC proposal is to raise the minimum age at which a person can be charged with a delinquent act and to create a new defense to a prosecution against a child based on the actor's developmental immaturity. As discussed below, OAG favorably inclined with the concept of removing the possibility of youth who commit offenses when they are under 12 years of age from being prosecuted as delinquents in Family Court. However, also as discussed below, we oppose, at this time, the proposal to create a developmental incapacity defense for youth who are under 14 years of age.

The substantive portion of the proposal is:

RCC § 22E-501. Developmental Incapacity Defense.

(a) *Defense.* An actor does not commit an offense when:
1. In fact, the actor is under 12 years of age; or

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any later hearing that the Council may have on any legislation that may result from the Report.

2. The actor is under 14 years of age and, as a result of developmental immaturity, lacks substantial capacity to:
   (A) Conform the conduct alleged to constitute an offense to the requirements of the law; or
   (B) Recognize the wrongfulness of the conduct alleged to constitute an offense.

OAG agrees that the District should have a minimum age for which a youth can be prosecuted for a delinquent offense and that young children should receive services from their health care provider, the Department of Human Services, the Department of Behavioral Health, Child and Family Services Agency, and other providers, as appropriate, rather than in the juvenile justice system. And although we agree that the cutoff should be around the age of 12, we are currently researching a number of issues concerning the setting of a minimum age for prosecuting a child for a delinquent act. OAG will present the CCRC with its recommendations as soon as this research is completed.

Whatever the minimum age that is set in the RCC, OAG recommends changing the statutory reference for such a change. First Draft of Report #58, Developmental Incapacity Defense, and Advisory Group Memo #37, Supplemental Materials to the First Draft Of Report #58, by their terms, do not apply to adults in the criminal justice system. Title 22 of the Code – and the proposed Title 22E – address the District's Criminal Code. Proceedings about delinquency matters are codified in Title 16, Chapter 23 of the Code. This portion of the Code establishes who is a child eligible for prosecution in the Family Court, what a delinquent act is[2]; how juvenile competency challenges are handled[3]; and all other aspects of delinquency proceedings.[4] Persons who litigate delinquency proceedings, and others who want to understand how these proceedings work, look to D.C. Code § 16-2301, *et. seq*., for the statutory framework for delinquency proceedings. So, if the concepts in this proposal, or any portion of them, are adopted by the Commission, those changes should be incorporated into Title 16, not in Title 22E.

RCC § 22E-501 (a)(1) couches the proposed establishment of a minimum age for a person to be prosecuted as a defense. It would be, however, a statutory floor as to who can be adjudicated of a delinquent act and the Commission should state it as such. For that reason, while OAG generally supports the establishment of the proposed floor, it recommends that the floor be established by placing a limitation in Chapter 23 of Title 16 on the filing of charges in petitions against a child for offenses committed by the child when he or she was under the specified age.

D.C. Code § 16-2305 is entitled "Petition; contents; amendment." Paragraph (c)(1) describes the process for the filing of a petition[5] and (c)(2) states, "Where the delinquency petition filed by the

[2] See D.C. Code § 16-2301.
[3] See D.C. Code § 16-2315.
[4] See D.C. Code §§ 16-2301 through 16-2340.
[5] D.C. Code § 16-2305 (c)(1) states,
   Each petition shall be prepared by the Corporation Counsel after an inquiry into the facts and a determination of the legal basis for the petition. If the Director of

Corporation Counsel is the 3rd petition filed against a child and the child is 13 years old or younger, the Child and Family Services Agency shall institute a child neglect investigation against the parent, guardian, or custodian of the child." OAG recommends that paragraph (c) be amended to add a new subparagraph (3) that states, "No charges can be filed in a petition against a child for a delinquent act that was committed when the child was under [x] years of age." [6]

OAG cannot, however, at this time support the proposal in RCC § 22E-501 (a)(2). That proposal is to create a defense applicable to children who are under 14 years of age based upon the undefined phrase "developmental immaturity" when the child "lacks substantial capacity to … Conform the conduct alleged to constitute an offense to the requirements of the law; or … Recognize the wrongfulness of the conduct alleged to constitute an offense." As the Commentary notes, the incapacity defense only has limited support in United States criminal codes and case law" and that "the standard here is employed in the context of developmental immaturity, District case law based on the insanity defense is instructive but not controlling." While we agree that the case law for the insanity defense is instructive, but not controlling, we would point out that the D.C. Code and related case law state that the insanity offense is in not applicable in delinquency proceedings except at the dispositional (sentencing) stage. See D.C. Code § 16-2315 (d) and *In re C.W.M.*, 407 A.2d 617 (D.C. 1979) (The insanity defense was repealed by implication when Congress enacted a statute specifying that results of mental examination may not be used to establish a defense of insanity.) As the court noted in *In re C.W.M,*

> In our view, these provisions clearly mandate that a predisposition report contain information relating to the child's mental state at the time of the offense and also at the time of the disposition hearing to enable the Division to determine whether, as a result of mental illness, the child lacked substantial capacity either to recognize the wrongfulness of his conduct or to conform his conduct to the requirements of law." [emphasis added]

Id. at 624 (internal quotes omitted).

The underlined portion of the quote from *In re C.W.M,* though stated in the reverse order, is almost identical to the proposal in (a)(2) that creates a defense for a child who "lacks substantial capacity to…Conform the conduct alleged to constitute an offense to the requirements of the law; or … Recognize the wrongfulness of the conduct alleged to constitute an offense."

> Social Services has refused to recommend the filing of a delinquency petition, or if the Director of the Agency has refused to recommend the filing of a neglect petition, the Corporation Counsel, on request of the complainant, shall review the facts presented and shall prepare and file a petition if he believes such action is necessary to protect the community or the interests of the child. Any decision of the Corporation Counsel on whether to file a petition shall be final.

[6] D.C. Code § 16-2301 (7) states that a "delinquent act" "means an act designated as an offense under the law of the District of Columbia, or of a State if the act occurred in a State, or under Federal law…"

As noted above, OAG does not support enacting a developmental immaturity defense at this time. While OAG is always interested in working with the Council to improve the District's juvenile justice system, we do not believe that the undertaking should be taken by the CCRC. The CCRC's mandate is to redraft the criminal code.[7] The advisory group is made up of agencies and people who have expertise in criminal law.[8] If the Council wanted the CCRC to draft juvenile justice reform, it would have said so explicitly in the Act and it would have

[7] D.C. Code § 3-152. Recommendations for comprehensive criminal code reform.
(a) By September 30, 2020, the Commission shall submit to the Mayor and the Council comprehensive criminal code reform recommendations that revise the language of the District's criminal statutes to:
(1) Use clear and plain language;
(2) Apply consistent, clearly articulated definitions;
(3) Describe all elements, including mental states, that must be proven;
(4) Reduce unnecessary overlap and gaps between criminal offenses;
(5) Eliminate archaic and unused offenses;
(6) Adjust penalties, fines, and the gradation of offenses to provide for proportionate penalties;
(7) Organize existing criminal statutes in a logical order;
(8) Identify any crimes defined in common law that should be codified, and propose recommended language for codification, as appropriate;
(9) Identify criminal statutes that have been held to be unconstitutional and recommend their removal or amendment;
(10) Propose such other amendments as the Commission believes are necessary; and
(11) Enable the adoption of Title 22 as an enacted title of the District of Columbia Official Code.

