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: July 8, 2019

SUBJECT: First Draft of Report #36, Cumulative Update to RCC Chapters 3, 7 and the Special Part.[1]

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 #36 - Cumulative Update to RCC Chapters 3, 7 and the Special Part.[2]

COMMENTS ON THE DRAFT REPORT

RCC 22E-701. DEFINITIONS

RCC 22E-701 5[3] defines "Block." It states:

> "Block," and other parts of speech, including "blocks" and "blocking," mean render impassable without unreasonable hazard to any person.

[1] This Memorandum completes the review of the statutory language and commentary on Subtitle I (General Part) provisions in Chapters 4 and 7 of the report, and Subtitles II-V (Special Part). Comments on the statutory language and commentary on Subtitle I (General Part) provisions in RCC § 214 and Chapter 3 of the report was submitted on May 13, 2019.
[2] 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.
[3] While the definitions are "numbered" in Appendix A, they are not numbered in the pdf file that contains both the Report and the Commentaries. For ease of communication, this memo will use the numbering system from the Appendix.

The portion of the definition that refers to "render[ing] impassable without unreasonable hazard to any person" is confusing. Why is rendering a space impassable without unreasonable hazard "blocking" but rendering impassable *with* an unreasonable hazard is not? The Explanatory Note says, "similar language" to this definition "is used in the current crowding, obstructing, or incommoding statute." However, the cited provision does not include any language comparable to this definition.

RCC 22E-701 6 defines "Bodily injury." It states, "'Bodily injury' means physical pain, illness, or any impairment of physical condition." The Commentary says that "impairment of physical condition" is intended to "includ[e] cuts, scratches, bruises, and abrasions." If that's the intent, the language of the text needs to be expanded. By phrasing it as "Impairment of physical condition" the RCC is implying that something actually has to be impaired. OAG recommends that the definition be redrafted to read, "'Bodily injury' means physical pain, illness, scratch, bruise, abrasion, or any impairment of physical condition."

RCC 22E-701 25 defines "Dangerous Weapon." It states, in relevant part, "'Dangerous weapon' means …(C)A sword, razor, or a knife with a blade over 3 inches in length" …or… (F) Any object or substance, other than a body part, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury." While OAG believes that the phrase "with a blade over 3 inches in length" was only meant to modify the word "knife", as drafted, it could be argued that that phrase actually also modifies the words "sword" and "razor." To clarify what the phrase modifies, the definition could either be redrafted to say, "A sword or a razor or a knife with a blade over 3 inches in length" or it could say, "A knife with a blade over 3 inches in length or a sword or razor."

The Commentary, on page 205, says that, under this definition, "a person's integral body parts… categorically cannot constitute a dangerous weapon." The modifier "integral" is not in the statute. In addition, it is not clear what the addition of the word "integral" adds. OAG recommends that the word be removed from the Commentary.

RCC 22E-701 30 defines "District Official." It states, "'District official' has the same meaning as 'public official' in D.C. Code § 1-1161.01(47)."

D.C. Code § 1-1161.01(47)(I) and (J) includes within the definition of "public official"

> (I) A District of Columbia Excepted Service employee, except an employee of the Council, paid at a rate of Excepted Service 9 or above, or its equivalent, who makes decisions or participates substantially in areas of contracting, procurement, administration of grants or subsidies, developing policies, land use planning, inspecting, licensing, regulating, or auditing, or acts in areas of responsibility that may create a conflict of interest or appearance of a conflict of interest; and any additional employees designated by rule by the Board of Ethics and Government Accountability who make decisions or participate substantially in areas of

contracting, procurement, administration of grants or subsidies, developing policies, land use planning, inspecting, licensing, regulating, or auditing, or act in areas of responsibility that may create a conflict of interest or appearance of a conflict of interest; and

(J) An employee of the Council paid at a rate equal to or above the midpoint rate of pay for Excepted Service 9.

The definition of a "public official", therefore, is partially determined by a person's pay scale and by Board of Ethics and Government Accountability rules. While such determinations may be useful for determining who must file a public financial disclosure statement pursuant to D.C. Code § 1-1161.24(a), there is no reason why these people are deserving of more protection than other government employees.[4] OAG recommends that the definition be redrafted to state ""District official" has the same meaning as "public official" in D.C. Code § 1-1161.01(47) (A) through (H).

RCC 22E-701 39 defines a "Halfway house." It states, "'Halfway house' means any building or building grounds located in the District of Columbia used for the confinement of persons participating in a work release program." The Commentary, on page 221, says a "work release program is a program established under D.C. Code § 24-241.01." As one of the goals of the RCC is to make the criminal code more understandable to non-lawyers, the definition of "Halfway house" in the statute should include this cross-reference.

RCC 22E-701 63 defines "Physically following." It states, "'Physically following', means maintaining close proximity to a person as they move from one location to another." The phrase "close proximity" is not defined in the text. However, on page 235, in the Commentary it states, "The phrase "close proximity" refers to the area near enough for the accused to see or hear the complainant's activities and does not require that the defendant be near enough to reach the complainant." Given the importance of this definition, it should either be incorporated into the definition of "physically following" or it should be a standalone definition.

RCC 22E-701 70 defines "Protected person." It states, in relevant part "'Protected person' means a person who is Under 18 years of age when, in fact the actor is 18 years of age or older and at least 4 years older than the complainant." [emphasis added] The lead in language and the terms in the subparagraphs should use the same word so that it is clear that the provision is referring to the same person.

RCC 22E-701 84 defines a "Sexual Act." It states:

"Sexual act" means:

[4] In fact, it could be argued that having greater penalties for injuring OAG prosecutors is more appropriate than having greater penalties for injuring someone who is paid at a rate of Excepted Service 9 or above.

(A)Penetration, however slight, of the anus or vulva of any person by a penis;
(B) Contact between the mouth of any person and the penis of any person, the mouth of any person and the vulva of any person, or the mouth of any person and the anus of any person; or
(C) Penetration, however slight, of the anus or vulva of any person by a hand or finger or by any object, with the desire to abuse, humiliate, harass, degrade, sexually arouse, or sexually gratify any person.

The definition fails to identify other body parts that could be used to penetrate an anus or vulva for the purposes listed in subparagraph (C). For example, a toe or a nose. OAG recommends that subparagraph (C) be amended as follows:

> (C) Penetration, however slight, of the anus or vulva of any person by an actor's body part, including, a hand or finger, or by any object, with the desire to abuse, humiliate, harass, degrade, sexually arouse, or sexually gratify any person.

RCC 22E-701 87 defines "Significant emotional distress." It states:

> "Significant emotional distress" means substantial, ongoing mental suffering that may, but does not necessarily, require medical or other professional treatment or counseling. It must rise significantly above the level of uneasiness, nervousness, unhappiness or <u>the like</u> which is commonly experienced in day to day living. [emphasis added]

Though the second sentence is taken from a judicial opinion, the sentence should be redrafted to make it more understandable. The phrase "the like" is not clear, nor is it clear what "commonly experienced" means – or by whom. OAG suggests that the phrase "similar feeling" be substituted for the phrase "the like." OAG also suggests that the Commentary explain what is meant by "commonly experienced."[5]

RCC 22E-1101. MURDER

RCC 22E-1101(d)(3)(B) provides for an enhanced penalty "when a person commits first degree murder or second degree murder and the person … Commits the murder with the purpose of harming the decedent because of the decedent's status as a law enforcement officer, public safety employee, or District official." In the first full paragraph on page 7, talking about intent to "harm" someone because of his or her status under (d)(3)(B), the Commentary says harm "may include, but does not require[,] bodily injury," and that it "should be construed more broadly to include causing an array of adverse outcomes." If this is the intent, this clarification needs to be

[5] The word "is" at the beginning of the second sentence in the definition is a typo and should be deleted.

incorporated into the text, perhaps as a definition of the word "harm." The question that must be answered in the Commentary is, in addition to bodily injury, just what does "harm" encompass?[6]

RCC 22E-1202. ASSAULT

RCC 22E-1202(g) is entitled "Limitation on Justification and Excuse Defenses to Assault on a Law Enforcement Officer." The last of the three conditions is "(C) The law enforcement officer used only the amount of physical force that appeared reasonably necessary." OAG assumes that in the context of that sentence, what "appeared reasonably necessary" is how it appeared to the law enforcement officer. If the Commission meant something else, the language should be amended and further discussion would be warranted.

RCC 22E-1203. MENACING

RCC 22E-1203 (a)(1) and (b)(2) both contain as an element that the actor "knowingly communicates to a complainant who is physically present that the actor immediately will cause a criminal harm to any person involving a bodily injury, a sexual act, a sexual contact, or confinement. [emphasis added] Paragraph (c) states that "Nothing in this section shall be construed to prohibit conduct protected by the U.S. Constitution, the First Amendment Assemblies Act of 2004 codified at D.C. Code § 5-331.01 et seq., or the Open Meetings Act codified at D.C. Code § 2-575." It is hard to imagine a situation where the Constitution, the First Amendment Assemblies Act, or the Open Meetings Act would prohibit the prosecution of a person who knowingly threatened an individual that they would immediately injure, sexually assault them, or confine them. Paragraph (c) should either be stricken or the Commentary should provide specific examples of when a person making these types of threats would be protected by the Constitution or the listed laws such that the person would not be committing this offense. (e.g. When a threat to immediately rape someone would be protected speech.)[7]

RCC 22E-1203(a)(3) & (b)(2) both contain the element that "With intent that the communication be perceived as a serious expression that the actor would cause the harm." The partial paragraph at the bottom of page 95 of the Commentary says that, under the requirement that the defendant "make the communication 'with the intent that' it be perceived as a serious expression of an intent to do harm", it is "not necessary to prove that the communication was perceived as a serious expression of an intent to do harm." OAG agrees with this explanation. However, it is at odds with a statement found on page 94 of the Commentary. There it states that part of requiring "communication" of intent to cause harm is that the "communication be 'received and understood'" by the other person [emphasis added].[8] In fact, there is no requirement in this offense that the communication be understood, at least by the victim, as a serious expression of an intent to do harm. The Comment on page 94 should be changed.

[6] There are other provisions that also use the word "harm" or "harming." A general definition for that word would help with interpretation questions in those other provisions too. (e.g. An element in the kidnapping offense found at RCC § 22E-1401 (a)(2)(B)(ii)).
[7] The same issue exists in RCC 22-E-1206, Stalking.
[8] This same issue appears in the criminal threats offense, and the discussion on p. 107, second full paragraph, of the Commentary.

RCC 22E-1206. STALKING

RCC 22E-1206 (e) provides the penalties for the stalking offense. Subparagraph (e)(2)(A) provides a penalty enhancement for when "The person, in fact, was subject to a court order or condition of release prohibiting contact with the complainant." [emphasis added] There are many situations, however, where a person may be subject to a court order or condition of release that permits limited contact with the complainant under specified circumstances.[9] The reasons for having a penalty enhancement for stalking applies just as much in these circumstances as when all contact is prohibited. To account for these situations, OAG recommends that the provision be redrafted to say, "The person, in fact was subject to a court order or condition of release restricting or prohibiting contact with the complainant." [emphasis added]

Page 130 of the Commentary discusses RCC 22E-1206 (e), it states, "The term 'court order' includes any judicial directive, oral or written, that clearly restricts contact with the stalking victim." The word "clearly" does not appear in the text and the mental state for this is "in fact." Accordingly, the word "clearly" should be stricken from the Commentary.

RCC 22E-1206 (e)(2)(B) provides for an enhancement when "The person, in fact, has one prior conviction for stalking any person within the previous 10 years." The Commentary, on pages 130 to 131 explains that "Subparagraph (e)(2)(B) allows a sentence increase for any person who has a prior stalking conviction within ten years of the instant offense. This includes any criminal offense against the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, with elements that would necessarily prove the elements of a District criminal offense in subparagraph (a)(1)(C)." To clarify in the text that the prior stalking conviction could be in any jurisdiction, the provision should be redrafted to say, "Within the previous 10 years, the person, in fact, has one prior conviction for stalking any person, or committing a comparable offense."[10] The term "comparable offense" is defined in 22E-701 15. RCC 22E-1206 (e)(2)(D) provides for an enhancement when "The person caused more than $2,500 in financial injury." However, there is no mental state associated with this provision. RCC 22E-1206 (e)(2) (A) through (C), the other enhancement provisions, all have the mental state of "in fact." Paragraph (D) should be redrafted to include that mental state as well. It should read "The person, in fact, caused more than $2,500 in financial injury."

RCC 22E-1301. SEXUAL ASSAULT

RCC 22E-1301 (a)(2)(A) makes it a first degree sexual assault when the person causes the victim to engage or submit to a sexual act "By using physical force that overcomes, restrains, or causes bodily injury to the complainant." OAG is concerned that the term "overcomes" by itself may not be clear enough. OAG recommends that the term be replaced by the phrase "overcomes resistance."

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[9] For example, a person may be ordered released on a domestic violence charge and be ordered not to have contact with the victim, except for supervised contact when the person picks up his or her children from the victim.

[10] The Commission should incorporate the phrase "comparable offense" into any other sentencing enhancement that is based upon a prior conviction of a District offense.

RCC 22E-1301 (a)(2)(B) makes it a first degree sexual assault when the person causes the victim to engage or submit to a sexual act "By using a weapon against the complainant." While the phrase "Dangerous weapon is a defined term in the RCC, the term "weapon" is not. OAG recommends that the RCC adopt the following as the definition for "weapon", "A 'weapon' means an object that is designed to be used, actually used, or threatened to be used, in a manner likely to produce bodily injury."[11]

RCC 22E-1301 (c) provides the elements for third degree sexual assault. It includes causing a person to engage in a sexual contact "(B) By using a weapon against the complainant." There are times, however, when a victim may be coerced into having sexual contact with a person because of use of, or threatened use of, a weapon against a third party (e.g. the victim's child). Subparagraph (B) should be redrafted to account for that motivation.

RCC § 22E-1301 (g)(1) codifies a penalty enhancement for recklessly causing "the sexual conduct by displaying" a weapon. However, the phrase "sexual conduct" is not defined. The Commission should redraft this subparagraph by substituting the phrase "sexual act or sexual contact" for the phrase "sexual conduct."

RCC 22E-1302. SEXUAL ABUSE OF A MINOR

RCC 22E-1302 (g) provides a "Marriage or Domestic Partnership Defense." OAG recommends deleting the reference to domestic partnership in that affirmative defense. The substantive offenses found in RCC 22E-1302 (a),(b), and (c) require the minor to be under the age of 12, 16, and 18, respectively. RCC 22E-1302 (g) states that "It is an affirmative defense to prosecution under this section for conduct involving only the actor and the complainant that the actor and complainant were in a marriage or domestic partnership at the time of the offense. RCC E-701 32 states, "'Domestic partnership' has the same meaning specified in D.C. Code 32-701(4). D.C. Code 32-701(4) in turn refers the reader to D.C. Code §§ 32-702 and 32-702(i). D.C. Code §§ 32-702 (a) (1) requires that District domestic partners be "at least 18 years old…" D.C. Code §§ 32-702 (i) recognizes out of jurisdiction domestic partnerships "that are substantially similar to domestic partnerships" in the District. Therefore, the District only recognizes domestic partnerships where the parties are at least 18 years old. As the gravamen of the various gradations of sexual abuse of a minor is that the minor be under the age of 18, there is never a situation where a person will be able to use the domestic partnership defense.[12]

RCC 22E-1303. SEXUAL EXPLOITATION OF AN ADULT

[11] The same issue concerning the definition of a weapon appears in subparagraph (c)(2)(B) and the same solution should apply.

[12] The same analysis applies to RCC § 22E-1304 (b) which provides for a domestic partnership defense to the offense of sexually suggestive conduct with a minor.

The offense title is misleading. While it refers to the sexual exploitation of an adult an actor can commit this offense against a victim who is a minor. See RCC 22E-1303 (a)(2)(A)(ii) which includes situations where school personnel engage in sexual acts when "The complainant is under 20 years of age." Therefore, this offense applies when the victim is 15 years old as a 15 year old "is under 20 years of age." OAG recommends that the title be shortened to "SEXUAL EXPLOITATION."

RCC 22E-1303(a)(2)(C) makes it an offense when "The actor is, or purports to be a healthcare provider, a health professional, or a member of the clergy. While the Commentary, on page 192, is helpful when it states, "'Member of the clergy' is intended to be interpreted broadly, using the ordinary meaning of the term which refers to Christian and non-Christion religious officials", OAG believes that it would be better to have more specificity to avoid issues when a particular religion does not have an ordination process. OAG suggests that the term "clergy" be defined. It should say "'Clergy' means any priest, rabbi, or other duly licensed, ordained, or consecrated minister of a religion authorized to perform a marriage ceremony in the District of Columbia, and any duly accredited practitioner of Christian Science." This definition provides more guidance to non-lawyers who read the RCC and avoids debate about whether a particular religion's elder or deacon fit within the definition of "clergy."

RCC 22E-1304. SEXUALLY SUGGESTIVE CONDUCT WITH A MINOR

RCC § 22E-1304 (a) states:

> An actor commits sexually suggestive contact with a minor when that actor:
>
> (1) Knowingly:
> (A) Touches the complainant inside his or her clothing with intent to cause the sexual arousal or sexual gratification of any person;
> (B) Touches the complainant inside or outside his or her clothing close to the genitalia, anus, breast, or buttocks with intent to cause the sexual arousal or sexual gratification of any person;
> (C) Places the actor's tongue in the mouth of the complainant with intent to cause the sexual arousal or sexual gratification of any person; or
> (D) Touches the actor's genitalia or that of a third person in the sight of the complainant with intent that the complainant's presence cause the sexual arousal or sexual gratification of any person;

Because there may be legitimate reasons for a person, whether alone or in sight of others, to touch a minor inside his or her clothing or touch the minor's genitalia, anus, breast, or buttocks, OAG agrees that subparagraphs (A),(B), and (D) should include the requirement that the actor touched the minor to cause the sexual arousal or sexual gratification of any person."[13] However, it is less

[13] OAG agrees that by adding the phrase "with intent that the complainant's presence cause the sexual arousal or sexual gratification of any person" it is clear that RCC § 22E-1304 does not apply to pediatricians and others who must perform examinations or otherwise touch a minor.

apparent when a person would have a legitimate reason place their tongue in a minor's mouth. Therefore, either the phrase, "with intent to cause the sexual arousal or sexual gratification of any person" should be stricken from RCC § 22E-1304 (a)(1)(C) or the Commentary should give examples of legitimate reasons why a person would put their tongue in a minor's mouth.

RCC 22E-1305. ENTICING A MINOR

RCC 22E-1305 (a)(2)(C)(iii) states that "In fact, the actor is at least 4 years older than the purported age of the complainant." By using the phrase "purported age" it appears that the minor must actually state his or her age (whether it is their actual age or not). Either the text or the Commentary should address what happens when a minor does not purport to be any specific age, but instead indirectly refers to their age range – and it is clear that they fall within the scope of this provision. For example, when a minor refers to their elementary or middle school they are not purporting to be any specific age, but, from that comment, the actor will know that the minor is a person who is under 16 years of age.

RCC 22E-1306. ARRANGING FOR SEXUAL CONDUCT WITH A MINOR

The statutory language in RCC 22E-1306 is confusing as currently numbered. Subsection (a) lists the elements for "arranging for sexual conduct with a minor," and it numbers those elements (1),(2), and (3). This would make sense if it required the satisfaction of all 3 paragraphs or if satisfying any of them was sufficient. However, we do not believe that that was the drafter's intent. It appears from the text that the drafters meant that one must satisfy (1), the "knowingly arranging" part and then satisfy either (2), a real 4-year age gap, or (3), pertaining to law enforcement. To reflect that intent, (a) needs to be rearranged. Subparagraph (1) should, like now, be the "knowingly arranging" part, but the other two subparagraphs should be grouped together under a new subparagraph (2).

RCC 22E-1306(a)(3) states:

> The actor and any third person, in fact, are at least 18 years of age and at least 4 years older than the purported age of the complainant; and the complainant:
>
> (A) In fact, is a law enforcement officer who purports to be a person under 16 years of age; and
> (B) The actor was reckless as to the fact that the complainant purports to be a person under 16 years of age.

As drafted, it would not be an offense for a 17 year-old to arrange for a 12 year-old have sex with a 30 year-old. This provision could encourage juveniles to run prostitution rings for adults as the youth would not be committing an offense. This is true despite the fact that the harm to the 12 year old is the same whether the arrangement for them to have sex with a 30 year-old was made by a person who is 17 years of age or 18 years of age or older. To fix this problem, OAG recommends that the introductory language in (a)(3) be amended to say, "The actor or any third person, in fact, are at least 18 years of age and at least 4 years older than the purported age of the complainant."

RCC 22E-1310. CIVIL INFRACTION FOR FAILURE TO REPORT A SEX CRIME INVOLVING A PERSON UNDER 16 YEARS OF AGE[14]

RCC 22E-1310 (a) states, "a person commits the civil infraction of failure to report a sex crime involving a person under 16 years of age when that person…(1) knows that he or she has a duty to report a predicate crime involving a person under 16 years of age pursuant to RCC 22 E-1309…" In the Commentary, on page 249, it states, "'Knows' is a defined term in RCC § 22E-206 that here means the person must be practically certain that he or she has a duty to report as required by RCC § 22E-1309(a)." As RCC 22E-1309 requires every person 18 years of age or older to report, it is unclear what more than the person's knowledge of their own age is required by subparagraph (1). The Commentary should address this issue.

RCC § 22E-1401. KIDNAPPING[15]

RCC § 22E-1401(a) describes the offense of aggravated kidnapping. One alternative element of the offense occurs when, the actor confines the complainant without the complainant's effective consent and the actor does so "(3) with intent to…(F) Cause any person to believe that the complainant will not be released without suffering significant bodily injury, or a sex offense …" On page 259 of the Commentary it states:

> Subparagraph (a)(3)(F) specifies that kidnapping includes acting "with intent to" cause any person to believe that the complainant will not be released without suffering significant bodily injury or a sex offense as defined in Chapter 13 of Title 22E. This element may be satisfied if any person believes the complainant will not be released at all, or will only be released after having suffered significant physical injury or being subjected to a sex offense. This element does not require that the actor actually intends to inflict significant bodily injury or to commit a sex offense.

The Commentary, above, says that the element found in (a)(3)(F) "may be satisfied if any person believes the complainant will not be released at all, or will only be released after having suffered significant physical injury or being subjected to a sex offense." If this is just meant to say the actor need not have actually intended to inflict bodily injury or commit a sex offense, this statement is accurate. But if it's meant to say it is enough for someone to believe the complainant would not be released without injury or offense, whether or not the actor intended anyone to believe that, it's not correct statement of that element. The Commentary should clarify that point.

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[14] It is unclear why the drafters put the obligation to report in RCC 22E-1309 and the infraction in RCC 22E-1310. There is no reason why these two provisions cannot appear in the same RCC section.

[15] The offense of kidnapping appears on both page 63 of the CCRC Compilation of Draft Statutes for the Revised Criminal Code (RCC) (4-15-19) and on page App. A 59. The two versions vary. For purposes of this memo, OAG is reviewing the version found on page 63.

Paragraph (c) contains the "Exclusions to Liability for Close Relatives With Intent to Assume Responsibility for Minor." It states:

> A person does not commit aggravated kidnapping or kidnapping under subparagraphs (a)(3)(G) or (b)(3)(G), when the person is a close relative of the complainant, acted with intent to assume full responsibility for the care and supervision of the complainant, and did not cause bodily injury or threaten to cause bodily injury to the complainant.

The phrase "bodily injury" appears broad enough to include corporal punishment. The Commentary should make clear whether that is the intent of that element.

RCC § 22E-1501. CRIMINAL ABUSE OF A MINOR

Footnote 26 on page 296 of the Commentary says that "If an accused reasonably believed that the complaining witness was not a minor, the accused would not satisfy the culpable mental state of recklessness as to the age of the complaining witness because the accused would not consciously disregard a substantial risk that the complainant was under 18 years of age." The Commentary is thus equating "reasonableness" with "disregarding a substantial risk." OAG is not sure if that is a correct analysis of the proposed element. A reasonable belief the person was not under 18 does not necessarily negate recklessness – not if the person believes the other person is a minor, but also knows of (and disregards) a significant risk that that it is not true.

RCC § 22E-1601. FORCED LABOR OR SERVICES

Paragraph (d) of RCC § 22E-1601 contains the cross-references for definitions. It states, "The terms… 'debt bondage' 'labor,' and 'services,' have the meanings specified in RCC § 22E-701." While the term "services" is a defined term in RCC § 22E-701, neither "debt bondage" nor "labor" are. OAG agrees that both should be defined there[16].

Paragraph (e) establishes "Exclusions from Liability." It states, "An actor shall not be subject to prosecution under this section for threats of ordinary and legal employment actions, such as threats of termination, demotion, reduced pay or benefits, or scheduling changes, in order to compel an employee to provide labor or services." [emphasis added] It is unclear, however, why the provision contains the word "ordinary." It makes sense that an actor should not be committing an offense when he or she makes threats to take legal employment actions – even when those legal employment actions are not "ordinary." OAG recommends striking the word.

RCC § 22E-1606. Benefiting from Human Trafficking.

RCC § 22E-1606(a) lists the elements for first degree offense of benefiting from human trafficking. They are:

[16] Likewise, paragraph (d) of RCC § 22E-1602, Forced Commercial Sex, and paragraph (d) of RCC § 22E-1604, Trafficking in Commercial Sex, reference RCC § 22E-701 for the definitions of "commercial sex act" and/or "debt bondage."

> (a) First Degree. An actor commits first degree benefiting from human trafficking when that actor:
> (1) Knowingly obtains any financial benefit or property;
> (2) By participation in a group of two or more persons;
> (3) Reckless as to the fact that the group has engaged in conduct that, in fact: constitutes forced commercial sex …, trafficking in commercial sex …, or sex trafficking of minors...

The last paragraph on page 364, going into page 365, of the Commentary says that the accused's participation in the group that is doing human trafficking "must be in some way be related to the conduct that constitutes forced commercial sex, trafficking in commercial sex, or sex trafficking of minors." OAG agrees with that statement as a policy matter. However, we do not believe that that statement is an accurate statement of the text of the provision quoted above. The text merely says the person must knowingly obtain a financial benefit or property by participating in a group and be reckless as to the fact that the group has engaged in various human trafficking offenses. Taking the hypothetical in footnote 5 on page 365 of the Commentary, suppose A takes part in a bowling team, and the team (without his participation but with his knowledge or at least knowledge of a substantial risk) engages in some of the trafficking conduct described. Then, A is liable under the text of this offense as long as he financially benefited from participation in the team, even if his participation in the group had nothing to do with the team's trafficking activities.

RCC § 22E-1607. MISUSE OF DOCUMENTS IN FURTHERANCE OF HUMAN TRAFFICKING

RCC § 22E-1607(a)(2) states that the actor must act "With intent to restrict the person's liberty to move or travel in order to maintain the labor, services, or performance of a commercial sex act by that person." [emphasis added]. OAG agrees with the Commentary, on page 366 that:

> Paragraph (a)(2) specifies that misuse of documents requires that the accused acted "with intent to" restrict the person's liberty to move or travel in order to maintain the labor, services, or performance of a commercial sex acts by that person. "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that he or she would restrict the person's liberty to move or travel. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor actually succeeded in restricting the person's liberty to move or travel, only that he or she believed to a practical certainty that he or she would.

However, paragraph (a)(2) also requires that the person have acted "in order to" maintain "labor, services, or performance of a commercial sex act." The Commentary should clarify that the phrase "in order to" also does not introduce a new mental state. Such an addition may avoid needless litigation on whether a new mental state has been introduced.

RCC § 22E-1612. LIMITATION ON LIABILITIES AND SENTENCING FOR RCC CHAPTER 16 OFFENSES

RCC § 22E-1612 bars a person from being charged as an accomplice or as a conspirator if, prior to commission of the offense, the person was himself or herself a victim of an offense under the human trafficking chapter by the principal or a party to the conspiracy. As noted in the Commentary, on page 379, under current law there are no such restrictions. While OAG agrees that victims of trafficking may be vulnerable to further manipulation by the principal while they are still being trafficked, the text of this provision creates a lifetime exemption to being charged as an accomplice or conspirator involving a principal for whom they were once trafficked. OAG suggests that the bar be redrafted such that it is limited to situations that occur while that person is being trafficked.

RCC § 22E-2002. DEFINITION OF "PERSON" FOR PROPERTY OFFENSES

RCC § 22E-2002 states, "Notwithstanding the definition of "person" in D.C. Code § 45-604, in Subtitle III of this Title, "person" means an individual, whether living or dead, as well as a trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government, government agency, or government-owned corporation, or any other legal entity." While OAG has no comments concerning the text of the definition, we are concerned about its placement in subtitle III. First, people who are unfamiliar with the RCC will look to RCC § 22E-701 if they have a question about how the term "person" is defined for property offenses, rather than to the beginning of subtitle III. Afterall, neither Subtitle II nor IV have a definition as its first statute. Second, if people are interpreting offenses that occur in those subtitles, they will need to know that they should be looking to D.C. Code § 45-604 for the definition of a "person." Finally, by placing the definition in RCC § 22E-701 the definitions paragraph that is associated with each substantive offense can refer the reader to RCC § 22E-701 for the definition of "person" along with the other applicable definitions.[17]

RCC § 22E-2101. THEFT

Second Degree theft has as one of its elements that, "In fact: (A) The property has a value of $25,000 or more; or (B) The property is a motor vehicle, and has a value of $25,000 or more." If the value of the automobile is not $25,000 then the offense is third degree theft. To prove third degree theft, all the government must prove is that the property was, in fact, a motor vehicle. See RCC § 22E-2101 (c). The problem is that there is too wide a gap between a vehicle that is worth $25,000 and vehicle that has almost no value.[18] Because people need cars to get to work, for emergencies, for food shopping, and for other necessities (as well as for pleasure), the value of a car to a theft victim is worth more than its fair market value. In fact, the harm to the victim is amplified if the car is not insured for theft or if the victim cannot document that they kept their vehicle in better condition than what the "fair market" value of the car appears to be.

