MEMORANDUM

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:	September 11, 2018
Re:	Comments on First Draft of Report No. 25, Merger

PDS has the following comments about the RCC principle of merger.

1. PDS recommends that merger, RCC § 22A-212 be restructured as a rule instead of a presumption. Presumptions are often difficult to apply and require either additional drafting language or appellate interpretation.[1] As currently framed, RCC § 22A-212, establishes rules for merger and an exception when the legislature clearly manifests the intent to allow multiple convictions. However, the use of a presumption for those rules makes them much more difficult to apply. In order to provide clarity for defendants, practitioners, and judges, and to avoid the need for appellate litigation of basic principles, the RCC should reframe the merger provision as a rule.

2. RCC § 22A-212(d)(1) establishes a rule of priority that when two offenses merge, the offense that remains shall be "the most serious offense among the offenses in question." Although footnote 27 to the Commentary explains what the most serious offense "will typically be," the phrase is still open to interpretation and argument by the parties in individual cases. Rather than leaving the matter of which offense is most serious to the parties to dispute, PDS recommends that for the purposes of clarity and certainty, the RCC define "most serious offense" as the offense with the highest statutory maximum. Further, the definition should be included in the statute, not relegated to the Commentary.

[1] *See, e.g.*, D.C. Code § 23-1322 (detention prior to trial); *Blackson v. United States*, 897 A.2d 187, 196 (D.C. 2006); *Pope v. United States*, 739 A.2d 819, 826 (D.C. 1999).

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: September 14, 2018

SUBJECT: First Draft of Report #25, Merger

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 #25 - Merger.[1]

COMMENTS ON THE DRAFT REPORT

§ 22A-212. Merger of Related Offenses.

Section 22A-212 makes changes to District merger law as it has evolved under case law. On page 10 of the Commentary it states, "Subsections (a)-(d) of RCC § 212 replace this judicially developed approach with a comprehensive set of substantive merger policies. Many of these policies are based on current District law, and, therefore, are primarily intended to clarify the mechanics of merger analysis for the purpose of enhancing the consistency and efficiency of District law. However, a few of these policies broaden the District's current approach to merger for purposes of enhancing the proportionality of the D.C. Code."

Acknowledging that the current scope of the RCC does not include a redrafting of every District Code offence, the question not specifically addressed by the merger provision or its Commentary

[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.

is how this provision should be applied to merger questions where a defendant has been found guilty of both an RCC offense and another criminal offense that has not yet been redrafted.

While it is clear that RCC § 22A-103's provision that "Unless otherwise provided by law, a provision in this title applies to this title alone." would clearly mean that the RCC's merger provision would not apply in situations where the court is examining whether two non-RCC offenses merge, the text of 22A-103's would also seem to apply to situations where the court is considering whether a mixed RCC and non-RCC offense merge. To avoid litigation on this point, the Commission should clarify its position on this issue in a subsequent Report.

RCC § 22A-212 (a) states that there is a presumption for merger in a number of circumstances. One of these is where "(3) One offense requires a finding of fact inconsistent with the requirements for commission of the other offense…" In the Commentary, on page 6, it states, "This principle applies when the facts required to prove offenses arising from the same course of conduct are "inconsistent with each other as a matter of law."[2] OAG believes that this clarification is too central to the analysis to be left in the Commentary and that it should be moved to the text of the merger provision. It should state, "(3) One offense requires a finding of fact inconsistent with the requirements for commission of the other offense as a matter of law."

Paragraph (d) establishes a rule of priority based upon the relative seriousness of the offenses as to which offense should remain when offenses merge. In the Commentary, on page 9, the Report says, "where, among any group of merging offenses, one offense is more serious than the others, the conviction for that more serious offense is the one that should remain." The term "serious", however, is not defined in the text. Footnote 27 offers something that can be used as definition.[3] We recommend incorporating the language of this footnote into the text of the merger provision.

OAG agrees with intent of paragraph (e), final judgment of liability, that no person should be subject to a conviction until after "[t]he time for appeal has expired; or … [t]he judgment appealed from has been affirmed."[4] [emphasis added] We make one technical suggestion. As the Court of Appeals may affirm, affirm in part, or remand, we suggest that paragraph (e)(2) be amended to say, "The judgment appealed from has been decided."

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[2] The Commentary cites to *McClain v. United States*, 871 A.2d 1185, 1192 (D.C. 2005) (citing *Fuller v. United States*, 407 F.2d 1199, 1223 (1967) (en banc)) for this proposition.

[3] Footnote 27 states, "The most serious offense will typically be the offense that is subject to the highest offense classification; however, if two or more offenses are both subject to the same classification, but one offense is subject to a higher statutory maximum, then that higher penalized offense is "most serious" for purposes of subsection (d)."

[4] This provision states:

> FINAL JUDGMENT OF LIABILITY. A person may be found guilty of two or more offenses that merge under this section; however, no person may be subject to a conviction for more than one of those offenses after:
>
> (1) The time for appeal has expired; or
>
> (2) The judgment appealed from has been affirmed.