[8] D.C. Code § 3-153. Code Revision Advisory Group.
(a) The Commission shall establish a Code Revision Advisory Group ("Advisory Group") to review and provide information and suggestions on proposals prepared by the Commission related to the comprehensive criminal code reform recommendations required by § 3-152. The Advisory Group shall consist of 5 voting members and 2 nonvoting members as follows:
(1) The voting members of the Advisory Group shall consist of the following:
(A) The United States Attorney for the District of Columbia or his or her designee;
(B) The Director of the Public Defender Service for the District of Columbia or his or her designee;
(C) The Attorney General for the District of Columbia or his or her designee; and
(D) Two professionals from established organizations, including institutions of higher education, devoted to the research and analysis of criminal justice issues, appointed by the Council;
(2) The non-voting members of the Commission shall consist of the following:
(A) The Chairperson of the Council committee with jurisdiction over the Commission or his or her designee; and
(B) The Deputy Mayor for Public Safety and Justice or his or her designee.

required that some advisory group members have backgrounds devoted to the research and analysis of juvenile justice issues.

Before enacting a defense for youth in the Family Court that is so closely related to the insanity defense, OAG would like an opportunity to review the effect of establishing a developmental immaturity defense in those jurisdictions that have enacted it, including what non-juvenile justice programs have been implemented by those jurisdictions to work with youth who lack developmental immaturity so that public safety is ensured. We would also like to evaluate the effectiveness of those programs.

In conclusion, while OAG supports the establishment of a minimum age for charging of children with delinquent acts, we do not support the establishment of a developmental immaturity defense until further study of this issue.[9] We would, of course, be happy to work with the Council on further reforms to the juvenile justice system.

[9] In addition, if the Commission does not adopt OAG's recommendation about eliminating the proposed developmental immaturity defense, OAG makes the following recommendation concerning RCC § 22E-501 (a)(2). It is unclear what is meant by the language in (a)(2)(A) about a person "conform[ing] the conduct alleged to constitute an offense to the requirements of the law." Conduct "constitut[ing] an offense" does not, *by definition*, conform to the requirements of the law. This should instead say the person was "unable to conform his or her conduct to the law."

M E M O R A N D U M

THE PUBLIC DEFENDER SERVICE
for the District of Columbia
CHAMPIONS OF LIBERTY

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	June 19, 2020
Re:	Comments on Second Draft of Report No. 35, Cumulative Update to Sections 2013-213 of the Revised Criminal Code

The Public Defender Service makes the following comments on the Second Draft of Report No. 35.

PDS recommends that the CCRC adopt language about concurrence as part of causation or as part of Chapter 2, Basic Requirements of Offense Liability. The following language is proposed:

> For offenses that require proof of a mental state and conduct, the mental state that is required for the conduct must concur with the actor's prohibited conduct. To concur, the mental state required for the conduct must actuate the conduct.

The Supreme Court in *Morissette v. United States* described crime as a "compound concept, generally constituted only from the concurrence of an evil-meaning mind with an evil doing hand." 342 U.S. 246, 251 (1952). "…Generally, concurrence reflects a requirement that the mens rea and the action that causes death must go together. "[T]he true meaning of the requirement that the mental fault concur with the act or omission is that the former *actuate* the latter." *1 Wayne R. LaFave, Substantive Criminal Law § 6.3(a),* at 451 (2d ed. 2003) (emphasis added). "[M]ere coincidence [of conduct and *mens rea*] in point of time is not necessarily sufficient." *Id.* "[M]ore is required than that the death-causing acts would not have occurred but for the prior intent." *Id.* at 454 n.21. "[T]he acts must be done *for the actual carrying out of the intent* and *not merely to prepare for its execution*." *Id.* at 454 (emphases added). An illustrative example is where "*A* forms an intent to kill *B*, . . . and . . . he accidentally runs over *B* and kills him." *Id.* Concurrence is lacking in that scenario even if "at the time of the accident, *A* was driving to a store to purchase a gun with which to kill *B*." *Id.* Although *A* had formed an intent to kill *B* and actually caused *B*'s death, his action of running *B* over was not actuated by his intent to kill, and thus does not constitute intentional murder.

While concurrence is a general principle in criminal law, it is especially important for result-element offenses. Because the causation definition refers generally to a person's "conduct" as being the cause of a prohibited result, there is a risk that factfinders might find causation satisfied by any conduct, regardless of whether the conduct concurs with the required mental state. For example, in LaFave's example of the driver who accidentally hits and kills the very person he intended to shoot and kill, the driver's conduct causes the death, but that conduct

does not concur with the driver's intent to kill. Without the principle of concurrence, the driver could be found guilty of first-degree murder.

Turning more specifically to the causation requirement, PDS has three interrelated concerns with RCC § 22E-204(c)(2). First, the "justly held responsible" standard is too vague and subjective to satisfy constitutional requirements. Second, the factors identified in the commentary for determining when a person is "justly held responsible" for the acts of another have no proper role to play in causation analysis. Finally, the standard ultimately codifies an unwarranted twentieth century expansion of criminal law, which tends to undermine the fundamental premise of individuals' responsibility for their actions that justifies much of criminal law and punishment.

PDS reiterates its previous concerns that the definition of legal cause in RCC § 22E-204(c)(2) does not comport with the requirement of the Due Process Clause that criminal laws be defined with specificity. *See, e.g.*, *Johnson v. United States*, 135 S. Ct. 2551, 2556-57 (2015). This requirement "guarantees that ordinary people have 'fair notice' of the conduct a statute proscribes" and "guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018). The rule also reflects "the separation of powers—requiring that [the legislative branch], rather than the executive or judicial branch, define what conduct is sanctionable and what is not." *Id.*; *see also Smith v. Goguen*, 415 U.S. 566, 575 (1974) ("Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law.").

The notion that whether a person is liable for the volitional conduct of a third party turns on whether a jury thinks the person is "justly held responsible" would invite arbitrary results. The same facts presented to two different juries could result in opposite results due to juries' different subjective senses of what is just. *See, e.g.*, Don Stuart, *Supporting Gen. Principles for Criminal Responsibility in the Model Penal Code with Suggestions for Reconsideration: A Canadian Perspective*, 4 Buff. Crim. L. Rev 13, 43 (2000) ("There is also reason to be concerned at the vagueness of the 'just bearing' formulation. Although nobody has been able to suggest a totally satisfactory approach; lawyers and triers of fact need a more workable test."); George P. Fletcher, *Dogmas of the Model Penal Code*, 2 Buff. Crim. L. Rev 3, 6 (1998) ("Including the word 'just' in this proviso, of course, leaves all the difficult problems unresolved, and therefore the attempted verbal compassing of the concept turns out to be words with little constraining effect."). "Uncertainty of that kind cannot be squared with the beyond-a-reasonable-doubt standard applicable in criminal trials or with the need to express criminal laws in terms ordinary persons can comprehend." *Burrage v. United States*, 134 S. Ct. 881, 892 (2014). RCC § 22E-204(c)(2) in its current form would not survive a constitutional challenge and hence would ultimately fail to accomplish the Commission's goals of reforming the District's criminal laws.

PDS understands the difficulties in codifying a standard of legal cause that is neither over-inclusive nor under-inclusive—a task that has eluded legal thinkers for centuries. And while achieving "just" results is the ultimate goal of legal causation, this goal can only be furthered through the development of clear, workable standards, not an appeal to the jury's subjective sense of justice. And while the commentary identifies three non-exhaustive factors that bear on whether a person is "justly

held responsible" for the conduct of another, these factors ultimately fail to cabin factfinders' discretion in any meaningful or consistent way.