[17] By making the third point, OAG is not waiving the objections that it has previously made to having a definitions paragraph in each substantive offense.

[18] The definition of "value" applicable to a motor vehicle is "[t]he fair market value of the property at the time of the offense. See RCC § 22E-701 93.

Considering the impact of the loss on the victim, a loss of an automobile that is valued at $15,000 may be worth more to a victim than the loss of other property that is valued at $25,000. Therefore, OAG recommends that Second Degree theft be redrafted so that it states, "In fact: (A) The property has a value of $25,000 or more; or (B) The property is a motor vehicle, and has a value of $15,000 or more, but less than $25,000." [19]

RCC § 22E-2104. SHOPLIFTING

RCC § 22E-2104 (a)(1)(A) states that a person commits shoplifting when that person knowingly, "conceals or holds or carries on one's person" property offered for sale. [emphasis added] OAG has two observations about the way that that sentence is drafted. First, it is unclear if the modifier "on one's person" was meant to only modify the word "carries" or if it was meant to modify the words "conceals" and "holds" as well. Either way, it is unclear why that phrase is necessary. Take the following example, a person rolls a baby carriage into a store, takes merchandise off of a shelf, places it in the baby carriage, and wheels the carriage outside of the store with the intent to steal the merchandise. In this example, though that person did not conceal the merchandise on their person, hold it on their person, or carry it on their person, they certainly shoplifted the property. OAG, therefore, recommends that the phrase "on one's person" be struck from subparagraph (a)(1)(A). In the alternative, OAG suggests that the order of (a)(1)(A) be reversed so that it would read "carries on one's person, conceals, or holds" property offered for sale. By moving the last phrase, it would clarify that the phrase "on one's person" only modifies the word "carries."[20]

RCC § 22E-2105. UNLAWFUL CREATION OR POSSESSION OF A RECORDING

First degree Unlawful Creation or Possession of a Recording contains the element that "In fact, the number of unlawful recordings made, obtained, or possessed was 100 or more." [emphasis added] Similarly, the second degree offense contains the element that "In fact, any number of unlawful recordings were made, obtained, or possessed." [emphasis added] See RCC § 22E-2105 (a)(4) and (b)(4). OAG recommends striking the adjective "unlawful" in both subparagraphs. The word "unlawful" is virtually self-referential; it is both an element of the offense and describes conduct in violation of the offense. Given the context of subparagraphs (a)(4) and (b)(4), it is clear which recordings the element is referring to.[21] If the Commission is not inclined to strike the word "unlawful", then OAG recommends that the Commission change the word to "unauthorized", as in is in the current law. See D.C. Code § 22-3214 (b).

[19] If the Commission does not adopt OAG's proposal then this provision should be redrafted to remove the reference to an automobile in second degree theft. If an element of second degree theft is that "The property has a value of $25,000 or more" then the reference to an automobile being worth $25,000 or more is superfluous. Any automobile that is valued at $25,000 or more is necessarily property that is valued at $25,000 or more. See RCC § 22E-701 68 (B).

[20] Of course, this begs the question about how a person can "carry" something that is not on his or her person.

[21] In fact, (a)(3), merely refers to "the" recording, not "the unlawful" recording.

Paragraph (e) is the forfeiture provision. It states, "Upon conviction under this section, the court may, in addition to the penalties provided by this section, order the forfeiture and destruction or other disposition of all sound recordings, audiovisual recordings, and equipment used, or attempted to be used, in violation of this section." Given the dictates of *One 1995 Toyota Pick-Up Truck v. District of Columbia*, 718 A.2d 558 (DC 1998), OAG agrees with the phrasing that the court "may" order the forfeiture and destruction of "equipment used, or attempted to be used." However, "sound recordings" and "audiovisual recordings" that have been illegally created or possessed are contraband. The court should not have discretion to return contraband (necessarily created without the effective consent of the owner) to a defendant. OAG, therefore, suggests that the forfeiture provision be redrafted to stay:

> Upon conviction under this section, the court, in addition to the penalties provided by this section:
>
> (1) may order the forfeiture and destruction or other disposition of equipment used, or attempted to be used, in violation of this section; and
> (2) shall order the forfeiture and destruction or other disposition of all sound recordings and audiovisual recordings, made, obtained, or possessed in violation of this section.[22]

RCC § 22E-2202. PAYMENT CARD FRAUD

The offenses of first through fifth degree Payment of Card Fraud contain the element that the "person" obtains or pays for property by using the card "For the employee's or contractor's own purposes, when the payment card was issued to or provided to an employee or contractor for the employer's purposes." See RCC § 22E-2202 (a)(1), (b)(1), (c)(1), (d)(1), and (e)(1). While the lead in language uses the word "person", the substantive provisions use the phrase "employee's or contractor's own purposes." To be clear that the person and the employee are the same person, and to simplify the language, OAG suggests that those subparagraphs be redrafted to say, ""For the person's own purposes, when the person is an employee or contractor and the payment card was issued to the person for the employer's purposes."

RCC § 22E-2205. IDENTITY THEFT

Paragraph (g) contains the statute of limitations. It states, "The applicable time limitation under § 23-113 shall not begin to run until after the day after the course of conduct has been completed, or the victim knows, or reasonably should have known, of the identity theft, whichever occurs earlier." The term "victim" is not defined. It could mean either, or both, the person whose personal identifying information was created, possessed or used and/or it could mean the person who lost property by deception, lost payment due for property, fines, fees, etc. The text and the Commentary must clarify who the victim is for purposes of the statute of limitations. If it is the

[22] OAG recommends that RCC § 22E-2106(d), the forfeiture provision that applies to the Unlawful Operation of a Recording Device in a Motion Picture Theater, and RCC § 22E-2207(e), the forfeiture provision that applies to the Unlawful Labeling of a Recording, be similarly redrafted.

intent of the drafters that the term "victim" may refer to both of these persons, then the lead in language of the text should be amended to refer to an "actor" instead of a "person" and then paragraph (g) should be amended to state:

> The applicable time limitation under § 23-113 shall not begin to run until after the day after the course of conduct has been completed, or the later of
> (1) The person whose personal identifying information knows, or reasonably should have known, of the identity theft, whichever occurs earlier; or
> (2) The person whom the actor tried to obtain property from by deception or avoid payment of property, fines, or fees by deception knows, or reasonably should have known, of the identity theft, whichever occurs earlier.

RCC § 22E-2207. UNLAWFUL LABELING OF A RECORDING

RCC § 22E-2207 (c) states:

> Nothing in this section shall be construed to prohibit: (1) Any broadcaster who, in connection with, or as part of, a radio or television broadcast transmission, or for the purposes of archival preservation, transfers any sounds or images recorded on a sound recording or audiovisual work; or
> (2) Any person who, in his own home, for his own personal use, transfers any sounds or images recorded on a sound recording or audiovisual work.

Subsection (c) should be redrafted so that it is clear that what is prohibited is actions, not people. If the subordinate clauses are removed from the current version of RCC § 22E-2207 (c)(1), it reads "Nothing in this section shall be construed to prohibit … Any broadcaster who … transfers any sounds or images recorded on a sound recording or audiovisual work" OAG proposes that the language be amended to say:

> Nothing in this section shall be construed to prohibit: (1) A broadcaster in connection with, or as part of, a radio or television broadcast transmission, or for the purposes of archival preservation, from transferring any sounds or images recorded on a sound recording or audiovisual work; or
> (2) A person who is in his or her own home from transferring, for his or her own personal use, any sounds or images recorded on a sound recording or audiovisual work.

Because Unlawful Labeling of a Recording is technically akin to a fraud, OAG understands why the Commission proposes codifying this offense in the Fraud chapter. However, it is unlikely that an uninformed reader would look for it between the Identity Theft provisions and Financial Exploitation of a Vulnerable Adult or Elderly Person. OAG believes that persons looking for this offense would more likely look for it near § 22E-2105, Unlawful Creation or Possession of a Recording and § 22E-2106, Unlawful Operation of a Recording Device in a Motion Picture Theater (notwithstanding that those offenses appear in the theft chapter). Therefore, OAG proposes moving this offense to the theft chapter and placing it with the other offenses that deal

with recordings. If the Commission chooses to leave this offense in the fraud chapter, then OAG recommends recodifying it so that it comes after the offense of Fraudulent Registration.

RCC § 22E-2208. FINANCIAL EXPLOITATION OF A VULNERABLE ADULT OR ELDERLY PERSON

An element of first through fourth degree Financial Exploitation of a Vulnerable Adult or Elderly Person is that the person commits the fifth degree version of this offense. One way that a person can commit the fifth degree version of the offense is if the person knowingly takes property of another "with [the] consent of an owner obtained by undue influence." See RCC § 22E-2208 (e)(1)(A). The phrase "undue influence" is no longer a defined term. See App. A 25 and page 35 of the CCRC Compilation of Draft Statutes for the Revised Criminal Code (RCC) (4-15-19). OAG recommends that the definition of "undue influence" be added back into the definitions section. In addition, vulnerable adults and elderly persons are not only more susceptible to undue influence than others, but they are also people who can be bullied or mislead into disposing of their property inconsistent with their wellbeing. To account for this, OAG suggests that the offense be redrafted to make it an offense when a person takes property of a vulnerable adult or elderly person without the effective consent[23] of an owner or by undue influence.

RCC § 22E-2501. ARSON[24]

RCC § 22E-2501 (a)(1) states, "Knowingly starts a fire or causes an explosion that damages or destroys a dwelling or building." As drafted this raises the question whether "damages or destroys…" modifies both fire and explosion or just explosion. Assuming that it was meant to modify both, the Commission may want to add two commas such that it reads "Knowingly starts a fire, or causes an explosion, that damages or destroys a dwelling or building."

RCC § 22E-2502. RECKLESS BURNING[25]

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[23] RCC § 22E-2208 34 states, "'Effective consent' means consent other than consent induced by physical force, a coercive threat, or deception.

[24] The offense of arson appears on both page 101 of the CCRC Compilation of Draft Statutes for the Revised Criminal Code (RCC) (4-15-19) and on page App. A 106. The two versions vary. The RCC version has a subparagraph (a)(3) that states, "The fire or explosion, in fact, causes death or serious bodily injury to any person" and an (a)(4) that states "who is not a participant in the crime." The version on page App. A 106 combines these two subparagraphs. It reads "The fire or explosion, in fact, causes death or serious bodily injury to any person who is not a participant in the crime." OAG agrees with the version in the Appendix.

[25] RCC § 22E-2502. Reckless Burning - The offense of Reckless Burning appears on both page 101 of the CCRC Compilation of Draft Statutes for the Revised Criminal Code (RCC) (4-15-19) and on page App. A 107. The RCC version contains a typo. It mislabels (a)(1) and (2) as (a)(3) and (4). The Comments in this memo will refer to the paragraph numbering as it appears in the Appendix.

Paragraph (a) states:

> A person commits reckless burning when that person:
> (1) Knowingly starts a fire or causes an explosion;
> (2) With recklessness as to the fact that the fire or explosion damages or destroys a dwelling or building.

As drafted, there is an issue as to whether a person commits this offense by knowingly starting a fire (or causing an explosion) reckless as to the fact that the fire would damage (or destroy) a dwelling (or building) – whether or not it does - or whether it is an element of the offense that the dwelling (or building) must be damaged (or destroyed). If the drafters intended the former, then subparagraph (a)(2) should be redrafted to state, "With recklessness as to the fact that the fire or explosion would damage or destroy a dwelling or building." If the intent is the latter, then the Commentary should state that proposition and provide examples of both fact scenarios.

On page 117 of the Commentary, it says that the RCC creates a new affirmative defense that "allows a person to recklessly damage or destroy with a fire or explosion a dwelling or building, regardless of its occupancy, with proper government authorization." [emphasis added] The phrase "regardless of its occupancy" should be struck from this portion of the Commentary. The RCC provision that it is interpreting does not contain such an exception. In addition, the phrasing of the Commentary incorrectly implies that a permit allows someone to burn down a building even if there are people in it.

RCC § 22E-2503. CRIMINAL DAMAGE TO PROPERTY

On page 125 of the Commentary, in the section entitled "Relation to Current District Law", it states, "… when the item is only partially damaged, the revised CDP statute provides greater flexibility as to how the amount of damage may be proven—it may either provide proof of the "reasonable cost of the repairs" as recognized in prior DCCA case law or it may provide proof of the change in the fair market value of the damaged property." It is unclear which part of the text of this offense leads to this interpretation. The various degrees of the offense only speak to the value of the amount of damage, it does not state how that value is to be determined. If the drafters wanted to include a statement in the substantive offense that reaches the "reasonable cost of the repairs" it could do so or it could use the phrase "financial injury." "Financial injury" is a defined term in the RCC, but it is not used in this offense.[26]

[26] RCC § 22E-701 38 states:
"Financial injury" means the reasonable monetary costs, debts, or obligations incurred by a natural person as a result of a criminal act, including, but not limited to:
(A)The costs of clearing a name, debt, credit rating, credit history, criminal record, or any other official record;
(B) The costs of repairing or replacing any property that was taken or damaged;
(C)Medical bills;

RCC § 22E-2601. TRESPASS

RCC § 22E-2601(a)(2), (b)(2), and (c)(2) establish the element that the person must enter the building "Without a privilege or license to do so under civil law.

RCC § 22E-2601(d) establishes exclusions from liability. Subparagraph (d)(2) states, "A person shall not be subject to prosecution under this section for violation of a District of Columbia Housing Authority barring notice, unless the barring notice was lawfully issued pursuant to 14 DCMR § 9600 et seq., on an objectively reasonable basis." While OAG does not object to the proposition that a person should not be prosecuted for trespass when the barring notice was unlawfully issued, we do caution that the RCC should not specifically reference "14 DCMR § 9600." The D.C. Municipal Regulations are constantly being amended and renumbered. There is no guarantee that the barring provisions will remain at that site. If it changes, the Council will have to enact a conforming amendment to the RCC. If the Council fails to, the RCC will refer the reader to the wrong location. To account for this possibility, OAG recommends that the provision reference the DCMR. generally. It should read "A person shall not be subject to prosecution under this section for violation of a District of Columbia Housing Authority bar notice, unless the bar notice was lawfully issued pursuant to the District of Columbia Municipal Regulations on an objectively reasonable basis."[27]

Page 136 of the Commentary states, "[a] person who has been asked to leave the premises must have a reasonable opportunity to do so before he or she can be found guilty of a remaining-type trespass." The Commentary should clarify that that requirement is only meant to apply to situations where a person had a privilege or license to be in a location and being asked to leave is what gives notice to the person that the privilege or license has been revoked. A person should not need " a reasonable opportunity to leave" if they are otherwise on notice that they no longer have a privilege or license to be at the location. So, for example, if someone enters a department store before it closes and then is found by a security guard 2 hours after the store closes, that person should be in violation of this offense even if they are willing to leave immediately after being found.

Page 139, note 23, of the Commentary uses *D.C. v. Wesby*, 138 S. Ct. 577 (2018) to illustrate signs of "forced entry". OAG recommends removing this reference. The factors they talk about in that footnote may indicate unlawful presence on certain property, but they are not factors that show forced entry.

RCC § 22E-2701. BURGLARY

(D)Relocation costs;
(E) Lost wages or compensation; and
(F) Attorneys' fees.

[27] In the redrafting of this provision, OAG substituted the phrase "bar notice" for "barring notice." We did that because in numerous places in 14 DCMR 9600, et seq., the regulations refer to the written notice as a "bar notice."

RCC § 22E-2701(c), third degree burglary, states, in relevant part:

> An actor commits third degree burglary when that actor:
> (1) Knowingly and fully enters or surreptitiously remains in:
> (A) A building or business yard, or part thereof, without a privilege or license to do so under civil law;
> (B) That is not open to the general public at the time of the offense;

As the Commentary notes, on page 149, "…[T]he revised burglary offense requires proof that the defendant's presence in the location is "without a privilege or license…under civil law"—i.e. trespassory." Doesn't a person have a privilege or license under civil law to enter a building or business yard that is open to the public? If so, it is unclear why subparagraph (B) is needed.[28]

RCC § 22E-3402. TAMPERING WITH A DETECTION DEVICE

RCC § 22E-3402 (a)(1)(E) provides that a person commits Tampering with a Detection Device when that person satisfies the other elements of the offense and is "On supervised release, probation, or parole, in a District of Columbia criminal case." [emphasis added] OAG suggests that this language be amended to read "On supervised release, probation, or parole, in a District of Columbia criminal or delinquency case." Subparagraphs (B),(C), and (E) already provide that a juvenile would be subject to this offense when on pretrial release, predisposition release, and when committed to the Department of Youth Rehabilitation Services. Without this amendment there would be a gap in this offense for when a juvenile was on probation and tampered with a detection device.

RCC § 22E-3403. CORRECTIONAL FACILITY CONTRABAND

On page 14 of the Commentary, it notes that the current statute "includes as Class A contraband the possession of any civilian clothing." The Commentary does not state why possession of civilian clothing should not be contraband if it is possessed to aid in someone's escape. OAG suggests that civilian clothing be added to the list of Class B contraband.

RCC § 22E-4201. DISORDERLY CONDUCT

RCC § 22E-4201(a)(2)(C) states that a person may commit disorderly conduct when that person is in a place that is open to the public and "Purposely directs abusive speech to any person present, reckless as to the fact that such conduct is likely to provoke immediate retaliatory criminal harm involving bodily injury, taking of property, or damage to property." [emphasis added] On pages 2 and 3 of the Commentary it states, "Subparagraph (a)(2)(C) punishes directing 'fighting words' to someone in a public place, which are likely to provoke immediate, violent retaliation. To commit disorderly conduct by fighting words, a person must act with the purpose of directing abusive speech to another person." [internal footnotes omitted] [emphasis

[28] The same analysis applies to the requirement in second degree burglary that the property not be "open to the general public at the time of the offense" See RCC § 22E-2701(b)(1)(B)(1).

added] The problem with the Commentary is that the predicate language does not use the phrase "fighting words", it uses the phrase "abusive speech." The Commentary is thus circular in that in explaining abusive speech, it uses the phrase "fighting words" which then is defined as using "abusive speech."

RCC § 22E-4202. PUBLIC NUISANCE

RCC § 22E-4202 (a)(1) makes it a public nuisance to purposely cause significant interruption to a "A lawful religious service, funeral, or wedding, that is in a location that, in fact, is open to the general public at the time of the offense." Paragraph (a)(1), unlike current law, refers to a "lawful" religious service. It is unclear how to determine when a religious service is lawful and when it is not and how this statute should be construed when a religious service that was lawful becomes not lawful. OAG assumes that by using the term "lawful" it means that the service is conducted in a manner that is consistent with District law. If that is what the drafters meant, does that mean that, once the service runs afoul of one District regulation, disrupting it is no longer a public nuisance? For example, suppose someone disrupts a religious service that exceeds the occupancy limit in the space it's using. Is that not a public nuisance? The Commentary should clarify what is meant by the word "lawful" and give examples that clarify this provision.

RCC § 22E-4202 (a)(3) makes it a public nuisance to purposely cause significant interruption to a "A person's quiet enjoyment of his or her residence between 10:00 p.m. and 7:00 a.m., and continues or resumes such conduct after receiving oral or written notice to stop such conduct." On page 12 of the Commentary it states, "An interruption of quiet enjoyment means a significant interference with the in-home activities of a person of ordinary sensitivity." That definition should be in the text of the statute.

RCC § 22E-4203. BLOCKING A PUBLIC WAY

RCC § 22E-4203(a) states:

> Except as provided in subsection (b), a person commits blocking a public way when that person:
> (1) Knowingly blocks a street, sidewalk, bridge, path, entrance, exit, or passageway;
> (2) On land or in a building that is owned by a government, government agency, or government-owned corporation; and
> (3) Continues or resumes such conduct after receiving a law enforcement officer's order that, in fact, is lawful, to stop such blocking.

Therefore, a person commits this offense when that person "knowingly blocks a[n] entrance… on land… that is owned by the government …" It is unclear from this phrasing whether it is the entrance that must be on public land or it is the person who must be on public land. Take the following example, a person blocks the entrance to a drug store. The drug store's sliding doors are on private property and the person is standing on the public sidewalk. If it is the entrance that

must be on public land then the person is not committing this offense even though he is blocking the entrance. However, if it is the person who must be on public land then the person is committing this offense.[29] OAG recommends that the elements of this offense account for the situation in the example above where a person is on the sidewalk blocking the drug store door. As both subparagraphs (1) and (3) refers to actions by the person, OAG suggests that subparagraph (2) be redrafted to make clear that it is the person who must be on public land, not the entrance. To accomplish this, OAG recommends that paragraph (2) state, "While on land or in a building that is owned by a government…"[30]

The offense of blocking a public way has as one of its elements that the person "Continues or resumes such conduct after receiving a law enforcement officer's order that, in fact, is lawful, to stop such blocking." See RCC § 22E-4203(a)(3). As drafted, and without explanation in the Commentary, this provision will cause litigation over whether the police must give a warning each time they see a person blocking a public way or whether after previously having given a warning the police may arrest a person who comes back to the location and blocks the public way. The Council expressed this concern when they enacted the current law. To avoid this from happening, OAG suggests that the Commentary quote language from page 7 of the Report on Bill 18-425, the Disorderly Conduct Amendment Act of 2010. In explaining the current blocking statute, the Committee Report states

> A difficulty with the CCE proposal is that it attempts to address a situation where a Person disperses after the police warning but then returns, so the CCE suggests that "An instruction by a law enforcement officer to cease the blocking shall remain in effect for a reasonable period of time, during which time a resumption of the blocking shall constitute a violation of this section." This is complicated and begs for litigation over what is "reasonable." It is the Committee's intent that a person can be arrested if he or she reappears in the same place after warning, even if some time later - e.g., if the officer gives the warning, remains present, the person stops incommoding, but then the person resumes incommoding in the officer's presence. If a homeless person, as another example, is asked by the same officer to move day after day from blocking a store entrance, and then the officer says something to the effect that "I've told you to move every day, and if I come back here tomorrow and you are blocking this doorway again you will be arrested," the Committee expects that the person could be arrested without another warning.

On page 8 of the Commentary it states, "The accused must also be practically certain that his or her action constitutes a continuance or resumption of the blocking conduct that was the object of the law enforcement officer order…" By having this mental state requirement for what

[29] A person who is blocking the entrance of the drug store from inside the store, on private property, is committing trespass, under RCC § 22E-2601, once they are asked to leave the store. (i.e. When their privilege to remain in the store is revoked.)

[30] Page 17 of the Commentary should be redrafted to state, "Paragraph (a)(2) specifies that while the person is doing the blocking he or she must be on land or in a building that is owned by a government, government agency, or government-owned corporation while."

constitutes a continuance or resumption of the blocking conduct, the statute, in many situations, will not meet the concerns that the Council expressed in the portion of the Committee Report quoted above. For example, a person may not be practically certain that if they come back to the same location a half an hour after being told to leave that their actions will be a resumption of the blocking conduct. To address this problem, OAG suggests that RCC § 22E-4203(a)(3) be given the mental state of recklessness.[31]

[31] RCC § 22E-206 (d) states that "A person acts recklessly: (1) As to a result element, when: (A)That person consciously disregards a substantial risk that conduct will cause the result; and (B) The risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, the person's conscious disregard of that risk is clearly blameworthy; and
(2) As to a circumstance element, when: (A)That person consciously disregards a substantial risk that the circumstance exists; and
(B) The risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, the person's conscious disregard of that risk is clearly blameworthy.

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:	Laura E. Hankins, General Counsel
Date:	July 8, 2019
Re:	Comments on First Draft of Report No. 36, Cumulative update to RCC Chapters 3, 7 and the Special Part

PDS submits the following comments on Report #36 for consideration.

1. PDS recommends that the commentary explaining the definition of "coercive threat" be rewritten to include the more thorough explanation the Commission wrote in Report #36 Appendix D, Disposition of Advisory Group Comments & Other Changes to Draft Documents ("Appendix D"). Specifically, at page 22 of Appendix D, the Commission explains its reasoning for rejecting PDS's recommendation to omit the word "ridicule" from the definition of "coercion."[1] As part of that explanation, the Commission wrote: "Moreover, this language is intended to only include threats to reveal the types of secrets, facts, photographs, or videos that would have constituted blackmail. Threats to reveal a secret, fact, photograph, or video that would tend to subject a person to mild humiliation would not be sufficient. The revised definition clarifies this by specifically referring to threats to expose a fact that would cause 'other significant injury to personal reputation.'"[2] PDS recommends rewriting the Explanatory Note for the definition of "coercive threat" in the Commentary Subtitle I. General Part to read as follows:

> This form of 'coercive threat' is intended to only include threats to expose the types of secrets or assert facts that would have traditionally constituted blackmail. Threats to reveal a secret, fact, photograph, or video that would tend to subject a person to mild humiliation would not be sufficient. The revised definition clarifies this by specifically referring to threats to expose a fact that would cause 'other significant injury to personal

[1] PDS made this recommendation in comments it submitted to the Commission on December 20, 2018 on the First Draft of Report #26, Sexual Assault and Related Provisions. In Report #26, the term "coercion" was defined in part to mean "threatening that any person will …assert a fact about another person… that would tend to subject that person to hatred, contempt, or ridicule, or to impair that person's credit or repute." (Emphasis added.)

[2] Report #36 Appendix D at App. D. 22 (emphasis added).

> reputation. This form of coercive threat also includes threats to expose secrets, assert facts, etc., that would tend to *perpetuate* hatred, contempt, ridicule, or other significant injury to personal reputation. A person who is already subject to hatred, contempt, and ridicule may still be the target of this form of coercive threat.[3]

2. PDS recommends rewriting for clarity the second paragraph of footnote 41 on page 5 of Commentary Subtitle II. Offenses Against Persons to read as follows:

> It is also possible, under narrow circumstances, for a person's self-induced intoxication to negate his or her blameworthiness even when it is not pathological. This is reflected in the situation of X, who consumes an extremely large amount of alcohol by herself on the second level of her two-story home. Soon thereafter, X's sister, V, makes an unannounced visit to X's home, lets herself in, and then announces that she's going to walk up to the second story to have a conversation with X. A few moments later, X stumbles into V at the top of the stairs, unaware of V's proximity, thereby causing V to fall to her death. If X is charged with depraved heart murder, under current law evidence of her voluntary intoxication could *not* be presented to negate the culpable mental state required for second degree murder. *Wheeler v. United States, 832 A.2d 1271, 1273 (D.C. 2003) (quoting Bishop v. United States, 71 App.D.C. 132, 107 F.2d 297 (D.C. Cir. 1939)).* In the RCC, however, evidence of the actor's voluntary intoxication could be present in the case and considered by the jury to presume awareness of the risk and to negate the *mens rea*. For example, the government's affirmative case might focus on the fact that an ordinary, reasonable (presumably sober) person in X's position would have possessed the subjective awareness required to establish depraved heart murder—whereas X might have difficulty persuading the factfinder that she lacked this subjective awareness without being able to point to her voluntarily intoxicated state. *See, e.g.*, Larry Alexander, *The Supreme Court, Dr. Jekyll, and the Due Process of Proof*, 1996 Sup. Ct. Rev. 191, 200 (1996) (arguing that such an approach, in effect, creates a permissive, but unrebuttable presumption of *mens rea* in situations of self-induced intoxication); Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 Cal. L. Rev.943, 955 (1999) (arguing that "retain[ing] a *mens rea* requirement in the definition of the crime, but keep[ing] the defendant from introducing evidence to rebut its presence would, in effect, "rid[] the law of a culpability requirement"). Thus although the actor's awareness of the risk may be imputed, the jury could consider the non-culpable nature

[3] The footnotes were omitted from this excerpt only to emphasize the changes PDS proposes to the text. PDS is not suggesting that the Commission delete the footnotes included in the original explanatory note.

of the voluntary intoxication in this hypothetical and still acquit the actor of depraved heart murder.

3. PDS objects to the expansion of the definition of "financial injury" to include any natural person as long as the expenditure is "reasonably necessitated by the criminal conduct."[4] Currently, "financial injury" as used in stalking is defined to include only those monetary costs, debts, or obligations incurred by the complainant, member of the complainant's household, a person whose safety is threated by the stalking, or a person who is financially responsible for the complainant. PDS agrees with the Commission's limitation of the definition to apply only to the costs incurred by a natural person, and not to any costs incurred by an organization or agency. However, including the costs incurred by any natural person in the calculation of "financial injury," and thereby potentially triggering a penalty enhancement,[5] is too broad and vague. For example, the proposed definition might allow for the inclusion of the cost of installing an improved security system by a neighbor to the stalking victim who was alarmed to learn that the victim's home had been entered unlawfully by the alleged stalker. The proposed definition might allow for the inclusion of the relocation costs of the alleged stalker's previous girlfriend who learns about the current alleged stalking and feels alarm that the alleged stalker might next target her. The requirement that the costs be "reasonably necessitated by the criminal conduct" is insufficient guidance to actually act as a limitation. PDS strongly recommends that the categories of people from the current statute continue to be used. Thus, "financial injury" should be rewritten as follows: "'Financial injury' means the reasonable monetary costs, debts, or obligations incurred by a natural person who is the complainant, a member of the complainant's household, a person whose safety is threatened by the criminal act, or a person who is financially responsible for the complainant as a result of a criminal act...."

4. PDS objects to the limitations placed on the affirmative defense of reasonable mistake of age to the offense of sexual abuse of a minor. The affirmative defense of reasonable mistake of age, e requires that the actor's reasonable belief that the complainant was 16 (or 18) years of age or older at the time of the offense be supported by an oral statement made by the complainant about the complainant's age.[6] Absent a recording or writing record (e.g., text messages) of every communication between the actor and the complainant, whether the complainant made an oral statement about his/her age will always come down to a "she said, he said" and a question of credibility. Whether the complainant made an oral statement might be one aspect of whether the actor's belief that the complainant was 16 (or 18) or older was reasonable. Other evidence might shed more light on the reasonableness, or unreasonableness, of the actor's alleged belief. For example, the actor and complainant may have met at a bar that "cards" every patron prior to entry. The actor may have asked the complainant whether she was 16 (or 18) and the complainant nodded her assent. The complainant may have shown the actor a fake ID. On the

[4] See Commentary Subtitle I. General Part at page 216. See also Commentary Subtitle II. Offenses Against Persons at page 138 and Appendix D at page App. D. 70.

[5] See e.g., RCC § 22E-1306(e)(2)(D), which provides for a penalty enhancement of stalking if the actor caused more than $2,500 in financial injury.

[6] See RCC § 22-1302(g)(2)(A)(ii) and -1302(g)(2)(B)(ii).

other hand, despite an oral statement by the complainant about his/her age, the actor's belief may be deemed unreasonable. The actor may have picked the complainant up outside of middle school. The complainant may have claimed to the actor that she was 16 while her friend standing right behind her shook her head and rolled her eyes, indicating the claim should be disbelieved. Obviously, the requirement of the oral statement does not mean the jury could not consider that the evidence of the middle school meeting location or of the body language of the friend to determine the reasonableness of the belief. The point of the other evidence hypotheticals is to demonstrate that there are numerous circumstances a factfinder could consider to find the claimed belief about the complainant's age unreasonable, including circumstances so overwhelming that any evidence of an oral statement by the complainant to the contrary carries negligible weight with a factfinder. In deciding whether the actor had a reasonable belief about the complainant's age, a jury should be instructed to view the circumstances as a whole rather than evaluating oral statements in a vacuum.

Memorandum

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United States Attorney
District of Columbia

Subject: Comments to D.C. Criminal Code Reform Commission for First Draft of Report #36, Cumulative Update to RCC	Date: July 8, 2019

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 Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the CCRC's First Draft of Report #36, Cumulative Update to RCC. USAO reviewed this document and makes the recommendations noted below.[1]

Comments on the Draft Report

I. General Comments.

1. USAO recommends using the current "while armed" language where applicable, instead of the language "uses or displays a dangerous weapon."

USAO recommends, throughout the RCC, replacing the words (or variations on the words) "displays or uses what, in fact, is a dangerous weapon or imitation dangerous weapon" with the following words:

> "The actor committed the offense while knowingly being armed with or having readily available what, in fact, is a dangerous weapon or imitation dangerous weapon."

USAO believes that it is more appropriate to include language from the current "while armed" enhancement statute, *see* D.C. Code § 22-4502(a), than the RCC's current language of "displaying or using" a weapon. Under various provisions in the RCC, the defendant must commit an offense by "displaying or using" a weapon. Under current law, the "while armed" enhancement applies if the defendant either is "armed with or ha[s] readily available" the prohibited weapon. See D.C. Code § 22-4502(a). Under current law, there is no requirement that the defendant actually use or display the weapon during the offense. See Crim. Jur. Instr. 8.101 (B) (defining "readily available" language). The current statutory language is more appropriate, as the RCC's language is too limited. In addition to the increased fear or injury that a victim may experience if a defendant uses or displays a gun or other weapon, a defendant creates an

[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.

increased risk of danger by introducing a weapon to an offense. Even if a defendant does not use or display the firearm or other dangerous weapon, there is an additional level of risk created when a defendant has a weapon readily available. A firearm could inadvertently discharge, and a complainant could suffer additional injury as a result of that weapon. Of course, the presence of a firearm also increases the chances of the intentional use of the weapon at some point during the offense, and subsequent resultant injury. Therefore, either being armed with or having a readily available a weapon should both be punished more severely than if a defendant were to commit an offense without being armed with or having readily available a firearm. USAO believes that it is appropriate to require that the defendant "knowingly" be armed with or have readily available the weapon.

USAO further believes that it is appropriate to include both dangerous weapons and imitation dangerous weapons in this language. If a firearm is not recovered, it is impossible to tell if it is a real firearm or an imitation firearm. Imitation firearms are intended to look like real firearms, and often cannot be distinguished without test-firing them, or otherwise checking them for operability. Thus, if a defendant holds up a gun to a victim and flees the scene with the gun, and the gun is not recovered (which is a common situation) it will, practically, be impossible to prove whether that gun was real or imitation.

2. <u>USAO recommends applying an affirmative defense of negligence to the circumstance of the complainant's protected person status, whether that status is categorized as an element of an offense or as an enhancement.</u>

USAO recommends, throughout the RCC, replacing the words (or variations on the words) "reckless as to the fact that the complainant is a protected person" with the following words:

> "The actor committed the offense against a complainant who, in fact, is a protected person. It is an affirmative defense that the accused was negligent as to the fact that the victim was a protected person at the time of the offense. This defense shall be established by a preponderance of the evidence."

This affirmative defense is consistent with current law for several enhancements. *See* D.C. Code § 22-3601 (under enhancement for committing crime against senior citizen victims, creating an affirmative defense that defense must establish by a preponderance of the evidence "where the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed"); D.C. Code § 22-3611 (under enhancement for committing crime of violence against minors, creating an affirmative defense that defense must establish by a preponderance of the evidence where "accused reasonably believed that the victim was not a minor at the time of the offense"). Several other enhancements, by contrast, include strict liability. *See* D.C. Code § 22-3602 (enhancement for committing certain dangerous and violent crimes against a citizen patrol member); D.C. Code § 22-3751 (enhancement for offenses committed against taxicab drivers); D.C. Code § 22-3751.01 (enhancement for offenses committed against transit operators and Metrorail station managers).

Imposing an affirmative defense of negligence for the circumstance of the complainant's protected person status furthers the statute's purpose of protecting certain classes of individuals based upon their vulnerability (minors, vulnerable adults, senior citizens) or their significant role in providing public services to District residents (police and law enforcement, District officials, transit operators). USAO believes that a negligence standard is appropriate and consistent with current law.

II. Chapter 4. Justification Defenses.

A. RCC § 22E-405. Special Responsibility for Care, Discipline, or Safety Defense.

1. USAO recommends that subsection (a)(1)(B) be rewritten to codify current *in loco parentis* law.

   USAO recommends that subsection (a)(1)(B) be rewritten as follows:

   "(B) The actor is either:
   - (i) A parent or legal guardian of the complainant~~, or a person acting in the place of a parent per civil law, who is responsible for the health, welfare, or supervision of the complainant~~; or
   - (ii) A person who has put himself or herself in the situation of a lawful parent or legal guardian, without going through the formalities necessary for legal adoption, by both assuming parental status and by discharging the duties and obligations of a parent toward a child ~~Someone acting with the effective consent of such a parent or person~~;

The current jury instructions for In Loco Parentis include a definition of *in loco parentis*. Criminal Jury Instructions for the District of Columbia, No. 4.121 (5th ed. Rev. 2018). The RCC definition of *in loco parentis* is expansive than the current definition, and should be limited.

USAO also believe that the provision, "person acting in the place of a parent per civil law" is confusing and should be eliminated.

2. USAO recommends that, in subsection (a)(1)(D), the words "under all the circumstances" be replaced by the words "under all the circumstances, including the child's age, size, health, mental and emotional development, alleged misconduct on this and earlier occasions, the kind of punishment used, the nature and location of the injuries inflicted, and any other relevant factors."

   With USAO's changes, this section would provide:

   "(D) Such conduct is reasonable in manner and degree, under all the circumstances, including the child's age, size, health, mental and emotional development, alleged misconduct on this and earlier occasions, the kind of punishment used, the nature and location of the injuries inflicted, and any other relevant factors;"

This change clarifies the law. The current jury instructions for Cruelty to Children include a statement of the reasonable parental discipline defense, Criminal Jury Instructions for the District of Columbia, No. 4.120 (5th ed. Rev. 2018), which includes this language. USAO also suggests including the word "size," which is not included in the jury instructions, but is a relevant factor to consider. Rather than relying on "all the circumstances," USAO believes it is more clear to point out some of the most relevant considerations in this analysis.

III. Chapter 6. Offense Classes, Penalties, & Enhancements.

Although this chapter is not directly under review in Report #36, there are implications for this chapter based on the review of Report #36 that affect the substance of the provisions in Report #36.

A. RCC § 22E-606. Repeat Offender Penalty Enhancements.

1. USAO recommends adding a Sexual Offense Repeat Offender Penalty Enhancement to RCC § 22E-606.

With USAO's changes, a new provision RCC § 22E-606(d) would provide:

"(d) *Sexual Offense Repeat Offender Penalty Enhancement.* A sexual offense repeat offender penalty enhancement applies to a sexual offense under chapter 13 of this Title when either:

(1) The offender, in fact, has one or more previous convictions for a District of Columbia sexual offense defined in Chapter 13 of this Title, or an offense equivalent to a current District of Columbia sexual offense defined in Chapter 13 of this Title, or

(2) The offender, in fact, is or has been found guilty of committing a District of Columbia sexual offense defined in Chapter 13 of this Title, or an offense equivalent to a current District of Columbia sexual offense defined in Chapter 13 of this Title, involving 2 or more victims."

USAO is concerned that that subsection (g) of RCC § 22E-1301 does not include a repeat offender penalty enhancement for sexual offenses. Because RCC § 22E-606 (Repeat Offender Penalty Enhancements) does not yet have a provision for penalties, USAO cannot yet fully comment on this section. But USAO is concerned that, in RCC § 22E-606, for misdemeanor repeat offender penalty enhancements and felony (other than crimes of violence) repeat penalty enhancements to attach, there must be *two* or more prior convictions. USAO is further concerned that this enhancement only applies to the number of prior convictions, rather than to the total number of victims.

Under current law, the sexual offense repeat offender enhancement applies when "[t]he defendant is or has been found guilty of committing sex offenses against 2 or more victims, whether in the same or other proceedings by a court of the District of Columbia, any state, or the United States or its territories." D.C. Code § 22-3020(a)(5). Adding USAO's proposed provision to RCC § 22E-606 is consistent with current law, which permits the enhancement with only one

previous conviction, or if there are two or more victims in the instant case. The wording "is . . . guilty of committing sex offenses against 2 or more victims" means that one victim could be a victim in the instant case, and one a victim in a previous case. Further, the proposed wording of subsection (2) of this provision allows for the enhancement to apply if the defendant has been found guilty but has not yet been sentenced for the prior victim (including, for example, if there are two victims in the instant case, for which the defendant would be sentenced at the same time). This is consistent with current law, and is appropriate. Even though not all sex offenses are crimes of violence, they are sufficiently serious that they should be treated in the same manner as crimes of violence are treated in the RCC. *See* RCC § 22E-606(c).

IV. Chapter 7. Definitions.

A. RCC § 22E-701. Definitions.

1. USAO recommends that the definition of "Bodily injury" include the words "a contusion, an abrasion, a laceration, or other physical injury."

   With USAO's changes, the definition of "Bodily injury" would be:

   " 'Bodily injury' means physical pain, illness, a contusion, an abrasion, a laceration, or other physical injury, or any impairment of physical condition."

The RCC's definition of "bodily injury" is intended to be very expansive. The CCRC intends contusions, abrasions, lacerations, and other physical injuries to be included in the "bodily injury" definition. If physical pain constitutes a "bodily injury," and " 'any' impairment of physical condition is intended to be construed broadly and includes cuts, scratches, bruises, and abrasions" (RCC Commentary at 175), then this language should be included in the plain language of the definition as well. Including these explicitly, rather than in the Commerntary, will eliminate potential future confusion and litigation on this point. Further, because the "significant bodily injury" and "serious bodily injury" definitions require some level of "bodily injury," the plain language of this definition should encompass the minor lacerations and contusions that are lesser than the more serious lacerations and contusions specified in those definitions.

2. USAO recommends that the definition of "Class A Contraband" include additional provisions.

   With USAO's changes, the definition of "Class A Contraband" would be:

   "(G) A tool created or specifically adapted for picking locks, cutting chains, cutting glass, bypassing an electronic security system, ~~or~~ bypassing a locked door, or otherwise designed or intended to facilitate an escape; . . .
   (K) A law enforcement officer's uniform, medical staff clothing, or any other uniform, or civilian clothing;
   (L) A stun gun; or
   (M) Any controlled substance or marijuana;

(N) A portable electronic communication device or accessories thereto."

First, the change from "intended to facilitate an escape" to "a tool created or specifically adapted for picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door" unnecessarily makes it more difficult to prosecute "homemade" implements of escape. USAO recommends including, in subsection (G), a catch-all provision that would encompass other tools not specifically named that are "otherwise designed or intended to facilitate an escape."

Second, civilian clothing has been removed from the list. Under current law, civilian clothing constitutes Class A Contraband. D.C. Code § 22-2603.01(2)(A)(viii). Civilian clothing can be used to facilitate an escape from a correctional facility, so USAO believes that it is appropriate to keep this defined as Class A Contraband.

Third, removal of "stun gun" as a prohibited item is unnecessary and dangerous. Under current law, a stun gun is included as Class A contraband. D.C. Code § 22-2603.01(2)(A)(iii)(III). DCCA law makes clear that a stun gun is not a dangerous weapon. Accordingly, it should be separately listed as a Class A Contraband item, as the possession of such an item in a correctional facility is inherently dangerous.

Fourth, there is no reason to lessen the penalties for possessing illegal narcotics inside a correctional facility, given the dangers that they cause when possessed inside a facility. The presence of illegal narcotics in a penal institution is dangerous. It not only affects the physical and mental stability of the inmates; it is a potential touchstone for conflict. If the Commission wants to differentiate between weapons and escape implements and all other contraband, perhaps an additional level of punishment should apply to the possession of drugs that further differentiates it from the possession of alcohol and drug paraphernalia.

Fifth, cell phones should be included as Class A Contraband, even though they are currently included as Class B Contraband. D.C. Code § 22-2603.01(3)(A)(iii). Cell phones can be used by inmates to coordinate escape or violent actions against correctional officers.

3. USAO recommends, in the definition of "Coercive threat," changing the title "Coercive threat" to "Coercion," and rewriting portions of the definition.

With USAO's changes, the definition of "Coercion" would provide:

" 'Coercion' ~~'Coercive threat'~~ means either: a threat, express or implicit, that, unless the complainant complies, any person will do any of the following to any other person; or an act intended to induce the complainant's compliance that, in fact, constitutes any of the following, to any person:

(A) Engage in conduct that, in fact, constitutes:

(1) An offense against persons as defined in subtitle II of Title 22E; or

(2) A property offense as defined in subtitle III of Title 22E;

(B) Take or withhold action as a government official, or cause a government official to take or withhold action;

(C) Accuse another person of a crime;
(D) Expose a secret, publicize an asserted fact, or distribute a photograph, video or audio recording, regardless of the truth or authenticity of the secret, fact, or item, that tends to subject another person to, or perpetuate:
(1) Hatred, contempt, ridicule, or other significant injury to personal reputation; or
(2) Significant injury to credit or business reputation;
(E) Notify a federal, state, or local government agency or official of, or publicize, another person's immigration or citizenship status;
(F) ~~Restrict~~ Facilitate or control a person's access to an addictive or controlled substance ~~that the person owns~~, or restrict a person's access to prescription medication ~~that the person owns~~; or
(G) Engage in fraud or deception; or
(H) ~~(G)~~ Cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply; or
(I) Knowingly participate in conduct with the intent to cause a person to believe that he or she is the property of a person or business and that would cause a reasonable person in that person's circumstances to believe that he or she is the property of a person or business."

Under the RCC, there is no longer a general definition of "coercion"; rather, there is only a definition of a "coercive threat." The definition of a "coercive threat" includes only coercion obtained by means of threats, and not coercion obtained by means of force or fraud. Thus, force and fraud are no longer statutorily permissible ways of coercing another person to engage in an activity. This is problematic in several contexts, but particularly in the human trafficking context. For example, with respect to force, if a defendant were to viciously assault a person in front of a human trafficking victim as a means of asserting his domination over both individuals and coerce compliance over that victim, that action on its own may not constitute a "threat." It would certainly, however, constitute force, and should be criminalized under this definition. As a further example, with respect to fraud, if a defendant were to falsely advertise modeling opportunities, and a victim presented herself to a perpetrator on that basis, but then became entangled in what truly was a scheme that culminated in commercial sex, that should be criminalized under this definition as well.

Because trafficking requires use of a coercive threat, coercing an individual to engage in labor by either fraudulent means or by actual use of force would no longer subject an individual to liability for human trafficking. Use of actual force should be a basis for liability. The RCC Commentary states that the use of actual force carries an implicit threat, but that may not always be the case. To ensure that the use of actual force is plainly allowed as a mean of coercion under the RCC, USAO believes that the force or fraud language should remain in the text. USAO has revised the RCC's proposed language to be closer to the current coercion definition in D.C. Code § 22-1831(3).

This proposed RCC definition does not include situations where a complainant is coerced by being supplied with a controlled substance or medication. USAO recommends adding a

provision for facilitating or controlling access to a controlled substance, or an otherwise addictive substance that is not controlled. USAO also does not believe that the complainant has to own the substance or prescription medication for there to be coercion. If the complainant substance is addictive or medically necessary, it is irrelevant who has an ownership interest in the substance.

In the current RCC proposal, there is no provision for when a perpetrator makes a threat or takes an action against a third party to compel compliance. For example, if a perpetrator makes an express or implied threat against a complainant's relative in this country or elsewhere, that threat is not addressed in any provision other than the catchall provision, which, as noted above, would shift an assessment regarding the coercive power of the threat to the complainant. USAO believes that adding the words "to any person" to the first paragraph clarifies that these threats/harms need not be made to the complainant in order to induce the complainant's compliance.

USAO recommends that every subsequent provision referencing a "coercive threat" be changed to "coercion."

4. USAO recommends, in the definition of "Commercial sex act," including the word "masturbation."

   With USAO's changes, the definition of "Commercial sex act" would be:

   " 'Commercial sex act' means any sexual act, ~~or~~ sexual contact, or masturbation on account of which or for which anything of value is given to, promised to, or received by any person."

Particularly in the human trafficking, there are instances of individuals being forced to masturbate in front of other individuals, in exchange for money. This definition should include all forms of sexual violations, not only including sexual acts and sexual contacts, but also masturbation.

5. USAO recommends, in the definition of "Correctional facility," adding the words "or the U.S. Marshal's Service."

   With USAO's changes, the definition of "Correctional facility" would be:

   " 'Correctional facility' means any building or building grounds located in the District of Columbia, operated by the Department of Corrections or the U.S. Marshal's Service for the secure confinement of persons charged with or convicted of a criminal offense."

Although the D.C. Central Detention Facility ("D.C. Jail") and the D.C. Correctional Treatment Facility ("CTF") are operated by the D.C. Department of Corrections, the D.C. Superior Court cellblock is operated by the U.S. Marshal's Service. Thus, defendants who are currently incarcerated at either the D.C. Jail or CTF are transferred to the custody of the U.S. Marshal's Service every time they make a court appearance. Under the Escape provision in RCC

§ 3401, defendants are liable for First Degree Escape only if they escape from a "correctional facility or juvenile detention facility." Defendants who escape from a cellblock at the D.C. Superior Court should be punished equally to those who escape from the D.C. Jail/CTF. Including the U.S. Marshal's Service in this definition eliminates a loophole which would make a defendant less culpable for escaping a cell block.

USAO also recommends that, in sections that refer to this definition (for example, Escape, RCC § 22E-3401, and Correctional Facility Contraband, RCC § 22E-3403), the U.S. Marshal be included among the list of individuals required to give effective consent for the defendant to engage in the prohibited conduct. *See, e.g.*, RCC § 22E-3401(a)(2).

6. USAO recommends deleting subparagraph (E) from the definition of "Deceive" and "Deception."

Subsection (E) of the definition of "Deceive" and "Deception" excludes from those terms "puffing statements unlikely to deceive ordinary persons." As an initial matter, the Commission's proposed " 'deception' definition is not broadly supported by law in a majority of jurisdictions." *See* RCC App. J at 170. Subparagraph (E) is particularly problematic. First, there are certain cases where the definition is unworkable. In investment scheme cases, for example, defendants commonly present their victims with false promises of out-sized investment returns. The current Redbook instruction makes clear that criminal liability stems from whether the defendant intended to deceive, not whether an "ordinary person" would be deceived. *See* D.C. Crim. Jur. Instr. 5.200 (defendant "must have known that the statement or assertion was untrue when he/she made or used it, or have made or used it with reckless indifference as to whether it was, in fact, true or false"). Second, subparagraph (E) would create a new affirmative defense in all fraud cases that is not supported in current D.C. law. And indeed, as the Commission notes, "the line between 'mere puffery' and outright deception sufficient to create criminal liability is frequently litigated." RCC App J. at 345 n.1884. USAO believes that the RCC should minimize litigation, not create new grounds for litigation.

7. USAO recommends adding the words "deputy marshals" to subsection (H) of the "Law enforcement officer" definition.

With USAO's changes, subsection (H) would provide:

> "(H) Any federal, state, county, or municipal officer performing functions comparable to those performed by the officers described in subparagraphs (A), (B), (C), (D), (E), and (F) of this paragraph, including but not limited to state, county, or municipal police officers, sheriffs, correctional officers, parole officers, deputy marshals, and probation and pretrial service officers."

Although they may already be included in this definition of "law enforcement officer," USAO wants to ensure that Deputy U.S. Marshals would be included in this definition, as they are essential law enforcement officers in the District who frequently interact with defendants, as they operate the cellblocks in D.C. Superior Court.

8. USAO recommends including the phrase "whether tangible or digital" in the definition of "Payment card."

   With USAO's changes, the definition of "Payment card" would be:

   " 'Payment Card' means an instrument of any kind, whether tangible or digital, including an instrument known as a credit card or debit card . . . ."

Financial instruments and payment methods are constantly changing. With the advent of services like Venmo and PayPal, and the proliferation of technologies that allow individuals to access their financial resources solely using the internet, USAO recommends that the RCC broaden the definition of "Payment card" to take into account the reality of the different ways in which criminals take advantage of victims' financial resources.

9. USAO recommends including, in the definition of "Property," the words "money," "documents evidencing ownership in or of property," and "captured or domestic animals."

   With USAO's changes, the definition of "Property" would be:

   " 'Property' means anything of value. The term 'property' includes, but is not limited to:
   (A) Real property . . . .
   . . . .
   (E) Debt;
   (F) Money;
   (G) Documents evidencing ownership in or of property;
   (H) Captured or domestic animals; and
   (H) A government-issued license, permit, or benefit."

USAO recommends this change in order to better align the proposed definition with the Proposed Federal Criminal Code and the Model Penal Code, as well as to account for common fact-patterns in D.C. criminal cases (which include the theft of money and domestic pets).

10. USAO recommends, in the definition of "Protected person," removing the age differential language.

    With USAO's changes, the definition of "Protected person" would be:

    " 'Protected person' means a person who is:
    (A) Under 18 years of age~~, when, in fact, the actor is 18 years or age or older and at least 4 years older than the complainant~~;
    (B) 65 years of age or older~~, when, in fact, the actor is at least 10 years younger than the complainant~~; . . ."

This is consistent with current law, which focuses solely on the age and vulnerability of the complainant. *See* D.C. Code § 22-3601 (enhanced penalty for crimes against senior citizen

victims); D.C. Code § 22-3611 (enhanced penalty for committing crime of violence against minors).

Certain age differential requirements exist in current law, and should remain in the RCC, such as the age differential requirement in the Sex Abuse of a Minor provision (providing, for example, that a defendant must be at least 4 years older than the complainant to be liable for that offense). The age differential requirements in that provision, however, serves a very different purpose than the age requirements here. The age differential requirements in the Sex Abuse of a Minor statute exclude from liability consensual or non-forced sexual acts/contacts between minors who are close enough in age that the law has deemed them capable of consenting. Indeed, the only thing that makes Sex Abuse of a Minor a crime at all is the age disparity between the defendant and complainant. Other provisions, however, are already criminal, regardless of any age disparity. The focus here should be on the particular vulnerability of the victim who has been subjected to a crime, not on whether the defendant happened to be a similar age. USAO believes that the RCC should track current law in this respect, and that this language should be removed.

11. <u>USAO recommends that subsection (D) of the definition of "Position of trust with or authority over" be modified to add a "contractor" and to remove the provision "under civil law."</u>

    With USAO's changes, subsection (D) would provide:

    "(D) Any employee<u>, contractor,</u> or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or other person responsible ~~under civil law~~ for the care or supervision of the complainant."

    USAO believes that adding the term "contractor" provides a more comprehensive definition of those responsible for the care and supervision of children at schools and other institutions. Many organizations do not hire all of their employees directly; rather, they enlist contractors as part of that staffing. The contractors have the same interactions with children and responsibilities as many of the direct employees do, and it makes no sense to distinguish them for purposes of liability.

    USAO supports the addition of the catch-all provision "or other person responsible . . ." As articulated in other provisions, however, USAO believes that the term "under civil law" is unnecessarily confusing, and needlessly requires a comprehension of civil law to interpret criminal law.

12. <u>USAO recommends that the definition of "Serious bodily injury" include the provision "or protracted loss of consciousness."</u>

    With USAO's changes, the definition of "Serious bodily injury" would be:

" 'Serious bodily injury' means a bodily injury or significant bodily injury that involves:
(A) A substantial risk of death;
(B) Protracted and obvious disfigurement; ~~or~~
(C) Protracted loss or impairment of the function of a bodily member or organ~~.~~; or
(D) Protracted loss of consciousness."

Under current law, a "serious bodily injury" includes, among other things, "unconsciousness." D.C. Code § 22-3001(7). As the RCC Commentary notes (at 257 n.621), the D.C. Court of Appeals has addressed this "unconsciousness" provision in the context of aggravated assault, finding that a "brief loss of consciousness" did not amount to a serious bodily injury. *In re D.P.*, 122 A.3d 903, 908 n.10 (D.C. 2015); *see also Vaughn v. United States*, 93 A.3d 1237, 1269 n.39 (D.C. 2014). Although the D.C. Court of Appeals has specifically the "brief" loss of consciousness with respect to serious bodily injury, it has not addressed whether a "protracted loss of consciousness" would qualify as a serious bodily injury. USAO believes that a "protracted loss of consciousness" would qualify as a serious bodily injury under current law, and should be codified in the RCC's definition of a "serious bodily injury." The RCC Commentary (at 257–58) notes that "[m]ore lengthy losses of consciousness still may constitute serious bodily injury if the unconsciousness causes 'a protracted loss or impairment of the function of a bodily member or organ,'" but USAO believes that any protracted loss of consciousness, regardless of whether it causes such an injury, should qualify as a serious bodily injury.

13. USAO recommends that, in the definition of "Sexual act," the word "desire" be replaced with the word "intent."

With USAO's changes, subsection (C) would provide:

"(C) Penetration, however slight, of the anus or vulva of any person by a hand or finger or by any object, with the ~~desire~~ intent to abuse, humiliate, harass, degrade, sexually arouse, or sexually gratify any person."

Under current law, the word "intent" is used in this provision, not the word "desire." The word "desire" is ambiguous, and is not defined in the RCC. The word "intent," however, is defined in the RCC and used frequently throughout the RCC.

14. USAO agrees with the addition of "sexual act" to the definition of "Sexual contact."

USAO supports this change, which makes a sexual contact a lesser-included of a sexual act, and believes that it is an appropriate way to codify this principle.

15. USAO recommends that, in the definition of "Sexual contact," the words "desire to sexually degrade" be replaced with the words "intent to abuse, humiliate, harass, degrade."

With USAO's changes, subsection (B) would provide:

"(B) Touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with the ~~desire to sexually degrade~~ intent to abuse, humiliate, harass, degrade, sexually arouse, or sexually gratify any person."

This change tracks the sexual intent language of the "Sexual act" definition. Sexual assault prosecutions often rely on the "abuse, humiliate, harass, or degrade" intent language, in addition to the "arouse or gratify" intent language. For example, if a defendant grabs the buttocks of a stranger, that victim will likely feel sexually violated, and this should be prosecuted as a sexual offense. Absent evidence of the defendant having an erection or outwardly manifesting sexual pleasure, however, the government may not be able to prove that the defendant's actions were sexually arousing or gratifying. The government, however, would be able to show that, at a minimum, the defendant intended to humiliate or harass the victim. USAO also believes that "intent" is a more appropriate word than "desire," as explained above with respect to the "Sexual act" definition.

16. USAO recommends that, in the definition of "Significant bodily injury," the words "temporary loss of consciousness" be changed to either "brief loss of consciousness" or "any loss of consciousness."

With USAO's changes, this subsection would provide:

"Significant bodily injury' means . . . a ~~temporary~~ brief loss of consciousness;"

USAO believes that the word "temporary" is vague. Unless a victim dies or falls into an irreversible coma, any loss of consciousness is, by definition, temporary. USAO believes that the RCC's definition of "Significant bodily injury" is intended to encompass any loss of consciousness, including a brief loss of consciousness. The plain language of the statute should clarify that any loss of consciousness, however brief, would suffice. This is also consistent with the D.C. Court of Appeals case law with respect to a brief loss of consciousness in the serious bodily injury context, as discussed above.

17. USAO recommends that, in the definition of "Significant bodily injury," the words "a contusion or other bodily injury to the neck or head caused by strangulation or suffocation" be changed to the words "a contusion, petechia, or other bodily injury to the neck or head, including the eyes or face, caused by strangulation or suffocation."

With USAO's changes, this subsection would provide:

" 'Significant bodily injury' means . . . a contusion, petechia, or other bodily injury to the neck or head, including the eyes or face, caused by strangulation or suffocation."