The three factors listed in the commentary are also not appropriate considerations for causation analysis. The first two of these factors—"the inherent wrongfulness of the actor's conduct" and "whether the actor desired a prohibited result to occur"—are already accounted for by other aspects of law. They have never played a role in causation analysis. Causation is fundamentally about a physical connection between an act and a result. When commentators speak of legal causation as being about what is fair or just, they are talking about whether it is fair or just to treat conduct as the "cause" of a result when other factors had a more direct role in producing the result. Legal causation has always focused on the causal chain of events and whether the "link" between act and result "is too remote, purely contingent, or indirec[t]." *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 9 (2010) (plurality) (internal quotation marks omitted) (alteration in original). It has never turned on the wrongfulness of conduct or the actor's intent to cause a particular harm. In *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258 (1992), for example, the defendants committed fraud—certainly wrongful conduct. Yet the Supreme Court held that these fraudsters were not the cause of foreseeable financial losses. *See id.* at 271. The Court focused exclusively on the indirectness of the causal link. *See id.* ("[T]he link is too remote between the stock manipulation alleged and the customers' harm, being purely contingent on the harm suffered by the broker-dealers."). Similarly, in *Hemi Group*, the Court addressed a claim that a cigarette seller had caused New York City to lose tax revenue by refusing to provide a list of customers that would allow the city to collect unpaid taxes. *See* 559 U.S. at 5-6. Refusing to provide the list was a violation of state law, and hence wrongful. *See id.* And the city's inability to collect taxes was exactly what the cigarette seller wanted—its business model depended on undercutting its competitors' prices by allowing customers to avoid the tax. *See id.* at 12. Despite having effectively built its entire business on purposefully aiding tax evasion, the Supreme Court held the seller was not liable for the loss of tax revenue because the link in the causal chain was indirect. *Id.* at 10; *accord Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 458–461 (2006) (steel company that intentionally defrauded state of tax revenue so that it could undercut its competitor was not liable for causing the competitor's loss of business, even though company's conduct was wrongful and competitor's loss of business was the desired result). As these cases show, legal causation is focused on the nature of the causal link, not the blameworthiness of the underlying conduct.

Causation is not intended to grade blameworthiness or culpability of conduct. For example, a person who intends to inflict a horrible, painful death on someone who is unexpectedly killed by a lightning strike is not liable for murder because, however reprehensible the conduct, causation is lacking. But a person who unintentionally, but recklessly (with extreme indifference to human life), directly causes death is liable for murder. The presence or absence of murder liability in these examples does not turn on the degree of blameworthiness but rather on the nature of the causal chain because murder has a result element. Other aspects of the law account for gradations in the wrongfulness of conduct or the actor's purpose.[1] To incorporate these factors into causation analysis amounts to improper double counting, and ultimately fails to further the point of causation in criminal law.

[1] For example, as the commentary notes, accomplice liability already covers situations where a person contributes to a result directly caused by a third party with the purpose of causing that result. Causation does not need to also attempt to cover this situation.

Much of criminal law is focused on punishing conduct without regard to whether it causes any particular result. But when the law does impose a result element, then a person should be punished only if he has, in fact, "caused" that result. "The doctrine that a person whose conduct excites moral disapproval may be punished for doing what he has not done is . . . a dangerous one." H.L.A. Hart & A.M. Honoré, *Causation in the Law* 328 (2d ed. 1985).

In addition, these factors ultimately do not produce acceptable results. Take the commentary's basketball example: if X makes the winning shot knowing that an enraged D will kill V, X is not liable for murder because he did not cause the death. The commentary justifies this result because X's conduct (making the shot) is not inherently wrongful and X's purpose is not to kill V (X just wants to win the game). But tweak the example slightly and this logic breaks down. Imagine that just before the final play, X sees that D has deliberately loosened the bolts on the backboard so that sinking the next shot will cause the backboard to come crashing down on V, who is standing right under the basket. X, not wanting to kill V but wanting to win the game, makes the shot, and V is killed. In the tweaked example, X *should be* liable for manslaughter. He has recklessly caused V's death.[2] But RCC § 22E-204(c)(2) and the commentary are incapable of explaining X's liability in the loose-backboard example but not the enraged-D example. X's conduct is the same (making the shot). X's purpose is the same (winning the game). Factual causation and reasonable foreseeability are equally present in both examples. And, in both examples, V's death "depends on another person's volitional conduct"—D's. The reason X is liable in the loose-backboard example is that an object falling is exactly the sort of physical phenomenon that a person can be deemed to have legally caused. In the enraged-D scenario, one might say that X's conduct foreseeably "causes" D to kill V, but the law does not regard D's volitional conduct as a phenomenon that can be caused by someone else; rather, the law regards D alone as responsible for his own volitional conduct.[3] Indeed, as the commentary acknowledges, this principle is fundamental to the legitimacy of criminal law—if a person's conduct is "caused" by external forces then punishing the person for that conduct is delegitimized. *See* Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 Cal. L. Rev. 323, 333 (1985) ("To treat the acts of others as causing a person's actions (in the physical sense of cause) would be inconsistent with the premise on which we hold a person responsible.").

This fundamental principle that no one causes D's volitional conduct except D himself is uncontroversial when, as in the enraged-D scenario, X's conduct and motives are innocent. The principle requires defense only when X's conduct or motives are wrongful because there is a

[2] Nothing in this example turns on whether D's conduct happens before or after X's. One might imagine that D loosens the bolts just after X launches his shot but before it hits the backboard, but that X sees D preparing to loosen the bolts, realizes what he is going to do, and takes the shot anyway. X would still be liable for manslaughter because his reckless conduct causes the backboard to fall and kill V.

[3] In the loose backboard scenario, D would be liable for intentional murder. But this is not because D "caused" X's volitional conduct of making the shot, but rather because D's act of loosening the bolts foreseeably caused, in combination with X's conduct, the backboard to fall and kill V. And if D had been negligent (or reckless) in failing to tighten the bolts, he could still be liable for some degree of homicide corresponding to his mental state. Causation principles do not vary with D's purposefulness or the inherent wrongfulness of his conduct.

legitimate desire to punish X in that scenario. But the desire to punish X for wrongful conduct need not, and should not, result in twisting the law of causation to make X liable for a result caused by D. If X engages in wrongful conduct, then he can and should be punished for that conduct under the appropriate offense. And if he facilitates D's conduct with an improper purpose, he can be liable for D's conduct as an accomplice. He simply should not be punished for having "caused" the conduct of a different volitional actor.