USAO supports the CCRC's proposal including injuries caused by strangulation or suffocation in the "significant bodily injury" definition. As the Commentary notes, strangulation and suffocation are often linked to more serious patterns of violence (RCC Commentary at 269

& n.696). USAO believes that additional language should be added to this definition to clarify strangulation-related injuries.

"Petechiae" (the plural of the singular "petechia") are defined as "a form of bruising that results from rupture of capillaries, the body's smallest blood vessels. Petechiae are red, non-elevated, less than 3 mm in diameter, and can be a singular capillary rupture or multiple." Henry, T., ed. *Atlas of Sexual Assault. International Association of Forensic Nurses*. St. Louis, MI: Mosby, Inc., 2013. Petechiae often develop on a victim's face or neck as a result of strangulation or suffocation. Although petechiae may be included in the "other bodily injury" definition, USAO believes that it is appropriate to expressly include petechiae as a form of injury to eliminate potential future confusion and litigation.

USAO also believes that it is appropriate to include the eyes and face as specific areas where strangulation/suffocation injuries could manifest. Although they are likely included in the definition of "head," specifically listing them reduces potential future confusion and litigation.

18. <u>USAO recommends that the definition of "Significant bodily injury" include the words "or a laceration for which the complainant required or received stitches, sutures, staples, or closed-skin adhesives."</u>

    With USAO's changes, this subsection would provide:

    " 'Significant bodily injury' means . . . . The following injuries constitute at least a significant bodily injury: a fracture of a bone, a laceration that is at least one inch in length and at least one quarter inch in depth<u>, or a laceration for which the complainant required or received stitches, sutures, staples, or closed-skin adhesives</u>; a burn of at least second degree severity . . . ."

As the Commentary cites (RCC Commentary at 268 & n.690), under current law, lacerations requiring stiches are sufficient proof of significant bodily injury. *See, e.g., Rollerson v. United States*, 127 A.3d 1220, 1232 (D.C. 2015); *In re R.S.*, 6 A.3d 854, 859 (D.C. 2010); *Flores v. United States*, 37 A.3d 866, 867 (D.C. 2011). There is no size requirement for lacerations requiring stitches. A layperson will likely not know the size of his or her laceration. Even if that layperson was able to measure the length of his or her own laceration, it would be nearly impossible for a layperson to measure the depth of his or her own laceration, particularly after stitches have been applied. Medical professionals often do not even measure the depth of a laceration, and measuring the depth of a laceration is not a standard procedure in a medical forensic evaluation. Thus, practically, every case involving this type of significant bodily injury would require medical testimony. This requirement is impractical, as medical testimony should not be required in every case to prove whether a significant bodily injury is present. Lay testimony about the required used of sutures is appropriate, and tracks current law. To allow a layperson to testify about the types of injuries he or she sustained, USAO believes that inclusion of this language is necessary.

Further, USAO recommends including "stitches, sutures, staples, or closed-skin adhesives" in this definition. These are all different tools that medical professionals use to close

open lacerations. Medical professionals often decide which tool to use based on the location of the injury on the body and the medical professional's judgment, not exclusively based on the length or width of the injury.

Finally, USAO recommends that the language provide that the complainant "required or received" these treatments. This encompasses both situations where the complainant actually received that treatment, and situations in which the complainant should have received the treatment but did not. This is consistent with the beginning of the "significant bodily injury" definition providing "a bodily injury that . . . *requires* hospitalization or immediate medical treatment beyond what a layperson can personally administer." RCC § 22E-701 (emphasis added).

19. USAO recommends rewriting the definition of "Value" to mean "the greater of" several different alternatives.

    With USAO's changes, the definition for Value would read:

    " 'Value' means the greater of:
        (A) The fair market value at the time and place of the offense;
        (B) The replacement cost of the property within a reasonable time after the offense; or
        (C) With respect to a credit card, check, or other written instrument, the amount of money, credit, debt or other tangible or intangible property or services that has been or can be obtained through its use."

USAO recommends this change to better align the definition of "Value" with the Model Penal Code, current federal law and the fairly recent amendments to the D.C. Omnibus Public Safety Amendment Act of 2009. *Cf.* U.S.S.G. §§ 2B1.1; Redbook Instruction 3.105.

20. USAO recommends deleting subsection (C) from the definition of "Value".

Subsection (C) of the definition of "Value" suggests a flat-rate dollar value for a payment card or an unendorsed check. This is plainly at odds with D.C. law. *See* Redbook Instruction 3.105 (" 'Value' with respect to a credit card, check, or other written instrument means the amount of money, credit, debt, or other tangible or intangible property or services that has been or can be obtained through its use, or the amount promised or paid by the credit card, check, or other written instrument."). Indeed, the RCC acknowledges that there are no jurisdictions that have adopted subparagraph (C) in their definition of "value." *See* RCC App. J at 352-54. Although the Commentary suggests that New Hampshire has a "similar provision," that statute only proscribes a minimum value (not a fixed value) for a payment or unendorsed check. *See* N.H. Rev. Stat. Ann. § 637:2(V)(c).

21. USAO notes that the definition of "Comparable offense" appears to be superfluous, as the term is no longer used in the RCC.

    USAO is accordingly reserving comments on the definition of "Comparable offense."

22. USAO notes that the definitions of "Commercial sex act" and "Custody" are included in the Commentary, but are not included in the draft statute.

V. Chapter 11. Homicide.

1. USAO recommends that Felony Murder be classified as First Degree Murder, with two separate provisions for both enumerated and unenumerated felonies.

Subsection 22E-1101(b)(2) provides, among other things, that when the death of another person is committed in furtherance of committing or attempting to commit one of multiple enumerated felonies, this shall be classified as Second Degree Murder.

Subsection (b)(2) minimizes the seriousness of Felony Murder and ignores the deterrence theories that have been recognized by the D.C. Court of Appeals and other courts that support categorizing Felony Murder as First Degree Murder. As noted by the CCRC, "criminalizing felony murder as second degree murder is not generally supported by state criminal codes," recognizing that only six states do so. *See* RCC App. J at 188. The reasoning behind this is the long-standing view held by the courts that certain felonies carry such high risks of death and injury for victims and co-felons that they must be deterred. *See, e.g., Wilson-Bey v. United States*, 803 A.2d 818, 835 (*en banc*) ("the underlying purpose of the felony murder doctrine . . . is designed to deter the commission of certain especially dangerous felonies because these particular crimes create an unacceptably high risk of death").[2]

2. USAO recommends removing the requirement that the defendant act negligently in causing death under Felony Murder (as related to enumerated felonies).

Subsection 22E-1101(b)(2) provides that in order to be guilty of Felony Murder (as related to enumerated felonies), a defendant must "negligently" cause the death of another person.

As it relates to Felony Murder involving enumerated felonies, subsection (b)(2) defeats the purpose of the statute, which is to deter certain crimes and to recognize that certain felonies create such a high risk of death that malice is presumed from the commission of these felonies. *See Wilson-Bey*, 903 A.2d at 838. Moreover, the CCRC cites no case law or support from a

[2] Assuming that the CCRC incorporates this change, the government submits that a third category of First Degree Murder is needed. This third category of First Degree Murder also will apply in the Felony Murder context where the actor purposely causes the death of an individual during the commission of an unenumerated felony. The CCRC mis-reads the current state of Felony Murder law as it relates to unenumerated felonies. The CCRC notes, and USAO does not dispute, that it is not appropriate to impose liability to a non-purposeful killing that occurs during the commission of a non-enumerated felony. However, what the CCRC fails to recognize is that the current statute only imposes liability for Felony Murder during the commission of a non-enumerated felony when the actor kills another purposely. *See* D.C. Code § 22-2101. In other words, engaging in the unenumerated felony is determined to be of the same significance as premeditation and deliberation. Thus, under the current statute, if an individual purposely kills another, either while engaged in an unenumerated felony or with premeditation and deliberation, he is guilty of First Degree Murder. The CCRC has provided no rationale for changing this long-standing law, and USAO believes that such a change is inappropriate.

majority of states that would support adding the requirement that the defendant act negligently. In fact, adding such a requirement undermines the very deterrence principle that Felony Murder is designed to promote – *i.e.*, deterring the commission of especially dangerous felonies. As recognized by the U.S. Supreme Court, "[i]t is unusual to impose criminal punishment for the consequences of purely accidental conduct. But it is not unusual to punish individuals for the unintended consequences of their *unlawful* acts." *Dean v. United States*, 556 U.S. 568, 129 S.Ct. 1849, 1855 (2009).

The Commentary provided by the CCRC correctly notes that there is no intent requirement as it relates to Felony Murder. However, the Commentary incorrectly relies on the *en banc* decision in *Wilson Bey v. United States*, 903 A.2d 818, 838 (D.C. 2006) to support the position that the D.C. Court of Appeals has indicated that negligence is required of all actors involved in the commission of Felony Murder. The D.C. Court of Appeals in *Wilson Bey* was discussing Felony Murder in the context of accomplice liability. In doing so, the Court indicated that, in determining whether an *accomplice* should be held liable for Felony Murder, the killing was "reasonably foreseeable." *Id.* In this respect, the accomplice is treated slightly differently from the principal involved in the Felony Murder, although the accomplice can still be found guilty of murder. That said, this language provides no support for the argument that it should be a requirement that the defendant/principal acted negligently in killing the decedent, as the statute's *mens rea* stems from the *mens rea* required by the underlying felony, rather than an additional *mens rea* requirement for the killing itself.

3. <u>USAO recommends removing the requirement that the lethal act be committed in furtherance of the underlying enumerated felony in a Felony Murder charge.</u>

Subsection 22E-1101(b)(2) provides that in order for a defendant to be guilty of Felony Murder when the underlying crime is an enumerated felony, the lethal act must have been "in the course of and in furtherance of committing or attempting to commit one of the [enumerated felonies]."

USAO submits this is directly contrary to current common law and that it will significantly undermine the deterrence behind the Felony Murder statute.

The Commentary appears to rely on the D.C. Court of Appeals language in *Head v. United States*, 451 A.2d 615, 625 (D.C. 1982), that "[t]he mere coincidence in time between the underlying felony and death is insufficient for felony murder liability" to support the requirement that it is no longer sufficient that the death occurred during the commission or attempted commission of the felony. However, that is directly contrary to the *Head* decision. The D.C. Court of Appeals in *Head* indicated that simply because the robbery and murder occurred close in time did not, without more, prove Felony Murder. In other words, if, for example, a defendant shot his victim and then, as an afterthought, decided to rob the victim as the victim lay dying, this would not alone satisfy the requirements of Felony Murder. Rather, the government must prove that the murder occurred during the commission or attempted commission of the felony. In other words, the Commentary is incorrect in stating that it is not sufficient, as a matter of common law, that the "death happened to occur during the commission or attempted commission of the felony." The Court of Appeals in *Head* specifically stated that "[t]here must be evidence

sufficient to support a jury finding that the murder took place during the course of the robbery." *Head*, 451 A.2d at 625.

Similarly, the Court of Appeals in *Johnson v. United States*, 671 A.2d 428 (D.C. 1995), on which the Commentary also relies, further supports USAO's position. *Johnson* states that there must be a "causal connection between the homicide and the underlying felony" and then goes on to state that "it must appear that there was such actual legal relation between the killing and the crime . . . . that the killing can be said to ***have occurred as a part of the perpetration of the crime***." Johnson, 671 A.2d at 432. There is no requirement under *Johnson* that the killing have been committed in furtherance of the crime.[3]

Moreover, requiring that the murder be committed in furtherance of committing or attempting to commit one of the enumerated felonies ignores the deterrence rationale for the Felony Murder statute, as discussed above.

Lastly, from a practical perspective, if it is a requirement that the murder was committed in furtherance of committing or attempting to commit one of the enumerated felonies, this will significantly minimize the effectiveness of the Felony Murder statute. In many situations, the commission of the murder does nothing to further the underlying crime. In fact, it is often the case that the murder is the result of a spur-of-the moment decision the perpetrator undertakes during the commission of the underlying crime, as opposed to a well-reasoned decision to further the underlying crime. This requirement again ignores the primary purpose behind the felony murder statute, which is to deter those types of felonies that are so dangerous that they may result in death or serious bodily harm.

4. <u>USAO recommends including all categories of robbery and felonies involving controlled substances as enumerated felonies that can serve as the predicate in a Felony Murder charge.</u>

Subsection 22E-1101(b)(2) limits the types of crimes that can serve as the predicate crime in a charge of felony murder. As drafted, Fifth Degree Robbery, defined as robbery wherein the defendant knowingly commits the robbery by causing bodily injury to the complainant or another person (other than an accomplice), threatens to immediately kill, kidnap, inflict bodily injury, or commit a sexual act, or uses physical force to overpower the complainant or another person (other than an accomplice), is not considered an enumerated felony. Similarly, felonies involving controlled substances are no longer included as enumerated felonies.

First, the CCRC Commentary makes clear that not only is there no legal support in the common law for these changes, but that the CCRC has not researched whether or not there is any support from other jurisdictions for removing these predicate offenses.

More importantly, in charging Felony Murder, the government will need to prove that the defendant committed the murder in the course of perpetrating or attempting to perpetrate a specific crime. Under the draft RCC, First through Fourth Degree Robbery all include as an

[3] Notably, in Appendix J, the CCRC notes that a minority of jurisdictions, *i.e.*, less than 10, have a similar requirement that the murder be in furtherance of the underlying felony. *See* RCC App. J at 189 n.1115.

element that the defendant committed Fifth Degree Robbery and then distinguish between the level of injury that the victim then suffered and the mental state attached to the injury. The purported rationale for not including all degrees of robbery, according to the First Draft of Report 19 Homicide (at p. 36) is because the lower degrees of robbery "do not involve the infliction of significant bodily injury" and thus lack the dangerousness from the greater degrees of Robbery. To be clear, in the Felony Murder context, if Felony Murder is charged with a predicate offense of any degree of Robbery, the most severe type of bodily injury has occurred—*i.e.*, death. The problem is that the higher degrees of robbery require an increased mental state as it relates to the injury—*i.e.*, recklessly causing the injury. The concern of maintaining the statute's proportionality as to the degree of injury simply is not at issue in the context of Felony Murder.

Additionally, as discussed above, the primary rationale behind Felony Murder is to deter a defendant from committing certain felonies that carry an unacceptably high risk of death. Again, just from a practical stand point, many of the Felony Murder cases charged in this jurisdiction involve felony drug transactions that go wrong in some fashion, and as a result, someone is killed. Keeping in mind the desire to deter felonies that carry such a high risk of death, there simply is no rationale for removing felony drug crimes from the list of predicate enumerated felonies.[4]

5. <u>USAO recommends that a person who is guilty of Felony Murder should be held responsible for the killing of his/her accomplice.</u>

Subsection 22E-1101(b)(2) provides that an individual is ***not*** responsible for causing the death of his/her accomplice, even if all of the other factors required for Felony Murder are met.

As noted in Appendix J (at 189), again, only a minority of the states bar liability where the decedent was a participant in the underlying felony. The Commentary does not set forth specifically why the RCC proposed this change to bar liability where the decedent was a participant, but presumably, the argument is based on a theory that the decedent assumed the risk. The problem with this argument is that removing liability for an accomplice decedent completely ignores the deterrence principals upon which Felony Murder is based—*i.e.*, to deter certain felonies that create unacceptably high risks of death. The risk undertaken by the decedent should not weigh into this calculation any more than if the decedent is a neighborhood drug dealer who routinely stands on the same street corner and who is then gunned down during a robbery. A similar argument can be made that the drug dealer also assumed the risk, however, we do not put a value on human life.

[4] To be clear, USAO recommends that the list of enumerated felonies that can serve as the predicate offense under the Felony Murder statute should include: First or Second Degree Arson; First Degree Sexual Abuse; First Degree Sexual Abuse of a Minor, First or Second Degree Child Abuse; First Degree Burglary when committed while possessing a dangerous weapon on his or her person; First, Second, Third, Fourth, or Fifth Degree Robbery; First or Second Degree Kidnapping; or any felony drug offense.

6. USAO recommends that all parties involved in an enumerated felony be held accountable for Felony Murder.

Subsection 22E-1101(b)(2) provides that only the individual who commits the lethal act during the course of a Felony Murder is responsible for the killing.

One of the most troubling proposals in the RCC is that it bars an accomplice from being held responsible for Felony Murder. As an initial matter, the Commentary in Appendix J indicates that slightly less than half of states adopt this approach. To be clear, 18 states are referenced, and many of the citations do not support the proposed change. For example, in *State v. Sophophone*, the Kansas court did not absolve an accomplice of liability, rather, the court refused to hold a defendant liable for the lawful acts of a law enforcement officer. The Minnesota decision cited in footnote 1117, *State v. Branson*, declined to extend liability where the fatal shot was fired from an adverse group "***rather than by the defendant or someone associated with the defendant in committing or attempting to commit a felony"*** (emphasis added). The Nebraska case, *State v. Quintana*, states that felony murder "requires that the death of the victim result from an act of the defendant or the defendant's accomplice." Likewise, in *People v. Washington*, the court stated that the killing needs to be committed by "a robber or his accomplice." In other words, there is little support for the proposition that an accomplice should not be held liable for Felony Murder.

Moreover, as discussed above, the CCRC incorrectly relies on the *en banc* decision in *Wilson Bey v. United States*, 903 A.2d 818, 838 (D.C. 2006) to support the position that negligence is required of all actors involved in the commission of Felony Murder. As discussed above, *Wilson Bey* was discussing Felony Murder in the context of accomplice liability. The D.C. Court of Appeals indicated that, in determining whether or not an accomplice should be held liable for Felony Murder, the killing should be "reasonably foreseeable." *Id.* In this respect, the accomplice is treated slightly differently from the principal involved in the Felony Murder, while still holding the accomplice guilty of murder.

As a practical matter, if two individuals decide to engage in an armed robbery—a crime that clearly carries an unacceptably high risk of death—and, during the course of the robbery, both men fire their guns, it should not matter in terms of liability which perpetrator is the better shot. Simply because one perpetrator fires a shot that kills the victim and the other fires multiple shots but does not strike the victim is of no moment. They both engaged in a felony that must be deterred, and the question of who fired the fatal shot is irrelevant. Moreover, in many cases, it is virtually impossible to determine who inflicted the fatal injury. For example, if both men engage in an armed robbery and both men fire a gun, unless the men are stopped almost immediately still in possession of the weapons, and a bullet is recovered from the victim that is not so damaged that it can be compared to the weapon (which are all rare situations), it will be impossible to determine who fired the fatal shot.

7. USAO recommends removing the language "with extreme indifference to human life" from the Murder and Manslaughter statutes.

Subsections 22E-1101(b)(1) and 22E-1102(a)(1) provide that, in order to commit Second Degree Murder, the person must have acted "[r]ecklessly, with extreme indifference to human life." The extreme indifference to human life language is now a requirement for Second Degree Murder and Voluntary Manslaughter but not Involuntary Manslaughter. According to the commentary, recklessness requires a conscious disregard of a substantial risk whereas recklessness with extreme indifference to human life requires a conscious disregard of an extreme risk.

In including this additional requirement that the defendant acted "with extreme indifference to human life," the CCRC misinterprets the D.C. Court of Appeals ruling in *Comber v. United States*, 586 A.2d 26, 39 (D.C. 1990). The CCRC relies on this decision to support this new definition of what is commonly referred to as depraved heart murder. However, *Comber* makes clear that, under current law, "malice may be found where conduct is reckless and wanton, and a gross deviation from a reasonable standard of care, ***or*** such a nature that the jury is warranted in inferring that the defendant was aware of a serious risk of death or serious bodily harm. In such circumstances, the defendant's behavior is said to manifest a wanton disregard of human life." *Id.* at 39 (emphasis added) (internal citations omitted).

Moreover, despite the attempt to distinguish between "recklessly" and "recklessly with extreme indifference to human life," the Commentary provides no case law that clarifies the distinction. The Commentary looks at what other factors are at play in the defendant's decision to act in a manner that is clearly reckless. For example, was the individual trying to advance a legitimate social objective at the time he or she was acting recklessly? There simply is nothing in the common law that supports a consideration of this type in determining whether or not the defendant was reckless. The issue is whether or not the defendant was aware of the serious risk, *i.e.*, whether or not the defendant is reckless. It is in that context, where the defendant has behaved recklessly, that the defendant is deemed to have acted with "a wanton disregard of human life." *Comber*, 586 A.2d at 39. In making a determination as to whether or not the defendant showed such a disregard for human life, the D.C. Court of Appeals does not indicate that the jury should also take into account whether or not the defendant had a legitimate social objective. The D.C. Court of Appeals equates recklessness with a disregard of human life. There simply is no distinction.

8. USAO recommends that the RCC preserve the long-standing rule that "mere words" are inadequate provocation to mitigate Murder to Manslaughter.

Under the proposed changes, the CCRC has indicated that a defendant could conceivably mitigate a murder charge to manslaughter solely on the basis of offensive or provocative words uttered by the victim. First Draft of Report #36 at 439 n.157. This proposed change abandons the long standing rule that "mere words" are inadequate provocation to mitigate murder to manslaughter. More than a century ago, it was already considered "well settled" that "mere words, however aggravating, are not sufficient to reduce the crime from murder to manslaughter." *Allen v. United States*, 164 U.S. 492, 497 (1896). Traditional formulations hold

that "[m]ere words standing alone, no matter how insulting, offensive, or abusive, are not adequate provocation." *Nicholson v. United States*, 368 A.2d 561, 565 (D.C. 1977). This principle has been repeated and reaffirmed in modern times. *See West v. United States*, 499 A.2d 860, 865 (D.C. 1985); *Bostick v. United States*, 605 A.2d 916, 919 (D.C. 1992); *High v. United States*, 972 A.2d 829, 836 n.5 (D.C. 2009).

The reason for the rule's persistence is quite intuitive; to mitigate a murder charge to manslaughter, with the accompanying reduction in sentence and lessened societal condemnation, is a major step which courts have been reluctant to take absent extremely provoking circumstances. Provocation is adequate only in "the most exceptional cases" wherein the deceased "provoked a defendant by committing an offense that was so grave, and so heinous" that the resultant killing would be, though not justified, expected. *High*, 972 A.2d at 834. Mitigation can be defended only when the provocation is "so extreme that a reasonable person could conclude that '[the deceased] had it coming.'" *Id.* (quoting Susan D. Rozelle, *Controlling Passion: Adultery and the Provocation Defense*, 37 Rutgers L.J. 197, 209 (2005)).

Mere words cannot satisfy this requirement. "[W]ords do not constitute adequate provocation because they amount to 'a trivial or slight provocation, entirely disproportionate to the violence of the retaliation.'" *Id.* at 836 n.5 (quoting *Nicholson*, 368 A.2d at 565). Simply put, courts have not embraced the prospect that words alone, however hostile or vile, could confer any legitimacy upon a killing. *Cf. West*, 499 A.2d at 864-65 (holding that an exchange of hostile words was not adequate provocation).

The insufficiency of words as even a partial excuse for a killing is complemented by the law's expectation that reasonable people will be able to control their reactions to insults or slights. A reasonable person is expected to "control the feelings aroused by an insult or an argument." *Commonwealth v. Bermudez*, 348 N.E.2d 802, 804 (Mass. 1976). Indeed, courts need to "encourage people to control their passions" rather than "countenance the loss of self-control," as doing otherwise may enable bad behavior. *People v. Pouncey*, 471 N.W.2d 346, 389 (Mich. 1991).

There is also a consistency in the law's refusal to accept mere words as mitigation across different types of crimes. Mere words, in the absence of some other hostile act, "cannot act as a defense to the criminal charge of assault." *Boyd v. United States*, 732 A.2d 854, 855 (D.C. 1999). Since "mere words alone do not excuse even a simple assault," it would seem illogical to allow mere words to mitigate the far greater crime of murder. *Allen*, 164 U.S. at 497. In sum, courts have recognized that mere words constitute provocation for neither manslaughter nor other types of aggression; to change this would render the law either inconsistent or deeply problematic. *See United States v. Alexander*, 471 F.2d 923, 936 n.26 (D.C. Cir. 1972).

9. <u>USAO recommends removing voluntary intoxication from Chapter 11.</u>

Subsection 22E-1101(c) provides a section describing voluntary intoxication as a defense to Murder.

As an initial matter, Voluntary Intoxication is already included in § 22E-209 of the RCC that focuses solely on the general principles of intoxication. USAO submits it is simply confusing and duplicative to include another subsection on the same topic in Chapter 11. Moreover, if the CCRC agrees with USAO position in Paragraph 7, above, and removes the language that the person acted "with extreme indifference to human life," there will be no need for this section at all.

10. USAO recommends the following technical changes to the requirements of a mitigation defense.

USAO proposes the following additions to § 22E-1101(f)(1)(A) and (B) that are meant to clarify and correctly state the current status of the law and are not meant to be substantive changes.

> "(1) *Mitigation Defense.* . . . Mitigating circumstances means:
>
> (A) Acting under the influence of an extreme emotional disturbance for which there is a reasonable cause based on the conduct of another as determined from the viewpoint of a reasonable person in the actor's situation under the circumstances as the actor believed them to be; or
>
> (B) Acting with an unreasonable belief that the use of deadly force was necessary to prevent a person from unlawfully causing imminent death or serious bodily injury to the actor or another."

11. USAO recommends removing any other partial defense as a mitigation defense.

Subsection 22E-1101(f)(1)(C) defines mitigating circumstances to broadly include any other legally recognized partial defense to murder. In an attempt to provide legal support, the CCRC cites to *Evans v. United States*, 277 F.2d 354 (D.C. Cir. 1960); however, *Evans* merely provides support for the long-standing principle that, in a homicide case where self-defense is raised, the character of the decedent is relevant in determining who acted as the aggressor, regardless of whether or not the defendant was aware of this reputation. *See, e.g.*, *Harris v. United States*, 618 A.2d 140, 144 (D.C. 1982). In other words, nothing in the *Evans* opinion supports including other partial defenses to murder as a mitigation defense. Rather, *Evans* simply further defines one aspect of self-defense law.

Self-defense as a mitigating defense is based on the actor's "extreme emotional disturbance." It is not something that is treated lightly in the law, especially when deadly force is used. To mitigate a case from murder to manslaughter based on any undefined partial defense is without legal support and would allow a defendant to avoid liability for murder based on any number of factors that the courts have previously determined are not sufficient to mitigate murder to manslaughter, *i.e.*, mere words.

12. USAO recommends removing a mitigating defense as a defense to Felony Murder and First Degree Murder.

Subsection 22E-1101(f) provides that mitigating circumstances are a defense not only to Second Degree Murder, but also to Felony Murder and First Degree Murder. As indicated above, USAO submits that Felony Murder should continue to be categorized as First Degree Murder. However it is classified, mitigating circumstances should not be a defense to Felony Murder or First Degree Murder.

The cases are clear that, in the context of murder that is mitigated to manslaughter, the murder that is mitigated is Second Degree Murder. *See, e.g., United States. v. Bradford*, 344 A.2d 208, 215 (D.C. 1975) ("[k]illings classified as voluntary manslaughter would in fact be second degree murder but for the existence of circumstances that in some way mitigate malice"); *West v. United States*, 499 A.2d 860, 964 (D.C. 1985); *Comber v. United States*, 584 A.2d 26, 52 (1990) ("[t]he four mental states recognized as malicious for purposes of second-degree murder exist in [voluntary and involuntary] manslaughter, as well. . . . If those two states of mind [that relate to mitigation to voluntary manslaughter] are accompanied by recognized circumstances of mitigation, however, the crime is voluntary manslaughter.") The rationale is obvious—the courts have long recognized that a defendant cannot claim self-defense, even imperfect self-defense, because "[t]he mitigation rationale is inapplicable if the defendant had the intention of killing the victim when he went to the fatal encounter, *i.e.*, *before* the perceived need to defend himself from the victim arose." *Smith v. United States*, 203 A.3d 790, 800 (D.C. 2019). Thus, in the case of First Degree Murder, which requires premeditation, imperfect self-defense is not available to the defendant. Similarly, as *Comber* recognizes, in intentionally committing certain felonies, under the doctrine of Felony Murder, "[m]alice, an essential element of murder is implied from the intentional commission of the underlying felony even though the actual killing might be accidental." *Comber*, 584 A.2d at 39. Once that malice is implied from the intentional commission of the underlying felony, similar to First Degree Murder, the defendant cannot then rely on mitigation principles that may have developed after the formation of the initial intent that the defendant had when he first undertook to commit the felony.

13. USAO recommends keeping the gross negligence standard currently required for Involuntary Manslaughter cases and the civil negligence standard currently required for Negligent Homicide.

Subsection 22E-1102(b) provides that "[a] person commits involuntary manslaughter when that person recklessly causes the death of another person." In other words, subsection (b) now seeks to make Involuntary Manslaughter a lesser-included offense of Voluntary Manslaughter.

As discussed above in Section 7, USAO submits that the attempt to distinguish between recklessly and recklessly with extreme indifference to human life is contrary to well-established case law. Assuming that the CCRC agrees with that position, then the definition of Involuntary Manslaughter as drafted in the RCC is duplicative of the definition of Voluntary Manslaughter. However, as discussed below, USAO submits that it is appropriate to keep the distinction

currently in place in the common law between Involuntary Manslaughter, which requires that the actor was grossly negligent, and the negligence standard applicable to Negligent Homicide.

As discussed in *Comber*, the mental state required for Involuntary Manslaughter is akin to gross negligence, *i.e.*, "[o]ne who acts in conscious disregard of an extreme risk of death or serious bodily injury is guilty of murder, but if he or she is only unreasonably unaware of such a risk, the crime is involuntary manslaughter." *Comber*, 584 A.2d at 52. This standard of negligence is akin to the "Negligence" standard set forth in § 22A-206. *See* First Draft of Report #19 at 61.