The third factor in the commentary, the passage of time, is also not a particularly relevant consideration for causation. Ordinarily, the passage of time does not impact causation. If X sets a bomb, X is the factual and legal cause of any resulting death whether he sets the bomb's timer for 10 second, 10 days, or ten years. The passage of time is irrelevant because, no matter how much times goes by, the causal link from act to result is direct and foreseeable. Neither the Court of Appeals' decision in *Fleming*[4] nor the commentary to RCC § 22E-204(c)(2) offers a logical explanation or policy justification for why the passage of time should ever preclude causation. Certainly, there is an intuitive sense that when a third party acts in response to something a person did a long time ago, the person is not the cause of the third party's response. But that is because the passage of time simply makes it easier to see the real causal problem—that a person's deliberate conduct is the product of her own choices, not caused by someone else. To see this, it helps to consider two examples that are identical except for the passage of time. In both examples, X intends to kill D. X knows to a certainty that if he attempts to kill D but fails to do so, D will set out to kill X in revenge, no matter how long it takes. X also knows that D will use any means to take his revenge, including killing bystanders. In the first variation, X shoots at D and misses, but is able to escape. One year later, X is walking down the street when D finally catches up to him and opens fire, killing bystander V. In this example, the *Fleming* opinion and the commentary suggest that X would likely not be guilty of V's murder (though X is guilty of attempted murder for his earlier attempt to kill D). *See Fleming*, 224 A.3d at 224-25.[5] Now imagine the same example, except eliminate the passage of time: X shoots at D and misses (as before), but this time D immediately returns fire and kills bystander V.[6] Under current D.C. law, X would be guilty of murder in this second example because V's death was reasonably foreseeable and there was no passage of time. There is no sensible justification for these different results. In both examples X's conduct and mental state are equally culpable; and the causal link between X's conduct and V's death is identical—X's shooting at D leads to D shooting at X, and hitting V; and V's death is equally foreseeable in both examples. But the passage of time makes it easier to see that D's conduct is a result of D's deliberate choice to seek revenge, not a "caused" phenomenon. The law regards D, and D alone, as the cause of his own volitional conduct. It is not the passage of time that matters; rather, the passage of time makes D's volitional conduct more salient.

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[4] *Fleming v. United States*, 224 A.3d 213 (D.C. 2020) (en banc).

[5] As *Fleming* notes, "the United States took the position that a person who started a deadly feud between two groups might not properly be held criminally responsible for reasonably foreseeable killings that took place years or even a day after the person's initial conduct." 224 A.3d at 224.

[6] To simplify things, assume that D is *not* acting in self-defense—D shoots at X purely for revenge.

While the revised version of RCC § 22E-204(c)(2) largely conforms to the Court of Appeals' decision in *Fleming*, for several reasons RCC § 22E-204(c)(2) should not attempt to codify *Fleming*. First, *Fleming* largely rejected the leading scholarly work on causation in the law because that work was normative rather than descriptive. *See Fleming*, 224 A.3d at 227. But the Commission's role is normative, and the Commission has appropriately looked to the work of leading scholars such as Professors Kadish, Hart, and Honoré, which *Fleming* largely brushed aside. The work of these preeminent scholars establishes the principle that a third party's volitional conduct breaks the causal chain. *See* Kadish, *supra*, at 334-35 ("[W]hen we examine a sequence of events that follows a person's action, the presence in the sequence of a subsequent human action precludes assigning causal responsibility to the first actor. What results from the second actor's action is something the second actor causes, and no one else can be said to have caused it through him."); Hart & Honoré, *supra*, at 326 ("The free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility.").

Second, by arbitrarily disregarding the majority of relevant cases on this issue, *Fleming* failed to achieve any logical or doctrinal coherence. *See Fleming*, 224 A.3d at 226-27. *Fleming* acknowledged the longstanding and substantial body of law (indeed, from a majority of jurisdictions) that holds that a defendant does not "cause" a gun-battle death when an adversary fires the fatal shot, but ignored these cases on the ground that they addressed causation for felony murder, whereas *Fleming* involved second-degree murder.[7] But these cases turned on well-defined principles of causation, not anything unique about felony murder. Causation principles have never varied depending on the offense or its degree; and the *Fleming* court offered no justification for why causation should work differently depending on the degree or type of murder charged. The Commission in contrast is appropriately developing a consistent definition of causation for all result-element offenses. And it should appropriately look to the large body of cases that have held, consistent with centuries of precedent and scholarly analysis, that causation is lacking when a death is directly caused by a third party's volitional conduct. [8]

[7] *See* Matthew A. Pauley, *The Pinkerton Doctrine & Murder*, 4 Pierce L. Rev. 1, 2 n.4 (2005); *see also, e.g.*, *Campbell v. State*, 444 A.2d 1034, 1041–42 (Md. 1982) (no liability for death in gun battle with robbery victim and police because defendant did not fire the fatal shot); *Commonwealth v. Campbell*, 89 Mass. (7 Allen) 541, 545 (1863) (no liable for gun-battle death where adversary fired fatal shot); *Myers*, 261 A.2d at 555 (no liability for person shot by police during gun battle); *State v. O'Kelly*, 84 P.3d 88, 97–98 (N.M. Ct. App. 2003) (defendant not liable for gun-battle death of bystander shot by adversary); *Rivers v. Commonwealth*, 464 S.E.2d 549, 554 (Va. Ct. App. 1995) (same).

[8] *See* Matthew A. Pauley, *The Pinkerton Doctrine & Murder*, 4 Pierce L. Rev. 1, 2 n.4 (2005); *see also, e.g.*, *Campbell v. State*, 444 A.2d 1034, 1041–42 (Md. 1982) (no liability for death in gun battle with robbery victim and police because defendant did not fire the fatal shot); *Commonwealth v. Campbell*, 89 Mass. (7 Allen) 541, 545 (1863) (no liable for gun-battle death where adversary fired fatal shot); *Myers*, 261 A.2d at 555 (no liability for person shot by police during gun battle); *State v. O'Kelly*, 84 P.3d 88, 97–98 (N.M. Ct. App. 2003) (defendant not

Third, *Fleming* overlooked the large body of historical evidence that, before the general expansion of criminal liability in more recent decades, it was widely accepted that a defendant could not be the "cause" of a death at the hands of someone else.[9] Instead, *Fleming* looked to cases decided in the last "thirty years," *Fleming*, 224 A.2d at 228, a time period that reflects a marked expansion in criminal liability brought about by judicial fear over then-higher crime rates. *See, e.g.*, *Roy v. United States*, 871 A.2d 498, 507 (D.C. 2005) ("While urban gun battles years ago involved revolvers or clipped pistols of limited fire power, they have now escalated to the use of automatic and semiautomatic weapons. The results are pocket wars with no rules of engagement resulting in a highly increased risk to noncombatants. It is this increased risk to innocent bystanders which justifies the application of proximate cause liability to those participants who willfully choose to engage in these battles."). As the law of causation developed over hundreds of years, it was consistently understood that a person could not cause another's volitional conduct. The recent relaxation of that settled doctrine should now be corrected.

PDS proposes that the definition of legal cause reflect the venerable and fundamental principle that individuals do not cause the deliberate volitional conduct of others. RCC § 22E-204(c) should read:

> *Legal Cause Defined.* A person's conduct is the legal cause of a result if the result is reasonably foreseeable in its manner of occurrence. Another person's volitional conduct is not reasonably foreseeable unless the other person's volitional conduct consists of lawful self-defense or defense of others that results from the defendant's actions.

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liable for gun-battle death of bystander shot by adversary); *Rivers v. Commonwealth*, 464 S.E.2d 549, 554 (Va. Ct. App. 1995) (same).

[9] *See, e.g.*, John Kaplan et al., *Criminal Law* 261 (6th ed. 2008) ("Rather than distinguish between foreseeable and unforeseeable intervening events . . . the common law generally assumed that individuals were the exclusive cause of their own actions."); Norval Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. Pa. L. Rev. 50, 66 (1956) ("For centuries innocent persons and felons have been killed as the result of justified resistance to felonies of violence; in only a handful of such cases has it been even suggested that the surviving felons are guilty of murder."); *Ross v. W. Union Tel. Co.*, 81 F. 676, 677–78 (5th Cir. 1897); *Commonwealth ex rel. Smith v. Myers*, 261 A.2d 550, 553 (Pa. 1970); *Commonwealth v. Campbell*, 89 Mass. (7 Allen) 541, 545 (1863) (defendant cannot be liable for shooting "committed by a person who is his direct and immediate adversary, and who is, at the moment when the alleged criminal act is done, actually engaged in opposing and resisting him and his confederates and abettors in the accomplishment of the unlawful object for which they are united")

M E M O R A N D U M

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	June 19, 2020
Re:	Comments on Second Draft of Report No. 19, Homicide Offenses; Second Draft of Report No. 27, Human Trafficking; First Draft of Report No. 54, Prostitution; First Draft of Report No. 55, Failure to Appear and Violation of Conditions of Release Offenses; First Draft of Report No. 57, Second Look; and First Draft of Report No. 59, Endangerment with a Firearm.

The Public Defender Service makes the following comments.

Second Draft of Report No. 19, Homicide Offenses

1. PDS objects to the inclusion of felony murder as basis for liability in second degree murder and manslaughter. Lowering the mental state required for murder fails to deter crime or appropriately apportion culpability. PDS agrees with the commentary to Hawaii's murder statute about the state's reasons for abolishing felony murder: "Even in its limited formulation, the felony-murder rule is still objectionable. It is not sound principle to convert an accidental, negligent, or reckless homicide into a murder simply because, without more, the killing was in furtherance of a criminal objective of some defined class. Engaging in certain penally-prohibited behavior may, of course, evidence a recklessness sufficient to establish manslaughter, or a practical certainty or intent, with respect to causing death, sufficient to establish murder, but such a finding is an independent determination which must rest on the facts of each case."[1]

   If felony murder remains a basis of liability for second degree murder, PDS strenuously opposes the expansion of felony murder to include persons who did not commit the lethal act the Second Draft of Report No. 19. Felony murder, which already allows for attenuated murder liability, becomes all the more divorced from actual culpability when it is applied to an individual who did not commit the lethal act and who might only be a peripheral aider and abettor to the predicate felony. The examples of miscarriage of justice in such instances are legion and caused California to retroactively amend its felony murder statute to preclude its application to individuals who

[1] Hawaii Rev.Stat., s 707-701.

were not the actor who committed the fatal act and to those who did not actively participate in bringing about the death as accomplices.[2] The RCC attempts to address the well-recognized miscarriage of justice of applying felony murder to those who do not commit a fatal act by creating an additional defense to felony murder. But the RCC commentary contemplates that the defense is much more protective than it would be in reality. The commentary states: "[A]n actor may be held liable for the lethal acts of a fellow participant in a predicate felony if he or she knows that the fellow participant intends to cause death or serious bodily injury, or failed to make reasonable efforts to prevent death or serious bodily injury." According to the RCC commentary, "These changes permit an actor to be convicted of felony murder when a co-felon committed the lethal act only when the actor's culpability is sufficient to warrant liability."[3] But in reality, that is far from the case. By creating a defense rather than elements that the government must prove, whether the actor's conduct is sufficient to warrant liability rests entirely on a jury's assessment of the defendant's testimony. Much of the credibility determination will depend on the defendant's prior record, education, fear about identifying and negatively testifying about co-actors, and jurors' biases about the defendant and his participation in the predicate felony. This defense would in some instances require the defendant to risk his own safety by testifying about the criminal conduct of multiple other actors. The failure to answer questions about other actors would also lead to claims that the defendant is evasive and not credible. Further, to benefit from this defense, in instances where there is uncertainty about who caused the fatal act, the defendant would have to assume the government's burden and prove that he did not commit the fatal act. For these reasons, PDS strongly urges the CCRC to preclude the application of felony murder to individuals who did not commit the fatal act.

If the RCC maintains the offense of felony murder or continues to apply felony murder to actors who do not commit the lethal act, PDS proposes the following revisions:

RCC § 22E-1101. Murder.

(a) *First Degree.* A person commits first degree murder when that person purposely, with premeditation and deliberation, causes the death of another person.
(b) *Second Degree*. A person commits second degree murder when that person:
    (1) Recklessly, with extreme indifference to human life, causes the death of another person; or
    (2) Negligently causes the death of another person, other than an accomplice, <u>by committing the lethal act</u> in the course of and in furtherance of committing or attempting to commit one of the following offenses:
        (A) First or second degree arson as defined in RCC § 22E-2501;
        (B) First degree sexual abuse as defined in RCC § 22E-1303; ...
    (3) <u>(A) Commits or attempts to commit one of the following offenses:</u>

[2] SB 1437, California. Available at: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1437

[3] RCC Report No. 33, page 3.

(i) First or second degree arson as defined in RCC § 22E-2501;
(ii) First degree sexual abuse as defined in RCC § 22E-1303; …
(B) (i) Intending to cause death or serious bodily injury; or
(ii) Knowing another participant in the predicate felony intends to cause death or serious bodily injury;
(C) Did not make reasonable efforts to prevent another participant from causing death or serious bodily injury; and
(D) The death of another person, other than an accomplice, was caused in the course of and in furtherance of committing or attempting to commit the predicate offense.

(c) …

(g) No Accomplice Liability for Felony Murder. Notwithstanding RCC § 22E-210, no person shall be guilty as an accomplice to second degree murder under paragraph (b)(2) or (b)(3). ~~*Defense to Felony Murder.* It is an affirmative defense to prosecution under paragraph (b)(2) of this section that the actor, in fact, does not commit the lethal act and either:~~

(1) ~~Believes that no participant in the predicate felony intends to cause death or serious bodily injury; or~~
(2) ~~Made reasonable efforts to prevent another participant from causing the death or serious bodily injury of another.~~ …

2. PDS objects to the inclusion of first and second degree criminal abuse of a minor as predicate felonies for felony murder. If the CCRC includes felony murder in the reform code, it should also adopt a merger principle that provides that the predicate felony must have a purpose that is independent of the decedent's death or serious injury.[4] First and second degree criminal abuse of a minor requires that the defendant commit serious injury, either physical or mental, to the minor. Generally, the failure to adopt a merger rule would mean that every act of violence against another that is not immediately fatal could be converted into felony murder – thereby relieving the government from proving the defendant's mental state.

3. PDS makes the same objections and recommendations with respect to RCC § 22E-1102, Manslaughter, as it makes above with respect to RCC § 22E-1101, Murder.

First Draft of Report No. 54, Prostitution

1. PDS recommends rewriting subsection (b)(2) to require that the District, rather than the Metropolitan Police Department (MPD) specifically, refer persons under age 18 who are suspected of violating subsection (a) of the section. PDS hopes that the Council for the District of Columbia and the Mayor answer the call to narrow the duties of MPD and to assign the work

[4] *People v. Rector*, 19 Wend. 569, 592-93 (N.Y. Sup. Ct. 1838).

of delivering health and human services to District agencies that are better suited to delivering those services. Requiring that the *District* make the referral allows the District to assign the work to a current social services agency, a new agency not currently in existence, or if it deems it appropriate, even to MPD.