A "lesser offense," if you will, is found in "Negligent Homicide" which is currently identified in Title 50 relating to Motor and Non-Motor Vehicles and Traffic. USAO does not object to moving "Negligent Homicide" to be included with the remaining Homicide offenses; however, USAO suggests that, consistent with common law, the *mens rea* required for the commission of this offense be akin to the civil standard of negligence that is currently required. This standard allows the perceived benefit of the risk-creating activity, *i.e.*, a police officer's high speed chase of a violent felon, to be considered in determining the applicable standard of care.

The law in the District of Columbia has long recognized that it is appropriate to hold someone who causes another's death through the negligent operation of a vehicle to be subject to criminal, felony, exposure, not merely civil liability. However, it also recognizes that because of the decreased *mens rea* requirement, Negligent Homicide is appropriately sentenced as a lesser felony, currently in the same category of the Voluntary Sentencing Guidelines as Second Degree Burglary or Felony Assault on a Police Officer, with a maximum prison term of three years. USAO submits that this categorization appropriately reflects the culpability that the law attaches to the conduct giving rise to Negligent Homicide charges.

Recently, Maryland has adopted a Negligent Homicide charge which is less severe than what had been Maryland's lowest charge in vehicular homicide cases (Vehicular Manslaughter), for which the standard is gross negligence. In other words, Maryland has added a less severe category of homicide that is consistent with D.C.'s current law that criminalizes both gross negligence and civil negligence. Even more, given the changing demographics, population, and street schemes of D.C., there has been a significant increase in the number of vehicular homicides in recent years. Prior to 2015, there were typically between 25 and 28 vehicular homicides per year in D.C., however, in the last two years, there has been an increase to 35 vehicular homicides each year.

14. <u>USAO recommends that, with the exception of the enhancements directly applicable to First and Second Degree Murder, as set forth below, all other enhancements be addressed with the general enhancements set forth in Chapter 6.</u>

Subsections 22E-1101(d)(3) and 22E-1102(d)(3) currently provide for enhanced penalties for Manslaughter and Murder. As it relates to enhancements for First and Second Degree Murder, USAO does not believe it is necessary to set forth those enhancements again, to the extent they are already provided for in Chapter 6.

USAO recommends that the enhancements directly applicable to First and Second Degree Murder, currently provided for in Section 22E-1101(d)(3)(C)-1101(d)(3)(G), remain with the edits discussed below.

15. USAO recommends that the enhancement for a defendant previously convicted of Murder be added to the enhancements for Murder.

Subsection 22E-1101(d)(3) has removed the enhancement for an individual who is convicted of murder who has previously been convicted for murder.

Current law enhances the penalty for individuals previously convicted of murder; however, the RCC has removed that enhancement because it is argued that it enhances the penalties twice and also is covered by the general recidivist enhancement. USAO submits that this enhancement can be included in a way that does not permit the actor to be sentenced under a general recidivist enhancement, as well as this recidivist enhancement, and allows for a greater enhancement to the sentence of a twice-convicted murderer.

The argument that inclusion of this enhancement results in the defendant suffering from enhanced penalties twice overlooks the consequences to the community when someone is murdered. A defendant who has a significant prior history score that is the result of multiple gun or misdemeanor offenses should not be sentenced the same as one who has previously taken a life, was given a second chance, and then takes yet another life. In the situation of an individual who has killed before and was afforded that second chance, especially in light of the Incarceration Reduction Amendment Act, an enhanced penalty is necessary.

USAO now regularly sees defendants who were incarcerated in the 1990s for murder and who are now being released. In multiple cases, these defendants, who have been afforded a second chance, have taken another life within a short time of being released from incarceration. USAO submits that this behavior warrants providing the Court the opportunity to impose an enhanced sentence.

16. USAO recommends that the enhancement for Murder of an individual capable of providing information to law enforcement be added to the enhancements for Murder.

Subsection 22E-1101(d)(3) has removed the enhancement for an individual who kills a victim who was or is believed to be a witness. The reasoning set forth by the CCRC is that the enhancement is not necessary because the defendant is subject to criminal liability under the Obstruction of Justice statute.

This reasoning fails for two reasons. First, the enhancement that is being removed is broader than the obstruction statute and penalizes additional behavior. For example, individuals are routinely killed because there is a belief that the individual already “snitched” to the police, when, in fact, the individual had not. Under the enhancement currently included in the law, because this witness was capable of providing this information (even if the victim had not), the enhancement still applies. However, because the intent of the defendant was to punish the victim

for (the mistaken belief) that the victim had already provided the information, the defendant cannot be charged with obstruction of justice if the victim had not actually provided the information. Additionally, often when a potential witness is killed, the case quickly turns cold and is not solved for years. In these situations, whereas the statute of limitations for murder has not yet run, including the enhancement, the government is time-barred from prosecuting the defendant for obstruction of justice.

Second, and more fundamentally, the murder of an individual believed to be a witness or who is or was a witness strikes at the core of the judicial system. The system simply does not work when witnesses, or perceived witnesses, are killed for cooperating with law enforcement. In the current "anti-snitch" culture, in which witnesses are regularly threatened and intimidated, the murder of a witness or perceived witness must be punished more severely given the damaging effects to the community, the victim, and the justice system.

17. USAO recommends that the enhancement for a defendant who commits First Degree Premeditated Murder during a Kidnapping, Robbery, Arson, Rape, or Sex Offense be added to the enhancements for Murder in certain circumstances.

Subsection 22E-1101(d)(3) has removed the enhancement for an individual who is convicted of a murder that is committed during a kidnapping, robbery, arson, rape, or sex offense. The rationale is that if an individual is convicted of Felony Murder, he is essentially punished twice for the underlying felony.

While this rationale may be sound in some contexts, it clearly does not apply in situations where the predicate felony for Felony Murder differs from the felony used to provide for an enhanced penalty. For example, in a case where the predicate felony is Kidnapping, and the Robbery is committed as an afterthought, the Robbery is not used as a predicate for the Felony Murder charge. Moreover, if the statute of limitations has already run for the Robbery charge, and this enhancement is removed, the defendant will not be subjected to any penalty for this additional egregious behavior. Similarly, if a defendant plans to commit a murder, and is guilty of First Degree Premediated Murder, but then commits the arson or rape as an afterthought, the government submits that this enhanced penalty is appropriate. To address the CCRC's concern, USAO suggests adding a limitation providing that the Felony Murder predicate and the basis for the enhancement must be different offenses.

18. USAO recommends that the enhancement for a drive-by or random shooting be added to the enhancements for Murder.

Subsection 22E-1101(d)(3) has removed the enhancement for an individual who is convicted of a murder that is a drive-by or random murder because the CCRC states that 'drive-by or random shootings are not sufficiently distinguishable from other murders to justify a more severe sentence." First Draft of Report #36 at 17.

USAO disagrees with this position. In today's environment, many homicides are the result of neighborhood "beefs" that do not target a specific person, and rather target a community as a whole. The perfect example of this is the murder of ten-year-old Makiyah Wilson. In a

situation such as that, where dozens of shots are fired randomly into a community, without any care for who is struck, a more severe sentence is absolutely warranted. Crime scenes today often are littered with upwards of 50 cartridge casings. The government may not be in a position to identify each and every person in the "zone of danger" such that it can effectively charge the defendant for shooting in the direction of each of those potential victims, but certainly an enhanced penalty for the complete disregard the defendant showed toward the safety of those individuals is warranted.

19. USAO recommends that the enhancement in § 22E-1101(d)(3)(E) be amended to more accurately reflect current case law.

Subsection 22E-1101(d)(3)(E) provides for an enhanced penalty if the defendant "[k]knowingly inflicts extreme physical pain or mental suffering for a prolonged period of time immediately prior to the decedent's death."

USAO has no objection to codifying what previously has been referred to as "heinous, atrocious, and cruel," but recommends that it be changed to indicate that the defendant "knowingly inflicts extreme physical pain or mental suffering" and removes the references to a "prolonged period of time" and that it occurred "immediately prior" to the decedent's death.

For example, if a defendant tortures a victim, but the torture is not prolonged, this enhancement would not apply. USAO can think of countless examples of cases where the victim was subjected to incredible pain through the removal of various parts of the body, however, this may not be defined as occurring over a "prolonged period of time." Moreover, in the case of *U.S. v. Darron Wint*, the government was not in a position to show that the torture the victims endured occurred "immediately prior" to the decedent's death, but rather that it occurred at some point during the 22 hours preceding death. It should be sufficient to show that the torture was inflicted, even if it was inflicted ten hours before the fatal blow was executed. Because the only person who may be able to speak to the length or timing of the torture will necessarily be deceased, the government frequently will not be able to prove the length or timing of the torture, even if the evidence is clear that the torture took place.

20. USAO recommends removing § 22E-1101(e), which requires a bifurcated trial when certain enhancements are present.

Subsection 22E-1101(e) provides that when the government charges the enhancements that the defendant inflicted "extreme physical pain or mental suffering" or "mutilates or desecrates the decedent's body," that the evidence of extreme pain, mental suffering, mutilation or desecration be presented during the second phase of a trial. The rationale for this provision is to prevent the admissibility of unfairly prejudicial evidence. USAO submits there are two fundamental problems with this provision.

First, the bifurcation ignores the practical effects that will result from longer trials and repeatedly calling the same witnesses during both phases. For example, in almost all circumstances, the evidence technicians and medical examiners will need to be called during both phases of the trial, placing an increased burden on already limited resources. The medical

examiner will need to testify in the first phase regarding the cause and manner of death in some sort of sanitized fashion. During the second phase, the medical examiner will need to return to discuss in more detail the severity of the injuries inflicted upon the decedent. In addition to these professional witnesses, some civilians who are already reluctant to testify may be forced to testify twice, which can be a very difficult experience.

Second, and more importantly, in almost every case, it will be necessary to show the extensive injuries in proving intent, premeditation and deliberation, and in some cases, even in proving identity. For example, the extent of the injuries inflicted may be necessary to show the prior relationship between the decedent and the defendant, and hence the personal nature of the crime, in showing identity. In a situation involving a domestic homicide where the decedent was pregnant at the time she was killed, multiple stab wounds to the abdomen (as opposed to some other method of killing) could provide additional evidence that the wounds were committed by someone who was unhappy with the pregnancy. Moreover, in almost all cases, the best evidence of intent and deliberation can be found in the nature of how the crime was committed – *i.e.*, through the infliction of multiple stab wounds that tortured the victim for hours. In short, the exception to bifurcation, that "such evidence [that] is relevant to determining whether the defendant committed" the murder is permissible in the first phase of the trial, will consume the rule.

21. USAO recommends adding a "while armed" penalty enhancement.

This change would be consistent with current law. Under current law, the "while armed" enhancement applies to all crimes of violence and dangerous crimes, including murder. D.C. Code § 22-4502. Under the RCC, a defendant is equally culpable for a murder committed without the use of a dangerous weapon as a defendant who committed the murder without the use of a dangerous weapon. Although both scenarios result in the loss of a human life, the fact of a dangerous weapon should subject a defendant to a higher penalty. A defendant creates an increased risk of danger by introducing a weapon to an offense, which could result in additional harm to other potential victims than if the defendant committed the offense unarmed. USAO recommends using the language proposed in the General Comments.

VI. Chapter 12. Robbery, Assault, and Threats.

A. RCC § 22E-1201. Robbery.

1. USAO opposes removing a provision for a "sudden or stealthy seizure or snatching" robbery.

The current D.C. Code defines robbery as the taking of property from another person "by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear." D.C. Code § 22-2801. The RCC dramatically alters the current robbery statute by entirely eliminating "sudden or stealthy seizure or snatching" as a species of robbery. RCC § 22E-1201. In so doing, the RCC creates significant ambiguity concerning whether snatch-takings of property from a person against his or her will constitute robberies. The commentary provides that "depending on the specific facts, it is conceivable that a purse snatching could

involve sufficient use of physical strength to constitute 'overpowering physical force.'" RCC App. J at 194 n.1145. "However, this would be a highly fact specific inquiry, and the revised robbery statute is not intended to categorically include or bar purse snatchings." *Id.*

The statute, however, provides no guidance whatsoever concerning the circumstances under which a snatching would rise to the level of an overpowering use of force. For example, if a defendant pulls a phone out of a complainant's hand, USAO believes that this would constitute a robbery. In this example, the defendant overpowered the complainant by being able to take the phone from the complainant's hand. The RCC, however, is vague as to whether this would constitute a robbery. The law from other jurisdictions runs the gamut, with several jurisdictions—including reformed jurisdictions—concluding that snatching away the property of another necessarily requires the use of force sufficient to overcome the will of the victim. *See, e.g.*, *State v. McKinney*, 961 P.2d 1, 8-9 (Kan. 1998) (snatching purse away from victim constituted threat of bodily harm even if defendant did not push victim); *Com. v. Brown*, 484 A.2d 738, 741 (Pa. 1984) ("It is clear to us that any amount of force applied to a person while committing a theft brings that act within the scope of robbery under § 3701(1)(a)(v) . . . . The degree of actual force is immaterial, so long as it is sufficient to separate the victim from his property in, on or about his body."); *State v. Stein*, 590 A.2d 665, 667-68 (N.J. 1991) (observing that some jurisdictions "implicitly recognize that victims do not turn over their property willingly, even if they do not resist or struggle with a thief. Thus, the amount of physical energy necessary to take the property is deemed sufficient to support a robbery conviction."). Indeed, in focusing on whether the use of force was "overpowering," the RCC suggests that the crime the defendant commits (robbery or theft) is entirely different depending on whether the victim of the crime resists and attempts to fend off the attacker or does not resist out of fear.

Moreover, the RCC introduces this ambiguity concerning whether forcefully snatching property from another constitutes robbery without creating an enhanced degree for theft from a person. *See* RCC § 22E-1201. While many jurisdictions hold that snatching constitutes larceny rather than robbery, those jurisdictions generally distinguish " 'larceny from the person,' which is usually a higher grade or degree of larceny permitting severer punishment irrespective of the value of the property." 4 Wharton's Criminal Law s. 465 (15th ed.) (citing Ariz. Rev. Stats. Ann., § 13-1802(C); Colo. Rev. Stats., § 18-4-401(5); Conn. Gen. Stats. Ann., § 53a-123(a)(3); Utah Code Ann., § 76-6-412(1)(a)(iv); Rev. Code of Wash. Ann. § 9A.56.030(1)(b)).

2. <u>USAO recommends creating a separate statutory provision for Carjacking, instead of subsuming Carjacking within Robbery.</u>

The RCC substantively alters current D.C. law by eliminating the offense of carjacking—which is currently the subject of its own detailed and thorough statutory provision (D.C. Code § 22-2801)—and subsuming it within the Fourth Degree Robbery provision. *See* RCC § 22E-1201(d). The RCC provides no justification for altering the law in this fashion, beyond stating that this alteration is "consistent with national norms." RCC App. J at 197. Yet the commentary to the RCC identifies five reformed jurisdictions that retain a separate offense of carjacking. *Id.* at 197 n.1168 (N.J. Stat. Ann. § 2C:15-2; 18 Pa. Stat. Ann. § 3702; 720 Ill. Comp. Stat. Ann. 5/18-3; Del. Code Ann. tit. 11, § 836; Tenn. Code Ann. § 39-13-404). The commentary appears to have overlooked two additional reformed jurisdictions that retain a separate carjacking statute.

See Wi. St. 943.23(1r); Kan. St. 21-3716 (defining aggravated burglary to include entering a car when a person is present with intent to commit a felony). Moreover, the reformed jurisdictions identified in the commentary that distinguish carjacking within their robbery statutes generally treat carjackings as among the most severe forms of robbery. *See* Conn. Gen. Stat. Ann. § 53a-136a (providing a separate penalty for carjacking robberies and imposing a three-year mandatory minimum for such offenses); N.Y. Penal Law § 160.10 (treating carjacking as second degree robbery); Utah Code Ann. § 76-6-302 (defining aggravated robbery to include carjacking). By eliminating the separate carjacking statute and subsuming carjacking within fourth degree robbery, the RCC proposes a dramatic change to the current law with little explanation. USAO believes that Carjacking should remain a separate statutory provision, and that it is inappropriate to subsume it into Robbery.

3. USAO recommends, in subsection (e)(4)(B), adding the words "or engaging in conduct that otherwise places the complainant or any person present other than an accomplice in reasonable fear of being killed, kidnapped, subject to bodily injury, or subject to a sexual act or sexual contact.

   With USAO's changes, this subsection would provide:

   "(B) Threatening to immediately kill, kidnap, inflict bodily injury, or commit a sexual act or sexual contact against the complainant or any person present other than an accomplice, or engaging in conduct that otherwise places the complainant or any person present other than an accomplice in reasonable fear or being killed, kidnapped, subject to bodily injury, or subject to a sexual act or sexual contact;"

USAO believes that the RCC proposed Robbery statute is too limited and does not clearly enough encompass certain situations that should be prosecuted as robberies. If a defendant approaches a complainant, points a gun at the complainant, and tells the complainant to give the defendant money, it is not clear that that conduct could be prosecuted as a robbery under the RCC statute. While the commentary from "Criminal Threats" under RCC § 22E-1204 states that the word "communicates" should be construed broadly, and that "non-verbal conduct such as displaying a weapon" can constitute a threat (RCC Commentary at 106 & n.6), the language in the robbery statute alone is not as clear. Because the plain language of the statute will control, rather than the Commentary, USAO recommends that the plain language clarify that this type of action would be covered by the Robbery statute. This "putting in fear" robbery is properly criminalized under the current robbery statute, *see* D.C. Code § 22-2801, and should continue to be a basis for robbery liability.

4. USAO recommends tracking the "while armed" and "protected person" provisions consistent with the recommendations in the General Comments, above.

5. In the alternative, USAO recommends, in subsections (a)(2)(A), (b)(2)(B), (c)(2)(A)(ii), (c)(2)(B), replacing the words "a dangerous weapon" with the words "a dangerous weapon or imitation dangerous weapon."

This is already incorporated in subsection (d)(2)(A)(ii), and USAO believes that this language should be consistent throughout the statute. As discussed elsewhere in USAO's comments, if a gun is not recovered, it is impossible to ascertain if the firearm used is real or an imitation, and they often look identical. Injury could be caused by an imitation dangerous weapon, so it is important to clarify that

6. In the alternative, USAO recommends, in subsection (d)(2)(A)(ii), replacing the words "displays" with the words "displays or uses."

This is already incorporated in subsections (a)(2)(A), (b)(2)(B), and (c)(2)(A)(ii), and USAO believes that this language should be consistent throughout the statute.

7. USAO recommends, in subsection (e)(4)(B), replacing the words "sexual act" with the words "sexual act or sexual contact."

With USAO's changes, this subsection would provide:

"(B) Threatening to immediately kill, kidnap, inflict bodily injury, or commit a sexual act or sexual contact against the complainant . . ."

"Sexual act" is a term defined in the RCC, which includes certain sexual offenses, but does not include a "sexual contact." Adding the term "or sexual contact" clarifies that robbery can be accomplished by either threatening to commit a sexual act or by threatening to commit a sexual contact (which would include, for example, contact between the penis and genitalia). This is consistent with other provisions in the RCC, including the Burglary statute, which states that a defendant committing a burglary may intend to commit, among other offenses, either a sexual act or sexual contact. RCC § 22E-2701(a)(4).

8. USAO recommends, in subsection (e)(4)(C), replacing the word "overpower" with the words "is sufficient to overpower."

With USAO's changes, this subsection would provide:

"(C) Using physical force that is sufficient to overpowers the complainant or any person present other than an accomplice."

This is consistent with current law regarding force in the sexual abuse context. Force is defined as, among other things, "the use of such physical strength or violence *as is sufficient* to overcome, restrain, or injure a person." D.C. Code § 22-3001(5) (emphasis added). This is consistent with the current sexual abuse jury instructions, which state: "Force means the use or threatened use of a weapon, the use of such physical strength or violence *as is sufficient to*

overcome, restrain or injure a person, or the use of a threat of harm sufficient to coerce or compel submission by the victim." D.C. Crim. Jur. Instr. 4.400 (emphasis added).

B. RCC § 22E-1202. Assault.

1. USAO recommends that the Assault provision include liability for assaults that do not result in bodily injury.

With USAO's changes, subsections (c) and (f) would provide:

"(c) *Third Degree.* A person commits third degree assault when that person:
(1) Recklessly causes significant bodily injury to the complainant
. . .
(2) Recklessly causes bodily injury to the complainant by displaying or using an object that, in fact, is a dangerous weapon; or
(3) With the intent to cause bodily injury to the complainant, uses force or violence against the complainant, while knowingly armed with or having readily available what, in fact is a dangerous weapon or imitation dangerous weapon.
. . .

(f) *Sixth Degree.* A person commits sixth degree assault when that person:
(1) Recklessly causes bodily injury to the complainant.; or
(2) With the intent to cause bodily injury to the complainant, uses force or violence against the complainant."

Under the RCC, all assaults now require that the complainant suffer "bodily injury." Under current law, by contrast, an assault may be committed in one of three ways—attempted battery, intent to frighten, and non-violent sexual touching, none of which require that the complainant suffer bodily injury. *See* D.C. Crim. Jur. Instr. 4.100. Intent-to-frighten assaults and non-violent sexual touching assaults would no longer be prosecuted under the RCC Assault statute; to a large extent, intent-to-frighten assaults would be prosecuted under the RCC's Menacing statute. The RCC's Offensive Physical Contact and Nonconsensual Sexual Conduct statutes would fill the gap left by the exclusion of non-violent sexual touching assaults from the RCC's Assault statute.

With respect to attempted-battery assaults, however, the RCC statute shifts the focus from the defendant's conduct (using force or violence against another) to the results of the defendant's actions (causing bodily injury). The defendant's actions may be the same whether the defendant inflicts bodily injury or not, so it is more appropriate to focus on the actions of the defendant when assessing whether the defendant committed an Assault than solely on the injuries created by the defendant's actions. In making this change, the RCC statute may shield from liability under the Assault provision defendants who, using force or violence, intend to cause physical injury to another but do not achieve that result. *See Robinson v. United States*, 506 A.2d 572, 574 (D.C. 1986) ("Attempt-battery assault requires proof of an attempt to cause a physical injury, which may consist of any act tending to such . . . injury, accompanied with such circumstances as denote at the time an intention, coupled with the present ability, of using actual

violence against the person."). It may also exclude from Assault liability defendants who actually cause physical injury to the complainant, but which the government is unable to prove at trial. This could include, for example, a situation where an eyewitness observes the entire assault, but cannot see whether the complainant had any visible injuries or suffered any physical pain. If the complainant is uncooperative, the government may rely exclusively on the eyewitness testimony to prove that the assaultive conduct took place. This defendant, however, should not be subject to lesser penalties for the same conduct (and subject to liability only for attempted assault or second degree offensive physical contact) simply because the complainant was uncooperative. The defendant's actions were the same, regardless of what injuries the complainant suffered, or what injuries the government was able to prove at trial. The government therefore believes that the crux of assault liability should rest on what actions the defendant took, not exclusively based on what injuries the complainant suffered.[5]

2. USAO recommends tracking the "while armed" and "protected person" provisions consistent with the recommendations in the General Comments, above.

3. USAO opposes eliminating separate liability for "assault with intent to commit" offenses.

USAO submitted a comment on this issue in its May 20, 2019 comments. USAO further notes, however, that a rebuttable presumption for charging a juvenile defendant as an adult pursuant to Title 16 only applies when the defendant is charged with "[m]urder, first degree sexual abuse, burglary in the first degree, robbery while armed, *or assault with intent to commit any such offense* . . . and any other offense properly joinable with such an offense." D.C. Code § 16-2307(e-2)(1)–(2) (emphasis added). There is no similar provision for attempts to commit such offenses. Thus, eliminating liability for assault with intent to commit offenses would limit USAO's ability to exercise its discretion in charging such individuals pursuant to Title 16.

In the alternative, if the RCC makes this change, the RCC would need to include a corresponding update to D.C. Code § 16-2307 replace "assault with intent to commit any such offense" with "an attempt to commit any such offense" so that Title 16 could continue to apply to these offenses.

4. USAO recommends adding a separate law criminalizing assaults and offensive physical contact on a law enforcement officer.

Unlike the Assault on a Police Officer ("APO") offense in current law, there does not appear to be a specific law criminalizing assaultive or offensive physical contact against a police officer under the RCC. USAO believes there should be such a law akin to the current APO law.

As written, the RCC criminalizes an assault on a law enforcement officer only if the assault results in some bodily injury to the complainant. *See* RCC § 22E-1202(a)(4) (first degree assault for serious bodily injury); RCC § 22E-1202(c)(1) (third degree assault for significant bodily injury); RCC § 22E-1202(e)(1) (fifth degree assault for bodily injury). "Bodily injury" is defined as "physical pain, illness, or any impairment of physical condition." RCC § 22E-701. If

[5] Consistent with current law, however, USAO believes that it is appropriate to have higher gradations of assault based on whether the complainant suffered either significant bodily injury or serious bodily injury.

bodily injury is not present, the person's physical actions towards a police officer would merely constitute second-degree offensive physical contact. *See* RCC § 22E-1205(b). USAO believes that there should be an RCC statute tracking the current APO statute, that creates liability for assaulting a police officer, regardless of whether injury results.

Based on the Table of Contents, it appears that that "Resisting Arrest" is a possible or planned RCC statute in Chapter 34 that has not yet been drafted. But USAO believes that a person's physical conduct might not qualify as "resisting arrest" and yet should still be criminalized.

For example, under the RCC, if a person pushes or shoves an officer, the person would not be guilty of an assault; the person would merely be guilty of the generic second-degree offensive physical contact. But, today, if a person shoves a police officer, the person would be guilty of assault on a police officer (APO). *See* D.C. Crim. Jur. Instr. 4.114 (APO does not require any bodily injury).

The Court of Appeals has recognized that the current APO statute "was intended to 'deescalate the potential for violence which exists whenever a police officer encounters an individual in the line of duty.'" *Coghill v. United States*, 982 A.2d 802, 806 (D.C. 2009) (quoting *In re C.L.D.*, 739 A.2d 353, 355 (D.C. 1999). USAO believes the RCC should separarly criminalize assault on and offensive contact with police officers, in recognition of officer's special roles and the potential for violence if a person does make offensive physical contact with the officer.

5. <u>USAO recommends adding the words "regardless of whether the arrest, stop, or detention was lawful" to RCC § 22E-1202(g)(B) and RCC § 22E-1205(c)(2).</u>

   With USAO's changes, RCC § 22E-1202(g)(B) and RCC § 22E-1205(c)(2) would provide:

   "The use of force occurred during an arrest, stop, or detention for a legitimate law enforcement purpose<u>, regardless of whether the arrest, stop, or detention was lawful</u>;"

As written, the RCC states that a person cannot assert a justification or excuse defense to a charge of assault on a law enforcement officer if, among other things, the use of force "occurred during an arrest, stop, or detention for a legitimate police purpose." RCC § 22E-1202(g)(B). The word "legitimate" is undefined in the RCC. This could lead to unnecessary litigation over whether the police officer's actions were for a "legitimate" purpose.

In addition, the word "legitimate" could connote that the officer's purpose was also *unlawful*. The RCC should make clear that whether an officer's actions were *legitimate* is not related to whether the officer's actions were *lawful*. Indeed, the Court of Appeals explicitly made this point in *Speed v. United States*, 562 A.2d 124, 129 (D.C. 1989), when it held that a person acts without justifiable excuse if the officer is engaged in an arrest for any legitimate police purpose, "regardless of whether or not the stop or detainment was lawful." *See id.* at 128 ("We further note that when Congress amended D.C. Code § 22–505, it made clear that the common

law right to defend one's self against an illegal arrest henceforth did not apply in the District of Columbia.").

To synchronize the language of *Speed* with the rest of the language from the RCC, USAO suggests adding the phrase "regardless of whether the arrest, stop, or detention was lawful" to RCC § 22E-1202(g)(B) and RCC § 22E-1205(c)(2).

C. RCC § 22E-1203. Menacing.

1. USAO opposes eliminating "intent-to-frighten" liability from the Assault statute, and recommends subsuming the Menacing statute into the Assault statute.

Current law criminalizes conduct wherein an individual commits a "threatening act" that would "reasonably" create in another a "fear of immediate injury." D.C. Crim. Jur. Instr. 4.101. Such cases also require that the defendant have the "apparent ability to injure" the victim. *Id.* Where this threatening act is committed with a "dangerous weapon," it is classified as Assault with a Dangerous Weapon ("ADW"); where no weapon is involved, it is classified as a Simple Assault ("SA"). Two key elements differentiate these "intent-to-frighten" assaults from threats cases: a) the defendant must have the "present ability to inflict immediate bodily harm"; and b) the victim must have "concurrent awareness" of the assault. *Joiner-Die v. United States*, 899 A.2d 762, 766-67 (D.C. 2006). The RCC has transformed these intent-to-frighten cases into a new two-part "Menacing" statute. This incorporates former ADW-intent-to-frighten as First Degree Menacing and SA-intent to frighten as Second Degree Menacing. As USAO understands it, the distinction between "menace" and "threats" is that in "menace" cases a reasonable person would believe that the "harm would **immediately** occur" whereas threats cases merely require a reasonable person to believe that the harm would occur at some point.

The most common set of cases this will affect are what are commonly referred to as "gun point" cases—fact patterns where a defendant draws a weapon and points it at a victim but does not fire it. Such cases are currently explicitly labeled as ADWs, per the D.C. Criminal Jury Instructions. Particularly with respect to these ADW-intent-to-frighten / First Degree Menacing cases, USAO is concerned that this will result in ADW-intent-to-frighten cases being explicitly treated as lesser cases, and likely subject to lesser penalties. USAO believes that this does not represent the dangers created by this offense, and that a departure from current law is not warranted.