2. PDS notes that RCC § 22E-4401, prostitution, and RCC § 22E-4402, patronizing prostitution, include provisions to allow for the suspension and dismissal of proceedings. PDS supports these provisions. As it did in its May 1, 2020 comments on the First Draft of Report No. 50, PDS recommends that the CCRC consider creating a general provision that allows for the judicial dismissal of proceedings for all offenses up to a certain class. In many instances, there is little difference between the capacity for rehabilitation of someone convicted of, for example, a shoplifting offense or a criminal graffiti offense or a 2nd degree trespass offense and someone convicted of prostitution or of patronizing prostitution or of a possessory drug offense. All of these individuals would benefit greatly from the opportunity to have the case dismissed. The dismissal could prevent collateral consequences in education, housing, and employment. Without a judicial dismissal provision, case dismissal rests entirely on the discretionary decisions of prosecutors. It makes good sense to expand this option of dismissal and allow dismissal when a judge who is familiar with the facts of the offense and with the defendant think it is warranted. Without an expanded dismissal provision, defendants are left to struggle with a record sealing process through which there is an eight-year waiting period to seal an eligible misdemeanor conviction.[5] The suspension and dismissal of proceedings provisions should be expanded or repeated elsewhere in the RCC to allow for judicial dismissal of all offenses of equivalent or similar grading.

First Draft of Report No. 55, Failure to Appear and Violation of Conditions of Release Offenses

1. PDS recommends rewriting the second element of both first degree and second degree failure to appear in violation of a court order at RCC § 23-1327. Currently, the second element reads: "Knowingly fails to appear or remain for the hearing." The commentary explains that this element "means the person must be practically certain that they failed to appear or remain as required."[6] As written, the element suggests that a person may be found guilty of this offense if they know they were not in court when they knew (pursuant to element 1) they were supposed to be. PDS does not believe that the CCRC intends to make the offense turn on whether or not the person knows they failed to appear in court. The gravamen of the offense is actually whether the person made reasonable efforts to appear in court as required. It is no coincidence that the commentary specifically notes that "the person's conduct must be voluntary,"[7] despite the fact

[5] D.C. Code § 16-803(c)(1).

[6] Report No. 55, page 12.

[7] *Id.*

that the government must prove voluntariness for *every* offense in the RCC.[8] Voluntariness is specifically mentioned because whether the person's non-appearance in court is "voluntary" is largely, though perhaps not exclusively, what determines the culpability of the person. It is not clear that all conduct that should be excused from liability would be excused because it fails to meet the definition of "voluntariness." The voluntariness requirement at RCC § 22E-203 defines both the voluntariness of an act and the voluntariness of omission. Because a person's omission (by failing to appear) provides the basis for liability of this offense, "a person commits the conduct element of [the] offense when [either] (A) the person has the physical capacity to perform the required legal duty [to appear or remain in court] or (B) the failure to act is otherwise subject to the person's control."[9] The failure to appear commentary gives examples of a person's absence being not subject to the person's control such as if the person is incarcerated, hospitalized, stranded, or unable to connect to a virtual hearing due to a technological problem.[10] One "stranded" scenario is the defendant in *Foster v. United States*, 699 A.2d 1113 (D.C. 1997), a bus driver for Greyhound who was "stranded in Montreal" when the bus that would have allowed him to drive back to the District from Montreal in time to appear in court was cancelled by his employer.[11]

Consider another scenario: D texts with the Pretrial Services Agency the day before his scheduled trial date in a felony case to confirm the date, time and courtroom of his hearing. D sets an alarm to wake up in plenty of time to get to court, but actually wakes up before his alarm rings. Though he leaves his house earlier than planned, he runs to the metro station (as witnessed by numerous people). When he arrives at the metro station, he learns that it is closed for "track maintenance work." Evidence would show that the metro station had closed one month earlier and that signs had been posted outside the station announcing the closure starting one month prior to the closure. Under the RCC's proposed failure to appear offense, D (1) knew he was required to appear before a judicial officer on a specified date and time for what was in fact a hearing in a felony matter and (2) knew that he failed to appear for the hearing. The question for the factfinder would be whether his "failure to appear" was voluntary, that is was his non-appearance subject to D's control? Under current law, the question for the factfinder in this case would be whether D's "failure to appear" was "willful,' as in "deliberate and intentional" or whether it was "accidental or inadvertent." Rather than asking whether the person was practically certain that he failed to appear, the question that better focuses on the conduct (by act or omission) that justifies holding someone culpable for this offense is whether the person made reasonable efforts to appear in court.

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[8] *See* RCC § 22E-203. ("No person may be convicted of an offense unless the person voluntarily commits the conduct element required for that offense."

[9] RCC § 22E-203(b)(2).

[10] See Report No. 55, page 12, n. 11.

[11] *Foster*, 699 A.2d. at 1114. The *Foster* court found that, if the trial court credited Mr. Foster's testimony as to the events preceding his trip to Montreal in the days before his court hearing, then there would not be a factual underpinning for a conclusion that Mr. Foster's failure to appear for his trial was "deliberate and intentional, not inadvertent or accidental." *Id*. at 1115.

Even if the "voluntariness" standard is coextensive with the culpability question at the heart of the failure to appear offense, it is inarguable that "voluntariness" does more work in this offense than in most other offenses in the RCC. For that reason alone, it should be "elementized" specifically in this offense. Specifically, PDS recommends rewriting first-degree failure to appear in violation of a court order be rewritten to read as follows:

> A person commits first degree failure to appear in violation a court order when that person:
> (1) Knows they are required to appear before a judicial officer on a specified date and time by a court order for what is, in fact, a hearing:
> (A) In a case in which the person is charged with a felony; or
> (B) In which the person is scheduled to be sentenced; ~~and~~
> (2) Knowingly ~~fails~~ failed to make reasonable efforts to appear or remain for the hearing; and
> (3) In fact, the person did not appear or remain for the hearing.

Second-degree failure to appear should be rewritten similarly.

PDS further recommends that the commentary explaining failure to appear should be clear that it is adding an element that encompasses voluntariness because it is the heart of the offense and that doing so does not diminish the requirement that no person may be convicted of an offense unless the person voluntarily commits the conduct element required for that offense.

2. PDS makes the same recommendations for the rewriting of RCC §23-586 as it makes above for rewriting RCC § 23-1327.

3. PDS recommends eliminating the mandatory consecutive sentencing provisions from RCC § 23-1327, failure to appear in violation of a court order, and from RCC § 24-241.05A, violation of work release. The reasoning offered by the CCRC for eliminating all mandatory minimum sentences,[12] which proposal PDS enthusiastically supports, applies equally to this mandatory sentencing provision. It exacerbates, rather than solves, disproportionality. "Sentencing guidelines, rather than statutory mandates are a more appropriate way to guide judicial decision making…"[13] There is no reason to distrust that the judges will not take seriously and exercise carefully their discretion when sentencing for violations of these offenses, particularly when both offenses are in essence about a defendant's defiance of the court's authority to issue and enforce orders.

4. PDS recommends rewriting subsection (d) of RCC § 23-1329A, Criminal contempt for violation of a release condition. First, PDS recommends eliminating the language that would require that the proceeding to determine a violation of this statute be "expedited." PDS recognizes that the

[12] *See* First Draft of Report No. 52, Cumulative Update to the Revised Criminal Code Chapter 6, March 20, 2020, at pages 6-7.