2. USAO opposes the creation of a right to a jury trial for all completed or attempted menacing cases.

The RCC specifically provides that menacing cases, whether charged as a completed offense or an attempt, are jury demandable. RCC § 22E-1203(d). USAO opposes this for multiple reasons. First, because no similar provision exists in the Assault statute, this provision will lead to incongruous results. Someone who commits Sixth Degree Assault and actually causes bodily injury will not have a right to a jury trial, whereas someone who commits Second Degree Menacing and only communicates that he or she intends to cause harm will have a right to a jury trial. Second, and more fundamentally, the offense of Menacing is unrelated to the

rationale that the RCC seeks to follow with respect to jury demandability. The RCC offers that the jury trial is "intended to ensure that the First Amendment rights of the accused are not infringed" because the District recognizes a "heightened need to provide jury trials to defendants accused of crimes that may involve civil liberties." It is unclear how there are any particular, unique constitutional interests created by this offense. Third, this will have a tremendous impact on misdemeanors prosecutions in D.C. The vast majority of misdemeanors are prosecuted in non-jury trials. There are significantly more resources required to prosecute jury trials, including USAO resources, court resources, defense resources, and community resources (as members of the jury). Creating jury trial rights for many crimes that have historically been prosecuted as misdemeanor non-jury trials (such as intent-to-frighten simple assault, or its analog Second Degree Menacing), would create a tremendous strain on already limited resources.

3. USAO recommends including an enhancement for committing this offense against a protected person.

USAO proposes using the language suggested in the General Comments, above. The RCC advocates removing the possibility of enhancements based on the victim's status (minor, senior citizen, transportation worker, District official or employee, or citizen patrol member) on the theory that those status-based enhancements should be reserved for cases involving physical injury and "other serious crimes such as sexual assault." First, this incorporates a value judgment that first degree menacing cases, which will involve threats of immediate harm with a dangerous or imitation dangerous weapon, are not "serious." Second, this enhancement reflects the added seriousness of committing these crimes against vulnerable community members. USAO believes that this enhancement should be available for the offense of Menacing.

D. RCC § 22E-1204. Criminal Threats.

1. USAO opposes the creation of a right to a jury trial for all completed or attempted threats cases.

The RCC specifically provides that threats cases, whether charged as a completed offense or an attempt, are jury demandable. RCC § 22E-1204(d). USAO opposes this for reasons similar to those articulated above with respect to the Menacing statute. First, it is incongruous that a right to a jury trial would exist for a Second Degree Threat but not for a Sixth Degree Assault, where that threat is carried out. Second, there are no particular constitutional interests creates by the Threats statute. Third, this will have a tremendous impact on misdemeanor prosecutions in D.C. Although under current law, Threats is punishable by 6 months' incarceration, and is therefore a jury-demandable offense, *see* D.C. Code § 22-407, Attempted Threats is punishable by 180 days' incarceration under the general attempt statute, and is therefore not a jury-demandable offense, *see* D.C. Code § 22-1803. Misdemeanor prosecutions almost always proceed under Attempted Threat theories, resulting in non-jury trials.

2. USAO recommends including an enhancement for committing this offense against a protected person.

USAO proposes using the language suggested in the General Comments, above. The RCC advocates removing the possibility of enhancements based on the victim's status (minor, senior citizen, transportation worker, District official or employee, or citizen patrol member) on the theory that those status-based enhancements should be reserved for cases involving physical injury and "other serious crimes such as sexual assault." First, a threat of bodily harm could be a serious offense in certain circumstances. Second, this enhancement reflects the added seriousness of committing these crimes against vulnerable community members. USAO believes that this enhancement should be available for the offense of Threats.

E. RCC § 22E-1205. Offensive Physical Contact.

1. If the RCC does not adopt USAO's recommendation to eliminate the "bodily injury" requirement from the Assault statute in RCC § 22E-1202, USAO recommends making second-degree offensive physical contact an explicit lesser-included offense of sixth-degree assault.

With USAO's changes, subsection (b)(2) would provide:

"(b) *Second Degree.* A person commits second degree offensive physical contact when that person:

. . .

(4) Or commits what would be sixth degree assault but for the absence of bodily injury.

USAO believes that the line between a sixth-degree assault and second-degree offensive physical contact will sometimes be hard to delineate. The question will often turn on whether the victim actually experienced "physical pain." *See* RCC § 22E-701 (defining "bodily injury" as "physical pain, illness, or any impairment of physical condition."). That condition will sometimes be met with simply the victim's testimony (for example, "I experienced pain when he hit me."), but oftentimes the factfinder will have to make a determination as to whether the victim was truly in pain.

For this reason, and to eliminate the need for USAO to charge both second-degree offensive physical contact and sixth-degree assault in every run-of-the-mill assault case in which Person A hits Person B, USAO recommends that the RCC make explicit that second-degree offensive physical contact is a lesser-included offense of sixth-degree assault.

There are many situations in which a defendant's actions towards the victim are close to a sixth-degree assault. For example, a defendant might slap a victim in the face. The victim may report that the slap "hurt." The victim's statement may not be sufficient to qualify as "bodily injury" if the factfinder does not find that the victim actually experienced "physical pain." Moreover, there may be cases in which the victim does not testify (*e.g.*, the slap is captured on video, or testified to by a third-party witness), or the victim testifies at trial that the slap did *not*

hurt (despite initially saying otherwise). Even if a video or third-party witness testifies to all of the facts of the assault, those facts may not be sufficient to prove the fact of an injury, even if one existed. In these situations, the factfinder should have the option to find the defendant guilty of second-degree offensive physical contact.

2. USAO recommends including an enhancement for committing this offense against a protected person.

USAO proposes using the language suggested in the General Comments, above. The RCC advocates removing the possibility of enhancements based on the victim's status (minor, senior citizen, transportation worker, District official or employee, or citizen patrol member) on the theory that those status-based enhancements should be reserved for cases involving physical injury and "other serious crimes such as sexual assault." First, conduct that constitutes first degree offensive physical contact could be a serious offense in certain circumstances. Bodily fluid can contain transmittable disease, and can lead to serious consequences for a victim who comes into contact with that bodily fluid and become infected with a disease. Second, this enhancement reflects the added seriousness of committing these crimes against vulnerable community members. USAO believes that this enhancement should be available for the offense of Offensive Physical Contact.

F. RCC § 22E-1206. Stalking.

1. USAO recommends that, in subsection (a)(1), the culpability standard be changed from "purposely" to "knowingly."

With USAO's changes, subsection (a)(1) would provide:

"(1) Knowingly ~~purposely~~, on two or more separate occasions . . ."

Knowingly is the proper intent for the course of contact necessary for a stalking charge. This is particularly the case for the "communicating to the complainant" prong. It is more appropriate to require proof that the defendant was aware that his actions were "practically certain" to result in communications, rather than that he "consciously desired" such a result. This is particularly the case with regard to electronic communications with the complainant.

2. USAO recommends removing the notice requirement in subsection (a)(1)(B).

With USAO's changes, subsection (a)(1)(B) would provide:

"(B) Communicating to the complainant, by use of a telephone, mail, delivery service, electronic message, in person, or any other means ~~after knowingly receiving notice from the complainant, directly or indirectly, to stop such communication~~;"

As currently written, the onus is on the complainant to provide notice to the defendant to stop a course of repeated communication, and the defendant must "knowingly receiv[e]" such notice. Under current law, there is no requirement that the complainant provide notice to the

defendant. Adding this requirement engages in victim blaming as it suggests that a crime did not occur unless the complainant took action to stop someone's harassment. No other similar crime requires the victim to act in a certain way. The law should remain as is, whereby the government must prove only that the defendant either knew or should have known that his actions would reasonably cause the complainant or someone in the complainant's circumstances to be seriously disturbed or suffer distress. Further, consistent with the current statute, subsection (a)(1) provides the conduct that the defendant must engage in, and subsection (a)(2) provides the mental state that the defendant must possess with respect to the effect of the defendant's actions on the complainant. Inserting this notice requirement into the first subsection conflates the two subsections. To be liable for stalking, the defendant still must either intentionally or negligently cause the complainant to be in fear or suffer distress, which implies that the defendant either knew or should have known that the defendant's actions were unwelcome.

3. USAO opposes removing "using another individual's personal identifying information" from the stalking provision.

With USAO's changes, a new subsection (a)(1)(D) would provide:

"(D) Using another individual's personal identifying information."

Under current law, stalking includes "using another individual's personal identifying information." D.C. Code § 22-2132(8)(C). There is no reason to exclude this from the RCC stalking statute, as it is an appropriate provision. USAO recommends including it in the revised statute.

4. USAO recommends removing the exemptions in subsections (b)(2) and (b)(3)

USAO believes that there should not be a *per se* bar on stalking certain government officials. Even when a complainant is involved in their official duties, they could still be subject to stalking if the defendant is, for example, following that person home and harassing them in their personal space. If a complainant is involved in a work call while at home, that person would likely be involved in their "official duties." This exemption, however, should not be expanded so far as to permit a government official to be stalked or harassed in their personal space when they could arguably fall under this statute. There is no definition of "government official" in the RCC, so it appears that all government workers could fall within this provision. Moreover, any "employee of a business that serves the public" could include virtually all businesses, and therefore virtually all employees.

USAO believes that subsection (b)(1) encompasses the constitutional concerns that could otherwise be implicated by this statute, and is an appropriate catch-all for the concerns articulated in subsection (b)(3) as well.

5. USAO recommends removing subsection (d), which provides for a jury trial.

Under the RCC, both stalking and attempted stalking are jury demandable. Under current law, misdemeanor stalking is jury demandable, but attempted stalking is not. This is appropriate

and is consistent with current law. There is no particular interest in attempted stalking being jury demandable, as jury trials involve considerable resources that non-jury trials do not.

6. USAO recommends that, in subsection (e)(2)(A), adding the words "or was subject to a court order or condition of release prohibiting stalking, harassing, assaulting, or threatening the complainant."

   With USAO's changes, subsection (e)(2)(A) would provide:

   "(A) The person, in fact, was subject to a court order or condition of release prohibiting contact with the complainant, or was subject to a court order or condition of release prohibiting stalking, harassing, assaulting, or threatening the complainant;"

Orders prohibiting a defendant from stalking, harassing, assaulting, or threatening a complainant (often called a "No HATS order") are frequently used in D.C. Superior Court, and are often a result of a complainant wanting some legal protection from a defendant, but not wanting a complete stay away or no contact order. Because a defendant violating the "No HATS order" is violating a court order in the same manner as a defendant who violated a no contact order, the same penalty enhancement and consequence should apply. This is particularly true when one of the orders specifically prohibits the defendant from "stalking" the complainant.

7. USAO recommends that, in subsection (e)(2)(B), the word "one" be replaced by the words "one or more."

   With USAO's changes, subsection (e)(2)(B) would provide:

   "(B) The person, in fact, has one or more convictions for stalking any person within the previous 10 years;"

Certainly, if a defendant has more than one past conviction for stalking, that defendant should be subject to this enhancement as well.

8. USAO recommends that, in subsection (e)(2)(C), requirement that the defendant "recklessly disregarded" the complainant's age be removed.

   With USAO's changes, § 22E-1206(e)(2)(C), would provide:

   "(C) The ~~person was, in fact, 18 years of age or older and at least 4 years older than the complainant and the person recklessly disregarded that the~~ complainant was, in fact, under 18 years of age;"

USAO relies on the rationale set forth in its General Comments regarding a protected person.

VII. Chapter 13. Sexual Assault and Related Provisions.

A. General Comments.

1. USAO recommends removing the Reasonable Mistake of Age defense from RCC § 22E-1302(g)(2) and removing the requirement of recklessness as to the complainant's age throughout the other provisions in Chapter 13 (Sexual Assault and Related Provisions) and Chapter 16 (Human Trafficking).

Under current law, an actor's mistake of the complainant's age is not a defense to child and minor sexual abuse misdemeanor and felony offenses or penalty enhancements. *See* D.C. Code §§ 22-3011(a) and 22-3020(a)(1) and (a)(2). Nor is an actor's actual knowledge of, or reckless disregard for, the complainant's true age an element of these crimes. *Id.* These well-established strict liability laws are based on the principles that children below a particular age are insufficiently mature to make a considered decision to engage in sexual acts with an adult, and that as a society, it is our obligation to protect children against sexual predators, pedophiles, adults who groom children for sexual acts, and adults who engage in sexual acts with children younger than an age at which the child can make an informed decision regarding consent. These laws also recognize that individuals who hold positions of trust or authority have greater power and control over the children they supervise. As such, only a child of more advanced years has the insight and maturity to make a reasoned decision to consent to a sexual relationship.

In each of the sexual abuse offenses involving child or minor complainants, the RCC introduces the actor's knowledge of, or reckless disregard for, the child/minor's age, either as an essential element for the government to prove or as an affirmative defense. *See* RCC § 22E-1301(g) (Sexual Assault Offense Penalty Enhancement if the actor recklessly disregarded that the complainant was under the age of 16, or the complainant was under the age of 18 and the actor was in a position of trust with or authority over the complainant); § 22E-1302(g) (Sexual Abuse of a Minor Defense, for a prosecution under subsection (b) and (e), if the actor reasonably believed that the complainant was under 16 years of age at the time of the offense, such reasonable belief was supported by an oral statement by the complainant about the complainant's age, and the complainant was 14 years of age or older; or, for a prosecution under subsection (c) and (f), if the actor reasonably believed that the complainant was under 18 years of age at the time of the offense, such reasonable belief was supported by an oral statement by the complainant about the complainant's age, and the complainant was 16 years of age or older; § 22E-1304(a)(2) (for Sexually Suggestive Conduct with a Minor, it is an element that the actor was reckless as to the fact that the complainant was under 16 or 18); § 22E-1305(a)(2) (for Enticing a Minor Into Sexual Conduct, it is an element that the actor was reckless as to the fact that the complainant was under 16 or 18); §22E-1306(a) (for Arranging for Sexual Contact with a Minor, it is an element that the actor was reckless as to the fact that the complainant was under 16 or 18); § 22E-1602(c)(1) (Forced Commercial Sex Offense Penalty Enhancement if the child was age 12 or over and the actor was reckless as to the fact that the complainant was under the age of 18); §22E-1604(c)(1) (Trafficking in Commercial Sex Offense Penalty Enhancement if the child was age 12 or over and the actor was reckless as to the fact that the complainant was under the age of 18); §22E-1605(a)(3) (for Sex Trafficking of Minors, it is an element that the actor was reckless to the fact that the complainant was under the age of 18); and §22E-1608(a)(3)

or (b)(2)(B) (for Commercial Sex with a Trafficked Person, it is an element that minor was under age 12 or over and the actor was reckless as to the fact that the complainant was under the age of 18); *see also* § 22E-1603(c) (Trafficking in Labor or Services Offense Penalty Enhancement if the actor was reckless as to the fact that the complainant was under 18 years of age).

USAO believes there is no reason to change these offenses' strict liability to allow for the defense of reasonable ignorance of the complainant's age or to require the government, in its case-in-chief, to demonstrate that the defendant had actual knowledge of, or recklessly disregarded knowing, the complainant's age. The change would, in reality, create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws. To demonstrate that an actor was not reckless to the fact that the complainant was older than the age at issue in the particular offense, the defendant would, and could, introduce the following types of evidence known to the defendant: the complainant had a history of engaging in sexual acts with adults, was on birth control, had prior pregnancies, had children, had an abortion, prostituted, and/or engaged in other sexual acts of an adult nature that suggested to the defendant that the complainant was of a legally mature age. This evidence is the exact type that exposes the extremely intimate life of the victim (and here, a child victim) that the Rape Shield Laws were specifically designed to exclude except in the most unusual cases where the probative value of the evidence is precisely demonstrated. *See Brown v. United States*, 840 A.2d 82 (D.C. 2004) ("With rare exceptions, evidence of prior sexual activity by the victim with persons other than the defendant is not admissible in a rape case because it has no probative value on the issue of consent and no relevance to the victim's credibility."); *Brewer v. United States*, 559 A.2d 317, 320 (D.C.1989) (upholding the exclusion of evidence that rape victim had engaged in acts of prostitution when there was no showing that she consented to sexual intercourse with the defendant); *Meaders v. United States*, 519 A.2d 1248, 1254 (D.C.1986) ("[p]rejudice results when cross-examination probes into the private life of a rape victim").

Changes to the strict liability nature of these child/minor sexual abuse provisions in the RCC will also open the floodgates to admission of extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act. This could include the victim's reputation, physical characteristics such as weight and size of body parts including breasts, hips, and buttocks, style of dress and speech, use of alcohol or drugs, school attendance, personal associates, compromising photographs on social media, etc. Introduction of such evidence, through cross-examination of the victim or otherwise, would not only serve to embarrass a victim with irrelevant personal details, but would also have the unintended, but inevitable, consequence of dramatically reducing a victim's willingness to report sexual abuse and/or participate in the resulting criminal case.

Nor is a reasonable mistake of age defense a legal principle that is well-recognized or uniformly adopted by other jurisdictions. The RCC notes that "there is mixed support in the criminal codes of the reformed jurisdictions for codifying an affirmative defense for a reasonable mistake of age when the complainant is under the age of 16 years or 18 years." RCC App. J. at 260.

USAO understands that the RCC attempts to balance the laudable societal goal of protecting children from sexual predators with the countervailing goal of not criminalizing sexual acts based on an innocent and objectively reasonable mistake of the complainant's age. USAO believes that escaping liability if the actor has not "recklessly disregarded" the complainant's true age, without more, does not strike the proper balance of these competing interests. Were the RCC to modify the strict liability nature of the current law, which USAO strongly opposes, USAO recommends that strict liability remain for offenses involving complainants under the age of 14 when the actor is not in a position of trust with or authority over the complainant, or under the age of 18 when the offense involves an actor who is in a position of trust with or authority over the complainant.

2. USAO recommends removing the age differential language wherever it represents a change from current law.

Consistent with current law, USAO recommends that the age differential language be removed in many, but not all, the portions of this chapter. The requested changes are set forth below in their respective sections.

Certain age differential requirements exists in current law, and should remain in the RCC, such as the age differential requirements in the Sex Abuse of a Minor provision (providing, for example, that a defendant must be at least 4 years older than the complainant to be liable for that offense). The age differential requirements in that section, however, serve a very different purpose than the enhancements in the Sexual Assault provision. The age differential requirements in the Sex Abuse of a Minor statute exclude from liability consensual or non-forced sexual acts/contacts between minors who are close enough in age that the law has deemed them capable of consenting. The Sexual Assault statute, however, only deals with sexual acts/contacts involving force or violence. The age differential, therefore, is not a relevant consideration. The focus is on the particular vulnerability of the victim who has been subjected to forced sexual acts/contacts, not on whether the defendant happened to be a similar age. This is true regardless of whether the age differential applies to a child, or to an elderly person. *See* RCC § 22E-1301(g)(4)(E). USAO believes that the RCC should track current law in this respect, and that no additional age differentials should be added to the statute.

Further, as to the RCC's proposal to create an age differential requirement where the defendant is in a position of trust or authority over the complainant (for example, in RCC § 22E-1301(g)(4)(C), USAO recommends that this requirement be removed as well. In this situation, the important consideration is the power dynamic between the defendant and the complainant, not on the age differential. Because the defendant must be in a position of trust with or authority over the complainant to satisfy the enhancement in this subsection, the defendant's relative age is not relevant. The focus is on the relationship between the parties, and the defendant violating the trust that was put into him or her. The RCC notes that, although there is "strong support in the criminal codes of the 29 reformed jurisdictions for requiring an age gap between the actor and the complainant" in the first, second, fourth, and fifth degree sexual abuse of a minor statutes, "there is mixed support in the criminal codes of reformed jurisdictions for third degree and sixth degree of the revised sexual abuse of a minor statute requiring a four year age gap between the complainant and applying strict liability to this gap." RCC App. J at 258-60.

3. USAO recommends applying the Offense Penalty Enhancements in subsection 22E-1301(g) to all offenses in RCC §§ 1301–1307.

   Under current law, the following aggravating circumstance apply to *all* sexual offenses:

   (1) The victim was under the age of 12 years at the time of the offense;
   (2) The victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim;
   (3) The victim sustained serious bodily injury as a result of the offense;
   (4) The defendant was aided or abetted by 1 or more accomplices;
   (5) The defendant is or has been found guilty of committing sex offenses against 2 or more victims, whether in the same or other proceedings by a court of the District of Columbia, any state, or the United States or its territories; or
   (6) The defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon.

D.C. Code § 3020(a). Although these are mostly codified in RCC § 22E-1301(g),[6] USAO believes that, consistent with current law, these offenses should apply to all offenses in RCC §§ 1301–1307. It is important that these offenses apply to all sexual offenses, as the conduct that they seek to deter merits an enhancement. For example, if a defendant engaged in a non-forced sexual act with his 13-year-old biological daughter, that would be criminalized under the RCC as second degree sexual abuse of a minor under § 22E-1302(b). The fact that the defendant is the complainant's biological father, however, renders the offense far more heinous, and worthy of a more significant penalty, than if the defendant had no significant relationship with the complainant. Because § 22E-1302 does not contain an enhancement recognizing the existence of a significant relationship, the RCC does not reflect the more serious nature of that relationship in categorizing and punishing that offense. Likewise, although the Sexual Abuse of a Minor offense accounts for the victim's age in its gradations, other offenses, such as Enticing a Minor Into Sexual Conduct and Arranging for Sexual Conduct with a Minor, do not account for the victim's age. A victim under 12 years old is more vulnerable than a victim who is at least 12 years old, and the offense should account for that additional vulnerability by creating an enhancement for a victim under 12 years old.

B. RCC § 22E-1301. Sexual Assault.

1. USAO recommends, in subsections (a)(1), (b)(1), (c)(1), and (d)(1), adding the words "engages in or."

   With USAO's changes, subsection (a)(1), (b)(1), (c)(1), and (d)(1) would provide:

   "(1) Knowingly engages in or causes the complainant to engage in or submit to a sexual [act/contact];"

[6] As discussed further above, USAO is recommending that a version of D.C. Code § 22-3020(a)(5), which provides an aggravating circumstance if the defendant "is or has been found guilty of committing sex offenses against 2 or more victims," be codified in RCC § 22E-606.

USAO believes that it makes more sense to focus on the actions of the defendant than on the actions of the complainant. This change also tracks the current law.

2. USAO recommends that, in subsections (a)(2)(A) and (c)(2)(A), the words "overcomes, restrains, or causes bodily injury" be replaced by the words "is sufficient to overcome, restrain, or cause bodily injury."

   With USAO's changes, subsections (a)(2)(A) and (c)(2)(A) would provide:

   "(A) By using physical force that is sufficient to overcome~~s~~, restrain~~s~~, or cause~~s~~ bodily injury to the complainant."

This is consistent with current law. Force is defined as, among other things, "the use of such physical strength or violence *as is sufficient* to overcome, restrain, or injure a person." D.C. Code § 22-3001(5) (emphasis added). This is consistent with the current jury instructions, which state: "Force means the use or threatened use of a weapon, the use of such physical strength or violence *as is sufficient to* overcome, restrain or injure a person, or the use of a threat of harm sufficient to coerce or compel submission by the victim." D.C. Crim. Jur. Instr. 4.400 (emphasis added).

3. USAO recommends, in subsections (a)(2)(B) and (c)(2)(B), replacing the words "using a weapon" with the words "displaying or using what, in fact, is a dangerous weapon or imitation dangerous weapon."

   With USAO's changes, subsections (a)(2)(B) and (c)(2)(B) would provide:

   "(B) By displaying or using what, in fact, is a dangerous weapon or imitation dangerous weapon against the complainant."

There is no definition of "weapon" in the RCC, so USAO believes that the word "dangerous weapon" is a better word than "weapon." USAO also believes that it is appropriate to include an imitation dangerous weapon in this provision. If a firearm is never recovered, it is impossible to prove that the firearm was a "firearm" as defined in D.C. Code § 22-4501(2A) and as required by the "dangerous weapon" definition. If the defendant flees the scene after committing the sexual assault, it will be very difficult, and frequently impossible, to recover the firearm used during the offense to ascertain if it was real or imitation. Moreover, imitation firearms often look identical to real firearms. It should be irrelevant to the offense of sexual assault whether the firearm used to compel a sexual act/contact was real or an imitation. The victim's belief that he/she was being threatened by a real firearm, and the victim's submission as a result of that belief, is the crux of the offense, not whether a firearm was truly a firearm.

USAO also believes that it is appropriate to include the words "in fact" to specify that the "knowingly" *mens rea* does not carry over to the dangerous weapon. This is consistent with the terminology in other sections that uses the words "in fact," including for Robbery, *see* RCC

§ 22E-1201(a)(2)(A), (b)(2)(B), (c)(2)(A)(ii), (c)(2)(B), (d)(2)(A)(ii), and Assault, *see* RCC § 22E-1202(a)(3), (b)(2), (c)(2).

USAO finally believes that it is appropriate to include the words "displaying or using" a dangerous weapon. "Using" a weapon could imply that the weapon needs to be discharged, which is not required under the law. Rather, "displaying" either a dangerous weapon or imitation dangerous weapon could compel a complainant to submit to a sexual act or contact, and should be criminalized as sexual assault. This is consistent with the terminology in other sections that uses the words "displaying or using," including for Robbery, *see* RCC § 22E-1201(a)(2)(A), (b)(2)(B), (c)(2)(A)(ii), and Assault, *see* RCC § 12E-1202(a)(3), (b)(2), (c)(2).

4. USAO recommends, in subsections (a)(2)(C) and (c)(2)(C), replacing the word "threatening" with the words "threatening or placing the complainant in reasonable fear."

   With USAO's changes, subsections (a)(2)(C) and (c)(2)(C) would provide:

   "(C) By threatening or placing the complainant in reasonable fear:"

This tracks current law, which provides liability for first degree sexual abuse by, among other means, "threatening *or placing that other person in reasonable fear* that any person will be subjected to death, bodily injury, or kidnapping." D.C. Code § 22-3002(a)(2) (emphasis added). The current law is an appropriate statement of the law. Threats must contain a communication. *See* RCC § 22E-1204. A complainant may be placed in reasonable fear through means other than a threat, and when the complainant engages in or submits to a sexual act/contact on that basis, that should be punished as sexual assault. There is no reason to limit this statute further than its current language.

5. USAO recommends, in subsections (a)(2)(C)(ii) and (c)(2)(C)(ii), replacing the words "sexual act" with the words "sexual act or sexual contact."

   With USAO's changes, subsections (a)(2)(C)(ii) and (c)(2)(C)(ii) would provide:

   "(ii) To commit an unwanted sexual act or sexual contact;"

This does not change the requirement of a sexual act for First Degree Sexual Assault, or of a sexual contact for Third Degree Sexual Assault. Rather, it clarifies the basis of the threat that can be a basis for those offenses. It is appropriate to include a sexual contact in this definition. If, for example, a defendant threatened to engage in a sexual contact with the complainant's child (contact between penis and genitalia), and the complainant submitted to a sexual act with the defendant because of that threat, the defendant's conduct should be criminalized as a sexual assault. A threat to commit any unwanted sexual contact can be a very serious threat, and should be a basis for liability.

6. USAO recommends, in subsections (a)(2)(C)(ii) and (c)(2)(C)(ii), removing the word "significant."

   With USAO's changes, subsections (a)(2)(C)(ii) and (c)(2)(C)(ii) would provide:

   "(ii) To . . . cause ~~significant~~ bodily injury to any person; or"

USAO believes that the appropriate language is "bodily injury," rather than "significant bodily injury." If, for example, a defendant threatened to punch a complainant repeatedly in the face, and the complainant submitted to a sexual act on that basis, the defendant's conduct should be criminalized as first degree sexual assault. The defendant would likely have only caused "bodily injury" to the complainant, not "significant bodily injury," but that threat of force is sufficiently serious that it should be criminalized here. The current definition of "bodily injury" for sexual offenses in D.C. Code § 3001(2) is admittedly more limited in certain respects than the RCC's proposed definition of "bodily injury" in RCC § 22E-701. The current definition provides that "bodily injury" is "injury involving loss or impairment of the function a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain." D.C. Code § 22-3001(2). Because this definition includes "injury involving significant pain," however, it is also far more expansive than the RCC's proposed definition of "significant bodily injury." Threatening to be punch someone repeatedly in the face could constitute a threat of an "injury involving significant pain" under current law, and should be equally criminalized under the RCC.

7. USAO recommends adding a provision to subsections (a)(2) and (c)(2) to provide "after rendering the complainant unconscious."

   With USAO's changes, a new subsection (a)(2)(E) and (c)(2)(E) would provide:

   "(E) After rendering the complainant unconscious."

This language is included in the current statute in D.C. Code § 22-3002(a)(3) and § 22-3004(3). If, for example, a defendant physically assaults a complainant to the point of unconsciousness, and then engages in a sexual act or sexual contact with that complainant while the complainant remains unconscious, that conduct may not currently fall within the RCC's proposed definition of sexual assault. Tracking current law, this conduct should remain part of the offense, and should be an option for liability.

8. USAO recommends, in subsections (a)(2)(D)(ii) and (c)(2)(D)(ii), adding the provision, "Substantially incapable, mentally or physically, of declining participation in the sexual [act/contact]," and in subsections (b)(2)(B) and (d)(2)(B), adding the provision, "Incapable, mentally or physically, of declining participation in the sexual [act/contact]."

   With USAO's changes, new subsections (a)(2)(D)(ii)(IV) and (c)(2)(D)(ii)(IV) would provide:

"(IV) Substantially incapable, mentally or physically, of declining participation in the sexual [act/contact]."

With USAO's changes, new subsections (b)(2)(B)(iv) and (d)(2)(B)(iv) would provide:

"(iv) Mentally or physically incapable of declining participation in the sexual [act/contact]."

Under current law for Second Degree Sexual Abuse, a defendant commits that offense if, among other means, the defendant "knows or has reason to know that the other person is . . . (B) Incapable of declining participation in the sexual act." D.C. Code § 22-3003(2)(B); *see also* D.C. Code § 3005(2)(B) (Fourth Degree Sexual Abuse). It is appropriate to attach liability in this situation, and is consistent with current law.

9. USAO recommends removing subsections (e)(1)(A) and (e)(1)(B).

With USAO's changes, subsection (e) would provide:

"(e) *Defenses.*

(1) *Effective Consent Defense.* In addition to any defenses otherwise applicable to the actor's conduct under District law, the complainant's effective consent to the actor's conduct or the actor's reasonable belief that the complainant gave effective consent to the conduct charged to constitute the offense is an affirmative defense to prosecution under this section, provided that:

(A) The conduct does not inflict significant bodily injury or serious bodily injury, or involve the use of a dangerous weapon; and

~~(B)At the time of the conduct, none of the following is true:~~

~~(i) The complainant is under 16 years of age and the actor is at least 4 years older than the complainant; or~~

~~(ii) The complainant is under 18 years of age and the actor is in a position of trust with or authority over the complainant, at least 18 years of age, and at least 4 years older than the complainant.~~

(2) *Burden of Proof.* If any evidence is present at trial of the complainant's effective consent to the actor's conduct or the actor's reasonable belief that the complainant gave effective consent to the actor's conduct, the government must prove the absence of such circumstances beyond a reasonable doubt."

USAO believes that this exception should not exist here. If the complainant is under 16 years of age and the defendant is at least 4 years older, that conduct is appropriately criminalized in the Sexual Abuse of a Minor provision, and should not be further criminalized here, assuming the complainant gave effective consent.

10. USAO recommends, in subsection (g)(1), modifying the "while armed" enhancement.

With USAO's changes, subsection (g)(1) would provide:

"(1) The actor committed the offense of sexual assault while knowingly being armed with or having readily available what, in fact, is a dangerous weapon or imitation dangerous weapon;"

USAO believes that it is more appropriate to include language from the current "while armed" enhancement statute, *see* D.C. Code § 22-4502(a), than the RCC's current language of "displaying or using" a weapon. Under subsection (g)(1), the defendant must commit an offense by "displaying or using" a weapon. Under current law, the "while armed" enhancement applies if the defendant either is "armed with or ha[s] readily available" the prohibited weapon. See D.C. Code § 22-4502(a). Under current law, there is no requirement that the defendant actually use or display the weapon during the offense. See Crim. Jur. Instr. 8.101 (B) (defining "readily available" language). The current statutory language is more appropriate, as the RCC's language is too limited. Even if a defendant does not use the firearm or other dangerous weapon, there is an additional level of risk created when a defendant has a weapon readily available. As stated above, even if inadvertent, a firearm could discharge and subject a complainant or others to unanticipated injury. Of course, the presence of a firearm also increases the chances of an intentional discharge and subsequent resultant injury. This conduct should be punished more severely than an offense that does not involve a weapon. USAO believes that it is appropriate to require that the defendant "knowingly" be armed with or have readily available the weapon.

11. USAO recommends, in subsection (g)(2), removing the words "that were present at the time of the offense."

    With USAO's changes, subsection (g)(2) would provide:

    "(2) The actor knowingly acted with one or more accomplices ~~that were present at the time of the offense~~;"

    First, the wording being "present at the time of the offense" is too vague. If the defendant and an accomplice jointly kidnapped, threatened, and assaulted a complainant, but each left the room while the other one engaged in a sexual act with the complainant, would each individual be deemed to be present "at the time of the offense"? It is unclear if "at the time of the offense" applies solely to the sexual act or sexual contact, or if it applies to the totality of the actions leading to the forced sexual act or sexual contact. Because this vagueness leaves room for the more limited reading, USAO believes that it is inappropriate. Second, the word "present" is too vague. Does this require a physical presence, or is a remote presence, such as by telephone, sufficient? Third, this is contrary to the current law, which allows for this enhancement if "the defendant was aided or abetted by 1 or more accomplices." D.C. Code § 22-3020(a)(4). Under current law, there is no requirement that an accomplice be present at the time of the offense, which is appropriate.

12. USAO recommends, in subsection (g)(3), removing the words "during the sexual conduct."

    With USAO's changes, subsection (g)(3) would provide:

"(3) The actor recklessly caused serious bodily injury to the complainant ~~during the sexual conduct~~;"

Under current law, this enhancement can apply if "[t]he victim sustained serious bodily injury as a result of the offense." D.C. Code § 22-3020(a)(3). The RCC proposed revision inappropriately limits this enhancement. If, for example, a defendant viciously stabbed a complainant, and then forced the complainant to engage in a sexual act after a brief period of time had passed, the defendant would not have caused serious bodily injury "during the sexual conduct"—that is, during the sexual act. USAO believes that this enhancement should be applicable to this hypothetical, and the words "during the sexual conduct" limit it too far. Further, the words "during the offense" in current law are vague for the reasons set forth above with respect to subsection (g)(2), and duplicative in any event. It is clear that this enhancement can only apply when it relates to a sexual offense, because this is an enhancement listed in Chapter 13, so would likewise be unnecessary for the statute to specify that the injury be caused "during the offense."

13. <u>USAO recommends removing the recklessness language and the age differential language in subsection (g)(4).</u>

With USAO's changes, subsection (g)(4) would provide:

"(4) At the time of the offense:

(A)The complainant, in fact, was under 12 years of age ~~and the actor was, in fact, at least 4 years older than the complainant~~;

~~(B) The actor was reckless as to the fact that the complainant was under 16 years of age and the actor was, in fact, at least 4 years older than the complainant;~~

(C) The ~~actor was reckless as to the fact that the~~ complainant<u>, in fact,</u> was under 18 years of age, ~~that~~ <u>and</u> the actor was in a position of trust with or authority over the complainant~~, and that the actor, in fact, was at least 4 years older than the complainant~~;

~~(D)The actor was reckless as to the fact that the complainant was under 18 years of age and the actor was, in fact, 18 years of age or older and at least 4 years older than the complainant;~~

(E) The ~~actor was reckless as to the fact that the~~ complainant<u>, in fact,</u> was 65 years of age or older ~~and the actor was, in fact, at least 10 years younger than the complainant~~; or

(F) The ~~actor was reckless as to the fact that the~~ complainant<u>, in fact,</u> was a vulnerable adult."

USAO relies on the rationale set forth above in the General Comments to this Chapter. This change is consistent with current law. *See* D.C. Code § 22-3020(a)(1), (a)(2).

If the CCRC does not accept USAO's recommendation to remove subsection (e)(1)(B), as discussed above, then USAO recommends that these changes be made to subsection (e)(1)(B) as well.

C. RCC § 22E-1302. Sexual Abuse of a Minor.

1. USAO recommends removing subsection (g)(2), the Reasonable Mistake of Age defense.

USAO relies on the rationale set forth above in the General Comments to this Chapter.

If the CCRC includes some version of the Reasonable Mistake of Age defense, USAO makes the following recommendations.

a. USAO recommends, in subsections (g)(2)(A)(ii) and (g)(2)(B)(ii), adding the words "to the defendant."

With USAO's changes, subsections (g)(2)(A)(ii) and (g)(2)(B)(ii) would provide:

"(ii) Such reasonable belief is supported by an oral statement by the complainant to the defendant about the complainant's age;"

The only relevance of the complainant making an oral statement about the complainant's age is if the defendant was aware of that statement. Given that the defendant's subjective belief is the issue, and that this is the defendant's burden to prove, it is appropriate to require that the statement be made to the defendant for it to have any relevance.

b. USAO recommends, in subsections (g)(2)(A) and (g)(2)(B), adding the provision, "and the actor had not had a reasonable opportunity to observe the complainant."

With USAO's changes, subsections (g)(2)(A) and (g)(2)(B) would include a new subsection (iv) which would provide:

"and (iv) The actor had not had a reasonable opportunity to observe the complainant."

This is consistent with the current Sex Trafficking of Children statute, D.C. Code § 22-1834(b), which provides that if the defendant had a "reasonable opportunity to observe" the complainant, the government need not prove the defendant's knowledge or recklessness as to the complainant's age. This language is consistent with the federal Sex Trafficking of Children statute. 18 U.S.C. § 1591(c).

c. USAO recommends, in subsections (g)(2)(A)(iii) and (g)(2)(B)(iii), adding the words "in fact."

With USAO's changes, subsection (g)(2)(A)(iii) would provide:

"(iii) The complainant, in fact, was 14 years or age or older."

With USAO's changes, subsection (g)(2)(B)(iii) would provide:

"(iii) The complainant, in fact, was 16 years of age or older."

USAO believes that it is the RCC's intent to have strict liability in these situations. Adding the words "in fact" clarifies this.

2. USAO recommends removing the age differential requirements in subsections (c)(3)(B) and (f)(3)(B).

With USAO's changes, subsections (c)(3)(B) and (f)(3)(B) would provide:

"(B) The actor is at least 18 years of age ~~and at least 4 years older than the complainant~~."

USAO relies on the rationale set forth above in the General Comments to this Chapter. USAO's change is consistent with current law, which does not require an age differential where the defendant is in a position of trust with or authority over the complainant. D.C. Code §§ 22-3009.01, 22-3009.02. The age differential is not appropriate here because it is the fact of the relationship, which creates a power imbalance, which is at the heart of the prohibition set forth in this statute. The age of the defendant is not the relevant consideration, as the power dynamic inherent in the relationship between the parties is the key element.

To be clear, consistent with current law, USAO is not requesting that the age differential language be removed in subsections (a), (b), (d), or (e).

3. USAO recommends, in subsections (a)(1), (b)(1), (c)(1), (d)(1), (e)(1), and (f)(1), adding the words "engages in or."

With USAO's changes, subsections (a)(1), (b)(1), (c)(1), (d)(1), (e)(1), and (f)(1) would provide:

"(1) Knowingly engages in or causes the complainant to engage in or submit to . . ."

Current law provides liability for First Degree Child Sexual Abuse when the defendant "engages in a sexual act with that child or causes that child to engage in a sexual act." D.C. Code § 22-3008. Consistent with current law, it is appropriate to provide liability for not only causing the complainant to engage in sexual conduct, but also for engaging in sexual conduct with the complainant. If, for example, a very young child were to "initiate" a sexual encounter with an adult defendant, and the defendant knowingly participated in the sexual encounter with the child, it could not be said that the defendant "caused" the child to engage in the conduct. However, liability should still attach in this situation, as the adult defendant acted culpably by engaging in sexual conduct with the complainant.

4. USAO recommends, in subsection (g), adding a provision stating that consent is not a defense.

With USAO's changes, a new subsection (g)(4) would provide:

"(4) *Consent not a Defense.* Consent is not a defense to a prosecution under RCC § 22E-1302, whether prosecuted alone or as an inchoate offense under Chapter 3 of this Title."

Although this is implied, USAO believes that this should be set out clearly in the text to eliminate any potential confusion, particularly given the potential change in law regarding a reasonable mistake of age defense. The consent law is currently codified at D.C. Code § 22-3011(a), and should be directly codified in the RCC as well.

D. RCC § 22E-1303. Sexual Exploitation of an Adult.

1. USAO recommends changing subsections (a)(2) and (b)(2) to require strict liability instead of recklessness.

With USAO's changes, subsection (a)(2) and (b)(2) would provide:

"(2) In one or more of the following ways:
(A) The actor, in fact, is a teacher, counselor, principal, administrator, nurse, coach, or security officer in a secondary school and ~~recklessly disregards that~~:
(i) The complainant:
(I) Is, in fact, an enrolled student in the same secondary school; or
(II) In fact, receives services or attends programming at the same secondary school; and
(ii) The complainant, in fact, is under the age of 20 years."

USAO relies on the rationale set forth above in the General Comments to this Chapter. This change is consistent with current law. *See* D.C. Code §§ 22-3009.03, 22-3009.04, 22-3011.

2. USAO recommends adding the words "or other person of authority" to subsections (a)(2)(A) and (b)(2)(A).

With USAO's changes, subsection (a)(2)(A) and (b)(2)(A) would provide:

"(A) The actor, in fact, is a teacher, counselor, principal, administrator, nurse, coach, or security officer, or other person of authority in a secondary school;"

This catch-all exists under the current statute at D.C. Code §§ 22-3009.03, 22-3009.04, and should be included in the RCC as well. Although the RCC's list includes many of the potential positions of authority, it is retain to have a catch-all for any individuals this list may inadvertently fail to include. For example, a doctor at the school would not be included in this list, and a nurse would. This dichotomy would not exist if there were a catch-all.

3. USAO recommends, in subsections (a)(1) and (b)(1), adding the words "engages in or."

With USAO's changes, subsections (a)(1) and (b)(1), would provide:

"(1) Knowingly engages in or causes the complainant to engage in or submit to . . ."

The current law provides liability for First Degree Sexual Abuse of a Ward, Patient, Client, or Prisoner when the defendant "engages in a sexual act with a ward, patient, client, or prisoner, or causes a ward, patient, client or prisoner to engage in a sexual act." D.C. Code § 22-3013; *see also* D.C. Code § 22-3014 (same, with a sexual contact required). The current law for First Degree Sexual Abuse of a Patient or Client provides liability when the defendant "engages in a sexual act with another person . . ." and does not include the phrase "or causes the complainant to engage in or submit to a sexual act." D.C. Code § 22-3015(a); *see also* D.C. Code 22-3016(a) (same, with a sexual contact required). Consistent with current law on First and Second Degree Sexual Abuse of a Ward, Patient, Client, or Prisoner, it is appropriate to provide liability for not only causing the complainant to engage in sexual conduct, but also for engaging in sexual conduct with the complainant. If, for example, a prisoner were to initiate a sexual encounter with a prison guard, and the prison guard knowingly participated in the sexual encounter with the prisoner, it could not be said that the defendant "caused" the complainant to engage in the conduct. However, liability should still attach in this situation, as the defendant acted culpably by engaging in sexual conduct with the complainant.

4. <u>USAO recommends adding the words "medical or therapeutic" to subsections (a)(2)(C)(i) and (b)(2)(C)(i).</u>

   With USAO's changes, subsections (a)(2)(C)(i) and (b)(2)(C)(i) would provide:

   "(i) Falsely represents that the sexual [act or contact] is for a bona fide professional<u>, medical, or therapeutic</u> purpose."

The current statute provides liability when the actor "represents falsely that the sexual act is for a bona fide medical or therapeutic purpose, or for a bona fide professional purpose for which the services are being provided." D.C. Code § 22-3015(a)(1). To be consistent with current law, and to ensure that the medical and therapeutic purposes are expressly included in this statute, USAO believes the addition of this provision is appropriate.

5. <u>USAO recommends adding a provision stating that consent is not a defense.</u>

   With USAO's changes, a new subsection (d) would provide:

   "(d) *Consent not a Defense.* Consent is not a defense to a prosecution under RCC § 22E-1303, whether prosecuted alone or as an inchoate offense under Chapter 3 of this Title."

Although this is implied, USAO believes that this should be set out clearly in the text to eliminate any potential confusion. The consent law is currently codified at D.C. Code § 22-3017(a), and should be directly codified in the RCC as well.

E. RCC § 22E-1304. Sexually Suggestive Conduct with a Minor.

1. USAO recommends changing subsection (a)(2) to require strict liability instead of recklessness.

   With USAO's changes, subsection (a)(2) would provide:

   "(2) The actor, in fact, is at least 18 years of age and at least 4 years older than the complainant; and:
   - (A) The complainant, in fact, is under 16 years of age ~~The actor was reckless as to the fact that the complainant is under 16 years of age~~; or
   - (B) The complainant, in fact, is under 18 years of age, and the actor is in a position of trust with or authority over the complainant ~~The actor was reckless as to the fact that the complainant is under 18 years of age and the actor knows that he or she is in a position of trust with or authority over the complainant~~.

USAO relies on the rationale set forth above in the General Comments to this Chapter. This change is consistent with current law. *See* D.C. Code §§ 22-3010.01, 22-3011.

2. USAO recommends, in subsection (a), changing the word "contact" to "conduct."

   With USAO's changes, subsection (a) would provide:

   "(a) *Offense.* An actor commits sexually suggestive conduct ~~contact~~ with a minor when that actor:"

   This is not a substantive change, but clarifies the statute.

3. USAO recommends, in subsection (a)(1), adding a provision "or engages in or causes the complainant to engage in a sexual act or a sexual contact."

   With USAO's changes, a new subsection (E) would provide:

   "(E) Engages in or causes the complainant to engage in a sexual act or a sexual contact;"

This would make Sexually Suggestive Conduct with a Minor a lesser-included offense of Second and Fifth Degree Sexual Abuse of a Minor. The current offense of Misdemeanor Sexual Abuse of a Child is frequently treated for plea purposes as a lesser charge to First and Second Degree Child Sexual Abuse. This change allows this current practice to continue. Assuming, further, that Sexually Suggestive Conduct with a Minor is a misdemeanor offense, and all of the various gradations of Sexual Abuse of a Minor remain felony offenses, it makes sense to have a misdemeanor lesser-included offense, which can benefit both the government and the defense.

4. USAO recommends modifying the language in subsection (a)(1)(A).

With USAO's changes, subsection (a)(1)(A) would provide:

"(A) Touches the complainant directly or causes the complainant to touch the actor directly, or inside the complainant's or actor's ~~his or her~~ clothing with intent to cause the sexual arousal or sexual gratification of any person;"

First, USAO believes that it is appropriate to modify the language to include touchings that are either direct or inside the clothing. As set forth in the next point, if a person is naked, it is unclear whether a touching would be "inside" the clothing. Second, USAO believes that it is appropriate to include liability for either the defendant touching the complainant, or the defendant causing the complainant to touch the defendant. Under current law, a defendant touching the stomach of a complainant while moaning and getting an erection would subject a defendant to liability under this subsection, while a defendant causes a complainant to touch the defendant's stomach while the defendant moans and gets an erection would not subject a defendant to liability under this subsection. This dichotomy does not make sense, as both acts should subject a defendant to liability under this subsection.

5. USAO recommends, in subsection (a)(1)(B), replacing the words "inside his or her clothing" with the words "directly or through the complainant's clothing."

With USAO's changes, subsection (a)(1)(B) would provide:

"(B) Touches the complainant directly or through the complainant's clothing ~~inside or outside his or her clothing~~ . . ."

Although the RCC's proposed language tracks the current law in the Misdemeanor Sexual Abuse of a Child statute, D.C. Code § 3010.01, USAO believes that this language is confusing. For example, if a child is completely naked and not wearing clothing, would a defendant be touching that child "inside or outside his or her clothing"? Certainly, it is equally (or more) culpable to engage in this sexual conduct with a naked child as with a clothed child. USAO believes that the language "directly or through the complainant's clothing" provides clarity and reduces confusion. This tracks the language in the "Sexual contact" definition in RCC § 22E-701.

6. USAO recommends, in subsection (a)(1)(B), adding the word "complainant's."

With USAO's changes, subsection (a)(1)(B) would provide:

"(B) Touches the complainant . . . close to the complainant's genitalia, anus, breast, or buttocks with intent to cause the sexual arousal or sexual gratification of any person."

This clarifies that the intimate body parts must belong to the complainant, not to the actor, which could be vague.

7. USAO recommends adding a provision stating that consent is not a defense.

With USAO's changes, a new subsection (c) would provide:

"(4) *Consent not a Defense.* Consent is not a defense to a prosecution under RCC § 22E-1304, whether prosecuted alone or as an inchoate offense under Chapter 3 of this Title."

Although this is implied, USAO believes that this should be set out clearly in the text to eliminate any potential confusion, particularly given the potential change in law requiring recklessness as to the complainant's age. The consent law is currently codified at D.C. Code § 22-3011(a), and should be directly codified in the RCC as well.

F. RCC § 22E-1305. Enticing a Minor Into Sexual Conduct.

1. USAO recommends changing subsection (a)(2) to require strict liability instead of recklessness, and to remove the age differential requirements in subsection (a)(2)(B).

With USAO's changes, subsection (a)(2) would provide:

"(2) The actor, in fact, is at least 18 years of age, and:

(A) The complainant, in fact, is under 16 years of age, and the actor, in fact, is at least 4 years older than the complainant; ~~The actor:~~

~~(i) Was reckless as to the fact that the complainant is under 16 years of age; and~~

~~(ii) In fact, is at least four years older than the complainant;~~

(B) The complainant, in fact, is under 18 years of age, and the actor is in a position of trust with and authority over the complainant; ~~The actor:~~

~~(i) Was reckless as to the fact that the complainant is under 18 years of age;~~

~~(ii) Knows that the actor is in a position of trust with or authority over the complainant; and~~

~~(iii)In fact, is at least four years older than the complainant;~~ or

(C) The complainant:

(i) In fact, is a law enforcement officer who purports to be a person under 16 years of age; and

~~(ii) The actor was reckless as to the fact that the complainant purports to be a person under 16 years of age; and~~

(iii) In fact, the actor is at least 4 years older than the purported age of the complainant."

USAO relies on the rationale set forth above in the General Comments to this Chapter. This change is consistent with current law. *See* D.C. Code §§ 22-3010, 22-3011.

To be clear, consistent with current law, USAO is not recommending that the age differential requirements be eliminated from subsection (a)(2)(A) or (a)(2)(C).

2. USAO recommends adding a provision stating that consent is not a defense.

With USAO's changes, a new subsection (c) would provide:

"(c) *Consent not a Defense.* Consent is not a defense to a prosecution under RCC § 22E-1305, whether prosecuted alone or as an inchoate offense under Chapter 3 of this Title."

Although this is implied, USAO believes that this should be set out clearly in the text to eliminate any potential confusion, particularly given the potential change in law requiring recklessness as to the complainant's age. The consent law is currently codified at D.C. Code § 22-3011(a), and should be directly codified in the RCC as well.

G. RCC § 22E-1306. Arranging for Sexual Conduct with a Minor.

1. USAO recommends changing subsections (a)(2) and (a)(3) to require strict liability instead of recklessness.

With USAO's changes, subsections (a)(2) and (a)(3) would provide:

"(2) Either:

(A) The actor and any third person, in fact, are at least 18 years of age ~~and at least 4 years older than the complainant~~; and

(i) ~~(A)~~ The complainant, in fact, is under 16 years of age, and the actor and any third person are at least 4 years older than the complainant; ~~The actor was reckless as to the fact that the complainant is under 16 years of age;~~ or

(ii) ~~(B)~~ ~~The actor:~~

(a) ~~(i)~~ The complainant, in fact, is under 18 years of age ~~Was reckless as to the fact that the complainant is under 18 years of age~~; and

(b) ~~(ii) Knows that t~~The actor is in a position of trust with or authority over the complainant; or

(B) ~~(3)~~ The actor and any third person, in fact, are at least 18 years of age and at least 4 years older than the purported age of the complainant; and the complainant:

(i) ~~(A)~~ In fact, is a law enforcement officer who purports to be a person under 16 years of age~~; and~~

~~(B) The actor was reckless as to the fact that the complainant purports to be a person under 16 years of age~~."

USAO relies on the rationale set forth above in the General Comments to this Chapter. This is consistent with current law. *See* D.C. Code §§ 22-3010.02, 22-3011.

2. USAO recommends adding a provision stating that consent is not a defense.

With USAO's changes, a new subsection (b) would provide:

"(b) *Consent not a Defense.* Consent is not a defense to a prosecution under RCC § 22E-1306, whether prosecuted alone or as an inchoate offense under Chapter 3 of this Title."

Although this is implied, USAO believes that this should be set out clearly in the text to eliminate any potential confusion, particularly given the potential change in law regarding a reasonable mistake of age defense. The consent law is currently codified at D.C. Code § 22-3011(a), and should be directly codified in the RCC as well.

H. RCC § 22E-1307. Nonconsensual Sexual Conduct.

1. USAO recommends rewriting subsections (a) and (b).

USAO recommends that the subsections be rewritten to provide:

"(a) *First Degree*. An actor commits first degree nonconsensual sexual conduct when that actor:
(1) Knowingly causes the complainant to engage in or submit to a sexual act; and
(2) Is negligent as to whether he is acting without the complainant's effective consent.
(b) *Second Degree.* An actor commits second degree nonconsensual sexual conduct when that actor:
(1) Knowingly causes the complainant to engage in or submit to a sexual contact; and
(2) Is negligent as to whether he is acting without the complainant's effective consent."

This change bifurcates the *mens rea* required for the defendant's actions and the *mens rea* as to the complainant's lack of consent. This change both clarifies the statute and elementizes this provision to make it consistent with other sexual assault provisions. It is appropriate for the defendant to be required to act "knowingly" with respect to his actions, as is required in the other sexual assault provisions in the RCC.

As to the lack of consent, negligence is the appropriate *mens rea*. The current misdemeanor sexual abuse statute essentially assigns a negligence standard to the defendant's *mens rea* as to the complainant's lack of consent, providing that the defendant must "have knowledge or reason to know that the act was committed without that other person's permission." D.C. Code § 22-3006. . Citing *Owens*, the RCC Commentary is concerned that "negligence is disfavored as a basis for criminal liability" (RCC Commentary at 237 n.22), but "this discussion in *Owens* merely reflects courts' longstanding reluctance to read a negligence standard into a criminal statute in the absence of 'a clear statement from the legislature.'" *Coleman v. United States*, 202 A.3d 1127, 1143-44 (D.C. 2019) (upholding "should have known," *i.e.*, negligence, liability as to stalking; "The 'should have known' language represents just the type of clear legislative statement not present in *Owens*, and it evinces the Council's intent to allow a conviction for stalking based on what an objectively reasonable person would have known.") (quoting *Carrell*, 165 A.3d at 320 (citing *Elonis v. United States*, —— U.S. ——, 135 S.Ct. 2001, 2011, 192 L.Ed.2d 1 (2015))). This negligence standard is consistent with the plain language of the current misdemeanor sexual abuse statute, the jury instructions on

misdemeanor sexual abuse, *see* D.C. Crim. Jur. Instr. 4.400(V)(2) (defendant "knew or should have know that s/he did not have [complainant's] permission"), and with case law defining misdemeanor sexual abuse, *see Mungo v. United States,* 772 A.2d 240, 244-45 (D.C. 2001).

2. USAO recommends removing subsection (c).

USAO believes that this provision is confusing and may inadvertently include conduct that should be criminalized. Lack of "effective consent" is required for the offense of Nonconsensual Sexual Conduct. "Effective consent" is defined in RCC § 22E-701 to include consent other than consent induced by "deception." Because deception is already included in the definition of effective consent, it is redundant to include it here.

I. RCC § 22E-1309. Duty to Report a Sex Crime Involving a Person Under 16 Years of Age and RCC § 22E-1310. Civil Infraction for Failure to Report a Sex Crime Involving a Person Under 16 Years of Age.

1. USAO recommends placing § 22E-1309 and § 22E-1310 in the same location of the D.C. Code as D.C. Code §§ 4-1321.01 *et seq.*

For clarity, USAO recommends that these provisions be in the same location in the D.C. Code, which is a change from their current placement in the D.C. Code. RCC § 22E-1309 and § 22E-1310 address civil liability for failure to make a mandatory report, and D.C. Code §§ 4-1321.01 *et seq.* address criminal liability for failure of certain persons to make a mandatory report. To reduce confusion about mandatory reporting obligations, it makes sense to place them in the same location.

2. USAO recommends adding the word "Universal" to the heading of § 22E-1309.

With USAO's changes, the heading of § 22E-1309 would provide:

"RCC § 22E-1309. Universal Duty to Report a Sex Crime Involving a Person Under 16 Years of Age."

USAO believes that it is appropriate to clarify that this provision applies "universally." This universal reporting requirement is in contrast to the reporting requirements in D.C. Code § 4-1321.01 *et seq.*, which only apply to certain individuals specifically required to make a report of abuse or neglect, and which subject those individuals to criminal penalties for failure to report. Including the word "universal" in the heading of § 22E-1309 provides notice to all adults that they are obligated to report child sex crimes to the authorities.

3. USAO recommends that subsection (b) be modified to include the provision, "No legal privilege, except the privileges set forth in subsection (b), shall apply."

With USAO's changes, a new subsection (b)(4) would provide:

"(4) No legal privilege, except the privileges set forth in subsection (b), shall apply."

Although this is implied, USAO believes that this statement clarifies that other privileged relationships do not create an exemption from mandatory reporting. This provision is included in the current law at D.C. Code § 22-3020.52(c), and it is appropriate to include it in the RCC as well.

4. USAO recommends that subsection (b)(3) be modified to include the provision, "A confession or communication made under any other circumstances does not fall under this exemption."

   With USAO's changes, a new subsection (b)(3)(E) would provide:

   "(E) A confession or communications made under any circumstances does not fall under this exemption."

This language is currently codified in D.C. Code § 22-3020.52(c)(2)((B), and USAO believes it is appropriate to include it here to clarify the law.

VIII. Chapter 14. Kidnapping, Criminal Restraint, and Blackmail.

A. RCC § 22E-1401. Kidnapping.

1. USAO recommends, in subsections (a)(3)(C) and (b)(3)(C), changing the words "any felony" to the words "any criminal offense," and in subsections (a)(3)(E) and (b)(3)(E), changing the words "Commit a sexual offense defined in Chapter 13 of this title" to the words "Commit any criminal offense."

   With USAO's changes, subsections (a)(3)(C) and (b)(3)(C) would provide:

   "(C) Facilitate the commission of any ~~felony~~ criminal offense or flight thereafter;"

   With USAO's changes, subsections (a)(3)(E) and (b)(3)(E) would provide:

   "(E) Commit ~~a sexual offense defined in Chapter 13 of this title against the complainant~~ any criminal offense;"

As written, subsections (a)(3)(C) and (b)(3)(C) exclude circumstances where the actor substantially confines or moves the complainant for the purpose of committing a misdemeanor offense. There is no reason to limit this conduct to felony offenses. Likewise, subsections (a)(3)(E) and (b)(3)(E) limit the actor's intent to commit a crime to an intent to "commit a sexual offense." There is no reason to limit the conduct to sexual offenses either. For example, in *Gooch v. United States*, 297 U.S. 124, 128 (1936), the appellant confined law enforcement agents to prevent such agents from arresting appellant. *Id.* Such a restraint would not qualify as a kidnapping under § 22E-1401 if the actor's conduct is construed as misdemeanor resisting arrest. Accordingly, USAO recommends that these subsections be revised.