[13] *Id*. at page 6.

statute for the current offense requires that the proceedings be expedited.[14] The CCRC does not cite any legislative history, case law, or court rules to explain what would constitute an "expedited" hearing versus one that is not "expedited." Judges control their calendars and the scheduling of proceedings. This offense is at heart about the court enforcing its own orders. A judge who wishes to initiate a proceeding for contempt under this section or is merely scheduling a proceeding initiated by a prosecutor, may schedule it as soon as their calendar, and the defendant's constitutional rights[15] permit without needing a statutory requirement to do so. On the other hand, if the judge is not in a rush to schedule the proceedings, this offense is not inherently more urgent than any other criminal offense and should not dictate how judicial resources are expended. Second, the subsection should simply provide that the proceedings shall be heard by the court without a jury. It is widely understood that bench trials are by a "single judge" and that the verdict is a conviction generally the same as a verdict in a jury trial. That said, a bench trial is decidedly not the same as a jury trial. To the extent any law distinguishes between a verdict delivered by a single judge and one delivered by a jury, this language proposed by the RCC should not be allowed to erase the stark differences between the two types of proceedings. In sum, subsection (d) should be rewritten as follows:

> (d) ~~Expedited non-jury~~ Non-jury hearing. A proceeding determining a violation of this section shall be ~~expedited. The proceeding shall be by a single judge, whose verdict shall have the same force and effect as that of~~ heard by the court without a jury.

5. PDS reiterates its position[16] that the violation of a release condition should be punished as contempt pursuant to RCC § 23-1329A, even when the violation is the commission of a new offense. If a person is found guilty of committing a new offense, they should be punished for that offensive conduct and not additionally for their "status" of having been released in another matter pursuant to D.C. Code § 23-1321. If the CCRC decides to retain an enhancement for having committed an offense while on release, then the penalty should be significantly lower than what was proposed in Report No. 52.

First Draft of Report No. 57, Second Look

1. CCRC's Second Look Provision, D.C. Code § 24-403.03 (a)(3)(A) provides that "any proceeding under this section may occur by video teleconferencing and the requirement of a defendant's presence is satisfied by participation in video teleconferencing." PDS recommends that the CCRC both expand and limit this provision. Some BOP facilities do not have the

[14] *See* D.C. Code § 23-1329(c). ("Such contempt proceedings shall be expedited and heard by the court without a jury.")

[15] Whatever "expedited hearing" currently means, it cannot mean a hearing so rushed that it deprives the defendant of their constitutional rights, such as the right to present a defense, which might take time to investigate, and the right to have compulsory process to obtain witnesses.

[16] *See* PDS Comments First Draft of Report No. 52, Cumulative Update to RCC Chapter 6 Offense Classes, Penalties, & Enhancements, dated May 15, 2020.

capacity for video conferencing or may raise objections to video conferencing because it may occur over non-secure lines. Remote participation should include participation by phone. However, non-physical appearance should only occur with the defendant's consent.

PDS recommends the following language:

> With the consent of the defendant, ~~A~~a<u></u>ny proceeding under this section may occur by video teleconferencing or by phone and the requirement of a defendant's presence ~~is~~ <u>shall be</u> satisfied. ~~by participation in video teleconferencing.~~

2. With respect to modifications to D.C. Code § 24-403.03, PDS also recommends modifying the requirement at (b)(3)(B) that a "defendant brought back to the District for any hearing conducted under this section shall be held in the Correctional Treatment Facility." Rather than mandating detention and a particular placement, PDS recommends the following language: "<u>A defendant brought back to the District under this section, if detained, shall be placed in a manner that maximizes programming and educational supports."</u>

<u>First Draft of Report No. 59, Endangerment with a Firearm</u>

PDS recommends that the statute and commentary make clear that this offense merges with any completed offense or inchoate offense, such as attempt, where part of the government's proof is evidence of the discharge of a firearm. For example, the endangerment with a firearm offense should merge with any homicide or assault or a robbery offense where the death or injury was caused by a projectile from a firearm. Similarly, the endangerment with a firearm offense should merge with any offense, such as menacing, first degree sexual assault, or a human trafficking offense, where the menacing or coercive threat involved the discharge of a firearm. While presumably, these offenses would merge pursuant to the general merger provision at RCC § 22E-214, PDS wants it made clear that this offense, with no precedent in the current criminal code, merges with other offenses as explained above. The endangerment with a firearm offense overlaps with many other criminal offenses. A primary mandate of the CCRC is to create a reform criminal code that reduces such overlap. Failing to address explicitly the overlap/merger issues created by this new offense would threaten to undo much, if not most, of the work the CCRC has done to reduce overlap amongst and between weapons offenses and offenses against persons.

Memorandum

Michael R. Sherwin
Acting United States Attorney
District of Columbia

Subject: Comments to D.C. Criminal Code Reform Commission for First Draft of Reports #53–59, Second Draft of Reports #19, 27, and 35, and Third Draft of Report #41	Date: June 19, 2020
To: Richard Schmechel, Executive Director, D.C. Criminal Code Reform Commission	From: U.S. Attorney's Office for the District of Columbia

The U.S. Attorney's Office for the District of Columbia (USAO) and other members of the Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the CCRC's First Draft of Reports #53–59, the CCRC's Second Draft of Reports #19, 27, and 35, and the CCRC's Third Draft of Report #41. USAO reviewed these documents and makes the recommendations noted below.[1]

First Draft of Report #54—Prostitution

1. USAO recommends modifying the expungement provisions to allow prosecutors to have access to these records.

In RCC § 22E-4401(c) (Prostitution) and RCC § 22E-4402(b) (Patronizing Prostitution), the CCRC makes proposals regarding expungement of records in certain circumstances. In its April 29, 2020 comments on the First Draft of Report #50 (at 18–19), OAG made recommendations regarding an identical proposal in RCC § 48-004.01a (Possession of a Controlled Substance). USAO agrees with OAG's comments that prosecutors and law enforcement need to have access to these nonpublic records. The same rationale applies to Possession of a Controlled Substance, and to Prostitution and Patronizing Prostitution. USAO recommends that, in lieu of expungement, the CCRC create a sealing provision for these offenses. Sealing would accomplish many of the goals of this provision, including lack of public access to these records. Expungement would have adverse impacts that are not immediately apparent. This would include an impact on USAO's ability to locate and disclose relevant *Brady* material. Sealing would help alleviate those *Brady* concerns. Closed files, including those that do not result in a conviction, sometimes contain *Brady* information, and USAO obtains that information from closed files. If those files were expunged, the government would not be able to access that material either for its own investigatory purposes or to disclose to defense. This would be a significant detriment to the defense at trial, and would preclude the government from carrying out its obligations regarding exculpatory information. Exculpatory material can be

[1] This review was conducted under the understanding that the structure of the code reform process allows the members of the CCRC Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

present even in these relatively low-level misdemeanor offenses. For example, if a case was originally investigated as a felony offense, a witness may have testified in the grand jury and perjured himself or herself. If a case went to trial as a misdemeanor offense, a witness may have perjured himself or herself at trial, or, regardless of whether it went to trial, a witness may have made inconsistent statements to police or prosecutors that could be exculpatory. The government must be able to access those prior statements to assess a witness's credibility and to make disclosures to defense. Finally, a requirement that USAO or federal law enforcement agencies expunge records may violate the Home Rule Act, as the DC Council cannot alter the authority or duties of a federal agency.

First Draft of Report #55—Failure to Appear and Violation of Conditions of Release Offenses

1. USAO recommends amending the Commentary to RCC § 23-1329A—Criminal Contempt for Violation of a Release Condition.

In the Commentary to this offense, a footnote provides: "Disobedience of these and other court orders are also punished under D.C. Code §§ 11-741 and 11-944. *See Caldwell v. U.S.*, 595 A.2d 961, 965–66 (D.C. 1991). The statute does not apply to a person who is detained. *That is, a person cannot be subject to pretrial or presentencing conditions if they are detained in the same case. For example, no statutory or other authority exists under District law for a judicial officer to order a defendant held at D.C. Jail and order that the defendant have no contact with a witness.*" (First Draft of Report #55 at 18 n.4 (italics added).) USAO recommends that the CCRC remove the italicized sentences from the Commentary. Although the CCRC appropriately notes that *this* offense is limited to violations of conditions where the defendant is not detained, it is not accurate to state that there is *no* authority under District law for a judicial officer to order a defendant held at D.C. Jail and order that the defendant have no contact with a witness. A judge may issue an order other than one listed in D.C. Code § 23-1321, and, as the footnote discusses earlier, a court can punish violations of other court orders under the general contempt provisions of D.C. Code §§ 11-741 and 11-944. D.C. Code § 23-1330 further provides: "Nothing in this subchapter shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt."

First Draft of Report #57—Second Look

1. USAO recommends that the CCRC not adopt this provision.

As this proposal would significantly expand second look review from current law, this proposal would affect many cases. Many victims and their families would be affected. Victims are not a monolith voice, and may have vastly differing views on what they want to see happen in a case in which they or a family member were victimized. Many victims, however, are opposed to a defendant's early release, or may require support services beyond those currently available that would enable them to navigate this second look process and/or a defendant's early release. Further, given the gravity of the relief sought in these motions—that is, the early release of a defendant who committed what is likely to have been a serious, violent offense—USAO is concerned about whether USAO and Superior Court will have sufficient resources available to

thoroughly address and litigate these important motions. Finally, USAO is concerned about limited support systems available to defendants who are released early and who transition back to the community following release that would enable them to succeed.

USAO also has concerns regarding the statutory factors that a court must consider, including the fact that the "nature of the offense" is not an expressly enumerated factor for a court to consider. Given that the CCRC, however, notes that its recommendation is based on current law (Commentary at 2 n.1), USAO will address these factors more fully at the appropriate time.

Second Draft of Report #35—Cumulative Update to Sections 201–213 of the Revised Criminal Code

1. USAO recommends removing subsection (c)(2) from RCC § 22E-204.

In an earlier report, the CCRC proposed that this subsection provide that a person's conduct is the legal cause of a result if the result is "not too dependent upon another's volitional conduct, to have a just bearing on the person's liability." In its May 20, 2019 comments on this section, USAO recommended deleting this quoted language. The CCRC modified its proposal, and subsection (c)(2) now provides: "When the result depends on another person's volitional conduct, the actor is justly held responsible for the result."

Determining whether one is "justly" held responsible remains vague, and suffers from many of the same concerns previously articulated by USAO in response to the earlier draft. The Commentary notes this difficulty in precision, stating: "There is no precise formula for determining the point at which intervening influences become so great as to break the causal chain between a defendant's conduct and the prohibited result." (Second Draft of Report #35 at 20.)

The interpretive factors suggested in the Commentary explaining this provision do not resolve this vagueness. For example, the Commentary discusses the "inherent wrongfulness of the conduct." (Second Draft of Report #35 at 20.) This language, however, does not clarify the standard, and introduces additional layers of imprecision, both as to (1) how to measure the "inherent wrongfulness" of particular conduct, and (2) how "inherently wrongful" conduct must be in order to support legal causation. Further, the wrongfulness of the conduct is not related to causation. The Commentary also discusses the "desire to cause the prohibited result." (*Id.*) Likewise, this language is not related to causation, but instead pertains to the defendant's *mens rea*. It also runs counter to the principle behind causation based on reasonable foreseeability, which arises almost exclusively in situations where the defendant did *not* intend the result, but is nonetheless responsible for having caused it because it was reasonably foreseeable.

We agreed that the third factor discussed in the Commentary, the passage of time, may be an attenuating factor. USAO took this position in *Fleming v. United States*, 224 A.3d 213, 224 (D.C. 2020) (*en banc*) ("Although the United States in this case initially appeared to argue that reasonable foreseeability by itself sufficed to establish proximate cause in the [urban gun battle] context, the United States acknowledged at oral argument that concepts of temporal attenuation

are also relevant. For example, the United States took the position that a person who started a deadly feud between two groups might not properly be held criminally responsible for reasonably foreseeable killings that took place years or even a day after the person's initial conduct."). Given that attenuation principles are already well-established in the case law analyzing reasonable foreseeability, and would probably be used to interpret when to "justly" hold someone responsible, it would be clearer to refer directly to "attenuation" rather than using "justly" as an undefined but roughly equivalent term.

We believe that attenuation principles are properly encompassed within the "reasonable foreseeability" analysis, without the need for a separate provision; and to avoid ambiguity, this could be set out expressly in the Commentary. But if the CCRC disagrees with USAO's recommendation to delete subsection (c)(2) in its entirety, USAO recommends that subsection (c)(2) be modified as follows:

> "When the result depends on another person's volitional conduct, ~~the actor is justly held responsible for~~ the result is not attenuated by that conduct, or by the passage of time."

Third Draft of Report #41—Ordinal Ranking of Maximum Penalties

1. USAO recommends increasing the penalty for RCC § 22E-4120—Endangerment with a Firearm.

We agree with the statements in the Commentary that "[t]he current D.C. Code provides significant liability for possessing or carrying a weapon illegally, irresponsibly, or during a crime but very little additional liability for firing a gun," and that public shootings that are not otherwise part of a crime against property or persons are "distinctly terrifying." (First Draft of Report #59 at 3.) The CCRC has proposed that Endangerment with a Firearm be a Class 9 felony, with a maximum of 3 years' incarceration. USAO recommends that the maximum penalty be increased to account for the significant danger created by discharging a firearm. Even where the defendant does not intend to hit someone, discharging a firearm in a manner that either creates a substantial risk of death or bodily injury to another person, or that is in a location that is open to the general public, etc. at the time of the offense is serious conduct that merits a higher maximum penalty.

2. USAO recommends increasing the penalties for RCC § 23-586—Failure to Appear after Release on Citation or Bench Warrant Bond, and RCC § 23-1327—Failure to Appear in Violation of a Court Order.

The CCRC has proposed that 1st Degree Failure to Appear after Release on Citation or Bench Warrant Bond be a Class B misdemeanor, punishable by a maximum of 180 days' incarceration, and that 2nd Degree Failure to Appear after Release on Citation or Bench Warrant Bond be a Class D misdemeanor, punishable by a maximum of 30 days' incarceration. Under current law, the corollary to 1st degree is a felony punishable by a maximum of 5 years' incarceration, and the corollary to 2nd degree is a misdemeanor punishable by not more than the maximum provided for the offense for which such citation was issued. *See* D.C. Code § 23-585(b). The CCRC has proposed that 1st Degree Failure to Appear in Violation of a Court Order

be a Class A misdemeanor, punishable by a maximum of 1 year incarceration, and that 2nd Degree Failure to Appear in Violation of a Court Order be a Class C misdemeanor, punishable by a maximum of 90 days' incarceration. Under current law, the corollary to 1st degree is a felony punishable by a maximum of 5 years' incarceration, and the corollary to 2nd degree is a misdemeanor punishable by a maximum of 180 days' incarceration. *See* D.C. Code § 23-1327(a).

For both offenses, the maximum penalty needs to be sufficiently high to incentivize the defendant's appearance. If it is too low, a defendant may make a calculation that it is better not to appear and not have to face the consequences of the underlying criminal charge. Of course, a defendant is still accountable for the underlying criminal charge if they fail to appear, but, in certain circumstances, it becomes more difficult for the government to proceed after a defendant has failed to appear. This is particularly true when the defendant has failed to appear for a lengthy time, which may impede the government's ability to locate essential witnesses, and may lead to witnesses' memories fading.