2. USAO recommends, in subsection (c), adding a provision to encompass the commission of sex offenses in addition to causing bodily injury.

With USAO's changes, subsection (c) would provide:

"(c) *Exclusions to Liability for Close Relatives With Intent to Assume Responsibility for Minor.* A person does not commit aggravated kidnapping or kidnapping under subparagraphs (a)(3)(G) or (b)(3)(G), when the person is a close relative of the complainant, acted with intent to assume full responsibility for the care and supervision of the complainant, and did not cause bodily injury or commit a sex offense as defined in Chapter 13 of this Title against the complainant, or threaten to cause bodily injury or commit a sex offense as defined in Chapter 13 of this Title to the complainant."

As currently written, § 1401(c) fails to capture sexual offenses defined in Chapter 13 of this Title. Sex offenses may or may not result in physical injury (and frequently do not), so USAO recommends specifically including those offenses in this exception. Unfortunately, close relatives are frequently the ones who perpetrate sexual abuse on minors, and there is no reason to *per se* exempt them from liability for kidnapping. The purpose of this subsection is, presumably, to exempt close relatives who are caregivers from liability, assuming they do not hurt the child. Because sexual abuse is a different type of harm, it is important to include that limitation on the exemption as well.

3. USAO recommends that, in subsection (e)(2), the words "has been affirmed" be replaced with the words "becomes final."

With USAO's changes, subsection (e)(2) would provide:

"(2) The judgment appealed from ~~has been affirmed~~ becomes final."

Consistent with USAO's comments submitted on May 20, 2019 regarding § 22E-214, USAO believes that "becomes final" would more accurately define what USAO believes is the RCC's intended time when the appeal has ended.

IX. Chapter 15. Abuse and Neglect of Vulnerable Persons.

A. RCC § 22E-1501. Criminal Abuse of a Minor.

1. USAO recommends removing subsections (a)(1), (b)(1), and (c)(1).

Subsections (a)(1), (b)(1), and (c)(1) require a relationship between the defendant and complainant. This is a change from current law, and is not warranted. Under D.C. Code § 22-1101, the current Cruelty to Children offense, there is no requirement of a relationship between the parties. USAO relies on this statute both in situations where there is a relationship between the parties and when there is not, and both applications of the statute are appropriate. For example, if a stranger walks up to a child and tips over the child's strollers, or a neighbor hits a

child, this behavior is equally culpable as when a person with a relationship with the child engages in the same behavior.

Further, due to this change, USAO recommends that the RCC include elsewhere in the statute the requirement that the complainant be, in fact, under 18 years of age.

2. In the alternative, USAO recommends removing the words "under civil law" from subsections (a)(1), (b)(1), and (c)(1).

   With USAO's changes, subsections (a)(1), (b)(1), and (c)(1) would provide:

   "(1) Reckless as to the fact that he or she has a responsibility ~~under civil law~~ for the health, welfare, or supervision of the complainant who is under 18 years of age;"

For reasons articulated above, the words "under civil law" are confusing and needlessly require a reliance on civil law to understand criminal law.

3. USAO recommends, in subsection (c)(2)(A), including the words "assault, per RCC § 22E-1202; or kidnapping, per RCC § 22E-1401," and eliminating the words "first degree" from "first degree offensive physical contact."

   With USAO's changes, subsection (c)(2)(A) would provide:

   "(A) In fact, commits: assault, per RCC § 22E-1202; stalking, per RCC § 22E-1206; menacing, per RCC § 22E-1203; criminal threats, per RCC § 22E-1204; kidnapping, per RCC § 22E-1401; criminal restraint, per RCC § 22E-1404; or ~~first degree~~ offensive physical contact, per RCC § 22E-1205~~(a)~~ against the complainant;"

Although assault is implicitly included in this definition in subsection (c)(2)(C), it should be expressly included in subsection (c)(2)(A) as well to eliminate confusion. Further, given that criminal restraint is included in this list, kidnapping should be as well. Moreover, it is appropriate to include liability for both First Degree and Second Degree Offensive Physical Contact in this statute. As discussed more extensively in the Assault comments, a primary distinction between Assault and Second Degree Offensive Physical Contact could be a factual question as to whether the complainant suffered "bodily injury." Particularly in the case of a child, who could be non-verbal, barely verbal, or reluctant to talk, cases prosecuted under this section may frequently involve third-party witnesses, rather than the testimony of the complainant. A third-party witness may not be able to either ascertain or testify beyond a reasonable doubt that a child was in "physical pain" as a result of the defendant's actions, so even what appears to be a clear assault on a child may only be prosecutable as a second degree offensive physical contact. For this reason, USAO believes that it is appropriate to include second degree offensive physical contact in this definition as well.

4. USAO recommends, in subsection (c)(2)(B), changing the word "Purposely" to "Knowingly" and removing the words "by confining."

   With USAO's changes, subsection (c)(2)(B) would provide:

   "(B) ~~Purposely~~ Knowingly causes significant emotional distress to ~~by confining~~ the complainant."

The appropriate standard is "knowingly," as "purposefully" creates a level of *mens rea* that is too high. Under the current child cruelty statute, the only *mens rea* requirements are intentionally, knowledge, or recklessness. D.C. Code § 22-1101(a), (b).

Further, it is unclear why confining the complainant is the only way to cause significant emotional distress under this statute. USAO believes that any time a defendant knowingly causes significant emotional distress to a child, whether by confinement or otherwise, that should constitute Criminal Abuse of a Minor.

5. USAO recommends, in subsection (c)(2)(C), adding the words, "or engages in conduct that creates a grave risk of causing bodily injury to the complainant."

   With USAO's changes, subsection (c)(2)(C) would provide:

   "(C) Recklessly causes bodily injury to the complainant, or engages in conduct that creates a grave risk of causing bodily injury to the complainant;"

This conduct is encompassed in the current Second Degree Child Cruelty statute at D.C. Code § 22-1101(b)(1) and should be included here. Consistent with current law, there should not be a requirement of an injury to satisfy this statute. The Commentary states that this could be prosecuted as an attempt, or as Criminal Neglect of a Minor (Commentary at 291), but with USAO's changes suggested above that would eliminate the need for a significant relationship in the Criminal Abuse of a Minor statute, these statutes justifiably no longer have the same overlap. Further, creating a "grave risk" of causing bodily injury is a different standard than coming "dangerously close" to causing bodily injury, so the attempt statute will not encompass every situation that would be covered under the current law.

B. RCC § 22E-1502. Criminal Neglect of a Minor.

1. USAO recommends removing the words "under civil law" from subsections (a)(1), (b)(1), and (c)(1).

   With USAO's changes, subsections (a)(1), (b)(1), and (c)(1) would provide:

   "(1) Reckless as to the fact that he or she has a responsibility ~~under civil law~~ for the health, welfare, or supervision of the complainant who is under 18 years of age;"

For reasons articulated above, the words "under civil law" are confusing and needlessly require a reliance on civil law to understand criminal law.

C. RCC § 22E-1503. Criminal Abuse of a Vulnerable Adult or Elderly Person.

1. USAO recommends removing subsections (a)(1), (b)(1), and (c)(1).

Subsections (a)(1), (b)(1), and (c)(1) require a relationship between the defendant and complainant. This is a change from current law, and is not warranted. Under D.C. Code § 22-933, the current Criminal Abuse of a Vulnerable Adult or Elderly Person offense, there is no requirement of a relationship between the parties. USAO relies on this statute both in situations where there is a relationship between the parties and when there is not, and both applications of the statute are appropriate. Alternatively, the relationship could be included as an enhancement to this provision.

Further, due to this change, USAO recommends that the RCC include elsewhere in the statute the requirement that the complainant be, in fact, a vulnerable adult or elderly person.

2. In the alternative, USAO recommends removing the words "under civil law" from subsections (a)(1), (b)(1), and (c)(1).

With USAO's changes, subsections (a)(1), (b)(1), and (c)(1) would provide:

> "(1) Reckless as to the fact that he or she has a responsibility ~~under civil law~~ for the health, welfare, or supervision of the complainant who is a vulnerable adult or elderly person;"

For reasons articulated above, the words "under civil law" are confusing and needlessly require a reliance on civil law to understand criminal law.

3. USAO recommends, in subsection (c)(2)(A), including the words "assault, per RCC § 22E-1202; or kidnapping, per RCC § 22E-1401," and eliminating the words "first degree" from "first degree offensive physical contact."

With USAO's changes, subsection (c)(2)(A) would provide:

> "(A) In fact, commits: assault, per RCC § 22E-1202; stalking, per RCC § 22E-1206; menacing, per RCC § 22E-1203; criminal threats, per RCC § 22E-1204; kidnapping, per RCC § 22E-1401; criminal restraint, per RCC § 22E-1404; or ~~first degree~~ offensive physical contact, per RCC § 22E-1205~~(a)~~ against the complainant;"

Although assault is implicitly included in this definition in subsection (c)(2)(C), it should be expressly included in subsection (c)(2)(A) as well to eliminate confusion. Further, given that criminal restraint is included in this list, kidnapping should be as well. Moreover, for similar reasons as those discussed above in the Criminal Abuse of a Minor provision, it is important to have a provision for second degree offensive physical contact. Like young children, some elderly

or vulnerable adults may not be able to articulate whether or not they felt any "physical pain," and the government's case will have to rely on the testimony of third-party witnesses. Even if it is likely that the complainant suffered bodily injury, the government may not be able to prove it beyond a reasonable doubt, so USAO believes that it is appropriate to include this option for liability as well.

4. USAO recommends, in subsection (c)(2)(B), changing the word "Purposely" to "Knowingly" and removing the words "by confining."

   With USAO's changes, subsection (c)(2)(B) would provide:

   "(B) ~~Purposely~~ Knowingly causes significant emotional distress to ~~by confining~~ the complainant."

The appropriate standard is "knowingly," as "purposefully" creates a level of *mens rea* that is too high. Under the current abuse of a vulnerable adult, the only *mens rea* requirements are intentionally or knowledge. D.C. Code § 22-933.

Further, it is unclear why confining the complainant is the only way to cause significant emotional distress under this statute. USAO believes that any time a defendant knowingly causes significant emotional distress to a vulnerable adult or elderly person, whether by confinement or otherwise, that should constitute Criminal Abuse of a Vulnerable Adult or Elderly Person.

5. USAO recommends, in subsection (c)(2)(C), adding the words, "or engages in conduct that creates a grave risk of causing bodily injury to the complainant."

   With USAO's changes, subsection (c)(2)(C) would provide:

   "(C) Recklessly causes bodily injury to the complainant, or engages in conduct that creates a grave risk of causing bodily injury to the complainant;"

This language is consistent with USAO's proposed changes to the Criminal Abuse of a Minor statute, as discussed above. Moreover, the current statute includes "threaten[ing] to inflict physical pain or injury," D.C. Code § 22-933(1), which means that no infliction of bodily injury is required. Thus, USAO's proposed changes are consistent with current law.

D. RCC § 22E-1503. Criminal Neglect of a Vulnerable Adult or Elderly Person.

1. USAO recommends removing the words "under civil law" from subsections (a)(1), (b)(1), and (c)(1).

   With USAO's changes, subsections (a)(1), (b)(1), and (c)(1) would provide:

   "(1) Reckless as to the fact that he or she has a responsibility ~~under civil law~~ for the health, welfare, or supervision of the complainant who is under 18 years of age;"

For reasons articulated above, the words "under civil law" are confusing and needlessly require a reliance on civil law to understand criminal law.

X. Chapter 16. Human Trafficking.

A. RCC § 22E-1601. Forced Labor or Services; RCC § 22E-1602. Forced Commercial Sex.

1. USAO recommends that the RCC define "debt bondage" and "labor" in Chapter 7.

In § 22E-1601, the words "debt bondage" and "labor" are used, but their meaning is vague and open to substantial interpretation. "Debt bondage" and "labor" are not defined in RCC § 22E-701. "Services" is defined in RCC § 22E-701, but is partially defined as "Labor, whether professional or nonprofessional." Without the definition of "labor," it is hard to assess how "services" broadens or narrows "labor." USAO believes that defining those terms would clarify this section. USAO recommends that the RCC incorporate the definitions of those terms set forth in D.C. Code § 22-1831.

2. USAO recommends changing subsection (c)(1) to require strict liability instead of recklessness.

With USAO's changes, subsection (c)(1) would provide:

"~~The actor was reckless as to the fact that t~~The complainant was, in fact, under 18 years of age;"

USAO relies on the rationale set forth above in the General Comments to Chapter 13.

3. USAO recommends, in subsection (c)(2), adding a comma after the words "provide services in RCC § 22E-1601, and adding a comma after the words "provide commercial sex acts" in RCC § 22E-1602.

With USAO's changes, subsection (c)(2) of RCC § 22E-1601 would provide:

"(2) The actor held the complainant, or caused the complainant to provide services, for a total of more than 180 days."

With USAO's changes, subsection (c)(2) of RCC § 22E-160 would provide:

"(2) The actor held the complainant, or caused the complainant to provide commercial sex acts, for more than 180 days."

Adding this comma clarifies that the enhancement applies either if the actor holds the complainant for more than 180 days, or causes the complainant to provide services for more than 180 days. Without the comma, it appears that only the second clause has the 180 days

requirement. USAO also recommends making this change throughout Chapter 16 to ensure consistency.

B. RCC § 22E-1603. Trafficking in Labor or Services.

1. USAO recommends adding the words "advertises, patronizes, or solicits" to subsection (a)(1).

   With USAO's changes, subsection (a)(1) would provide:

   "(1) Knowingly recruits, entices, houses, transports, provides, obtains, ~~or~~ maintains, advertises, patronizes, or solicits by any means, a person;"

These changes track federal human trafficking law, as codified in 18 U.S.C. § 1591(a)(1). These additions would include, for example, a job posting or similar situations that would arguably not be encompassed in the statute otherwise.

2. USAO recommends changing subsection (c)(1) to require strict liability instead of recklessness.

   With USAO's changes, subsection (c)(1) would provide:

   "~~The actor was reckless as to the fact that t~~The complainant was, in fact, under 18 years of age;"

   USAO relies on the rationale set forth above in the General Comments to Chapter 13.

C. RCC § 22E-1604. Trafficking in Commercial Sex.

1. USAO recommends adding the words "advertises, patronizes, or solicits" to subsection (a)(1).

   With USAO's changes, subsection (a)(1) would provide:

   "(1) Knowingly recruits, entices, houses, transports, provides, obtains, ~~or~~ maintains, advertises, patronizes, or solicits by any means, the complainant;"

   This change has the same rationale as the change suggested above.

2. USAO recommends changing subsection (c)(1) to require strict liability instead of recklessness.

   With USAO's changes, subsection (c)(1) would provide:

   "~~The actor was reckless as to the fact that t~~The complainant was, in fact, under 18 years of age;"

USAO relies on the rationale set forth above in the General Comments to Chapter 13.

3. USAO recommends, in subsection (c), changing the words "Before applying" to "In addition to."

With USAO's changes, subsection (c) would provide:

"(c) *Offense Penalty Enhancements.* ~~Before applying~~ In addition to any general penalty enhancements . . ."

USAO believes that this change is not substantive, but is intended to conform with the language of the other penalty enhancements in Chapter 16.

D. RCC § 22E-1605. Sex Trafficking of Minors

1. USAO recommends changing the heading of § 22E-1605 from "Sex Trafficking of Minors" to "Sex Trafficking of a Minor," and, in subsection (a), changing the word "minors" to the words "a minor."

With USAO's changes, § 22E-1605 would provide:

"**RCC § 22E-1605. Sex Trafficking of ~~Minors~~ a Minor.**
(a) *Offense.* An actor commits sex trafficking of ~~minors~~ a minor when that actor:"

This change is not intended to be substantive. This change clarifies that, to be liable for this offense, an actor must only traffic one minor, rather than multiple minors. This change is also consistent with the other headings in the RCC, including in Chapter 13, that discuss "a minor" instead of "minors."

2. USAO recommends adding the words "advertises, patronizes, or solicits" to subsection (a)(1).

With USAO's changes, subsection (a)(1) would provide:

"(1) Knowingly recruits, entices, houses, transports, provides, obtains, ~~or~~ maintains, advertises, patronizes, or solicits by any means, the complainant;"

This change has the same rationale as the change suggested above.

3. USAO recommends changing subsection (c)(1) to require strict liability instead of recklessness.

With USAO's changes, subsection (c)(1) would provide:

"~~With recklessness as to the fact that t~~The complainant was, in fact, under 18 years of age;"

USAO relies on the rationale set forth above in the General Comments to Chapter 13. Although under current law there is a requirement of recklessness as to whether the complainant is under 18, *see* D.C. Code § 22-1834(a), the government need not prove this recklessness if the defendant had a "reasonable opportunity to observe" the complainant, D.C. Code § 22-1834(b).

4. USAO recommends, in subsection (a)(2), omitting the words "with another person."

As set forth above, USAO is recommending including "masturbation" in the definition of "commercial sex act" in RCC § 22E-701. Because masturbation does not require "another person's" involvement, this phrase is unnecessary and could lead to confusion in this context.

E. RCC § 22E-1608. Commercial Sex with a Trafficked Person.

1. USAO recommends changing subsections (a)(3) and (b)(2)(B) to require strict liability instead of recklessness.

With USAO's changes, subsections (a)(3) and (b)(2)(B) would provide:

"~~With recklessness as to the fact that t~~The complainant was, in fact, under 18 years of age ~~or, in fact, the complainant was under 12 years of age~~."

USAO relies on the rationale set forth above in the General Comments to Chapter 13.

F. RCC § 22E-1612. Limitations on Liabilities and Sentencing for Chapter 16 Offenses.

1. USAO recommends removing RCC § 22E-1612 in its entirety.

The RCC does not allow prosecution of prior trafficking victims as accomplices or co-conspirators to trafficking. This is a change from current law, and limits the ability to prosecute individuals who were previously trafficked but are currently perpetrating trafficking. Even someone who was trafficked for a short time can become an essential part of the criminal enterprise. But for that prior victim's involvement in the enterprise—now as an accomplice rather than as a victim—the primary trafficker would not be able to recruit new victims and continue to build a trafficking network. It is frequently the case that these accomplices are used as recruiting tools, or as enforcers in the enterprise who enforce the victims' compliance and allow the primary trafficker to appear sympathetic to these victims.

XI. Chapter 21. Theft.

A. RCC § 22E-2101. Theft

1. USAO recommends decreasing the number of gradations of theft.

§ 22E-2101 currently provides for five gradations of theft, separated primarily by dollar value of the property at issue. USAO believes, however, that too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing. Of note, some other property provisions within the RCC include only two or three gradations (see RCC § 22E-2203 (two gradations of check fraud); RCC § 22E-2204 (three gradations of forgery)).

2. USAO recommends removing subsection (b)(4)(B).

Subsection (b)(4)(B) provides: "The property is a motor vehicle, and has a value of $25,000 or more." Subsection (b)(4)(A) provides: "The property has a value of $25,000 or more." Because all motor vehicles with a value of $25,000 or more under (b)(4)(B) will necessarily also have a value of $25,000 or more under (b)(4)(A), subsection (b)(4)(B) is a superfluous provision.

3. Contingent upon the CCRC accepting USAO's recommendations in the Robbery statute, USAO recommends deleting subsection (c)(4)(C).

With USAO's changes, § 22E-2101(c) would provide:

"(c) Third Degree. A person commits third degree theft when that person:
(1) Knowingly takes, obtains, transfers, or exercises control over the property of another;
(2) Without the consent of an owner;
(3) With intent to deprive that owner of the property; and
(4) In fact:
(A)The property has a value of $2,500 or more; or
(B) The property is a motor vehicle~~; or~~
~~(C) The property is taken from a complainant who:~~
~~(i) Holds or carries the property on his or her person; or~~
~~(ii) Has the ability and desire to exercise control over the property and it is within his or her immediate physical control~~."

Unlike the other provisions of § 22E-2101, subsection (c)(4)(C) refers to the taking of property from a complainant's person or his or her immediate physical control. As such, the proposed third degree theft statute is akin to robbery, and USAO believes that this conduct should be included in the Robbery statute instead of the Theft statute. This distinction is important, given that a robbery accounts for the violation not only of property but also of one's person. Indeed, although the Commentary on RCC § 22E-2101 (Theft) does not directly address the inclusion of subsection (c)(4)(C), the Commentary on RCC § 22E-1201 (Robbery) acknowledges that so-called "pick-pocketing" can morph into robbery in at least some

circumstances (see Commentary at 193-94 & nn.1144-46). Therefore, contingent upon the CCRC adopting USAO's recommendation that the RCC Robbery statute track current law, USAO recommends removing this provision from the Theft statute. This theory of theft would accordingly be subsumed into Robbery.

B. RCC § 22E-2103. Unauthorized Use of a Motor Vehicle.

1. USAO recommends, in subsection (a)(1), changing the word "operates motor vehicle" to the words "operates or uses a motor vehicle, or causes to a motor vehicle to be operated or used."

   With USAO's changes, subsection (a)(1) would provide:

   "(1) Knowingly operates or uses a motor vehicle, or causes a motor vehicle to be operated or used;"

USAO believes that, consistent with current law under D.C. Code § 22-3215(b), it is appropriate to include the word "use" in addition to "operate." Indeed, the title of the statute, "Unauthorized *Use* of a Motor Vehicle" (emphasis added), includes this term. Further, USAO believes that, consistent with D.C. Code § 22-3215(b), it is also appropriate to retain liability for someone who "causes" a motor vehicle to be operated or used.

2. USAO recommends that § 22E-2103, like the current statute, include a provision penalizing the use of a stolen vehicle in the commission of a crime of violence.

   With USAO's changes, § 22E-2103 would add the following language:

   "(a) A person convicted of unauthorized use of a motor vehicle under this section who took, used, or operated the motor vehicle, or caused the motor vehicle to be taken, used, or operated, during the course of or to facilitate a crime of violence, shall be:
   (i) Fined not more than $[X], imprisoned for not more than [X] years, or both, consecutive to the penalty imposed for the crime of violence; and
   (ii) If serious bodily injury results, imprisoned for not less than [X] years, consecutive to the penalty imposed for the crime of violence."

This language is consistent with the current law in D.C. Code § 22-3215(d)(2)(A). Appendix J recognizes that at least some states prohibit the use of a motor vehicle during the commission of a felony. *See* RCC App. J at 367 & n.2020. USAO believes that including such a provision is important because the use of a vehicle in fleeing (or attempting to flee) from the scene of a crime is inherently dangerous, and increases the risk that innocent bystanders will be harmed on top of any harm caused by the crime of violence itself.

XII. Chapter 22. Fraud.

A. RCC § 22E-2201. Fraud.

1. USAO recommends decreasing the number of gradations of fraud.

§ 22E-2201 currently provides for five gradations of fraud, separated by dollar value of the property at issue, or the number of hours of services/labor. USAO believes, however, that too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing. Of note, some other property provisions within the RCC include only two or three gradations (see RCC § 22E-2203 (two gradations of check fraud); RCC § 22E-2204 (three gradations of forgery)).

2. USAO recommends replacing "that" with "an" in subparagraph 3 of each gradation of fraud.

With USAO's changes, each subsection of the fraud statute would read:

"*[X] Degree*. A person commits [X] degree fraud when that person:
(1) Knowingly takes, obtains, transfers, or exercises control over property of another;
(2) With the consent of an owner obtained by deception;
(3) With intent to deprive ~~that~~ an owner of the property . . . ."[7]

As currently drafted, § 22E-2201 creates criminal liability for fraud only where a person has obtained property with the consent of *an owner* with the intent to deprive *that owner* of the property. Accordingly, the current language might fail to account for fraud on legal persons (e.g., businesses or corporations) or fraud perpetrated with respect to jointly owned property. Consider, for example, a jointly owned vehicle where one owner resides in the District of Columbia and frequently uses the vehicle, and another does not reside in the District of Columbia and never uses the vehicle. A defendant who obtains control over the vehicle by deceiving the non-DC owner does not necessarily deprive the non-DC owner of the use of the vehicle, because the vehicle is not being used by the non-DC owner. However, the defendant would effectively deprive the DC owner of use of the vehicle. USAO's proposed language addresses this gap.

B. RCC § 22E-2202. Payment Card Fraud.

1. USAO recommends decreasing the number of gradations of payment card fraud.

Section 22E-2202 currently provides for five gradations of payment card fraud, separated by dollar value of the property at issue. USAO believes that too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing. Indeed, Appendix J acknowledges that only five jurisdictions nationwide have five gradations of payment card fraud. RCC App. J at 378-79. Of note, some other property provisions within the

[7] Of note, the current draft of RCC § 22E-2208(e)(1) (Financial Exploitation of a Vulnerable Adult or Elderly Person) follows the same form as the form that USAO proposes here.

RCC include only two or three gradations (see RCC § 22E-2203 (two gradations of check fraud); RCC § 22E-2204 (three gradations of forgery)).

C. RCC § 22E-2203. Check Fraud.

1. USAO recommends that, in line with the majority of other jurisdictions and in addition to the conduct set forth in the revised check fraud statute, § 22E-2203 provide that a person commits check fraud when that person "draws" a check or "delivers" a check.

   With USAO's changes, § 22E-2203(a) would provide:

   "(a) *First Degree.* A person commits first degree check fraud when that person:
   (1) Knowingly:
   (A) obtains or pays for property by using a check; or
   (B) draws or delivers a check . . . ."
   . . . .

   (b) *Second Degree.* A person commits second degree check fraud when that person:
   (1) Knowingly:
   (A) obtains or pays for property by using a check; or
   (B) draws or delivers a check . . . ."

Appendix J acknowledges that "requiring for check fraud that the accused actually pays for or obtains property of another, appears to be a minority practice in other jurisdictions. RCC App. J at 380. Rather, it is sufficient in a majority of jurisdictions for a person to "issue" or "pass" a check (*id.*). Although the Commentary suggests that liability for *attempted* check fraud *might* cover conduct like drawing or delivering a check (Commentary at 58-59), USAO is concerned that eliminating clearly specified criminal liability for drawing or delivering checks will create a gap in the enforcement of financial crimes.

Moreover, including liability for drawing and delivering checks will bring the check fraud statute in line with the proposed forgery statute, RCC § 22E-2204. Under RCC § 22E-2204(c)(1)(C), one form of conduct that constitutes forgery is "transmitting or otherwise using" a forged document. But the statute requires only that the person "transmitting or otherwise using" the forged document *intends* to obtain property; no actual exchange of property need occur (*see* RCC § 22E-2204(c)(2)). Similarly, RCC § 22E-2205—the identity theft statute—does not require that a person actually obtain property to be criminally liable for identity theft. Rather, a person need only to *intend* to (among other possibilities) obtain property.

2. USAO recommends that, in line with the majority of jurisdictions, the $2,500 threshold be decreased to $1,000.

   With USAO's changes, § 22E-2203(a)(3) would provide:

   "(3) The amount of loss to the check holder is, in fact, ~~$2,500~~ $1,000 or more."

As acknowledged in Appendix J, "the minimum value threshold for felony check fraud is $1,000 *or less*." RCC App. J at 381 (emphasis added). Accordingly, USAO sees no reason to depart from the national trend. Doing so would result in a drastic difference in criminal liability between check fraud committed in the District of Columbia and other jurisdictions—including the neighboring jurisdictions of Maryland and Virginia (see Va. Code § 18.2-181 (setting $500 threshold for felony check fraud); Md. Code § 8-106 (same)).

D. RCC § 22E-2205. Identity Theft.

1. USAO recommends decreasing the number of gradations of payment card fraud.

§ 22E-2205 currently provides for five gradations of identity theft, separated by dollar value of the property at issue. USAO believes that too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing. Of note, some other property provisions within the RCC include only two or three gradations (see RCC § 22E-2203 (two gradations of check fraud); RCC § 22E-2204 (three gradations of forgery)).

2. USAO recommends that subsection (e)(3) include subparagraph (D)-(F) that reads, "(D) identify himself or herself at the time of his or her arrest; (E) facilitate or conceal his or her commission of a crime; or (F) avoid detection, apprehension, or prosecution for a crime"

With USAO's changes, § 22E-2205(e)(3) would provide:

"(3) With intent to use the personal identifying information to:
(A) Obtain property of another by deception;
(B) Avoid payment due for any property, fines, or fees by deception;
(C) Give, sell, or transfer . . . . ;
(D) Identify himself of herself at the time of his or her arrest;
(E) Facilitate or conceal his or her commission of a crime; or
(F) Avoid detection, apprehension, or prosecution for a crime."

USAO believes that the current wording of (e)(3) is under-inclusive, in that it focuses only on the financial harms potentially caused by identify theft, without accounting for other nefarious reasons for misappropriating another person's identity. Although the Commentary (at 71) suggests that the conduct in proposed subparagraphs (D)-(F) is criminalized under obstruction of justice and false statements offenses, none of these takes into account the harm caused to the person whose personal identifying information has been misappropriated. For example, where a defendant identifies himself as John Doe at the time of arrest, then John Doe's information will almost certainly enter police paperwork, court dockets, national databases, and the like. This will have an effect on the real "John Doe," who might suffer continuing harms during background checks for employment or housing. While RCC § 22E-2206 (Identity Theft Civil Provisions) provides some civil remedies for persons who are victims of identity theft, the provision reaches only "District of Columbia public records," which will not reach, for example, records that have already entered national databases, or private company records.

E. RCC § 22E-2206. Identity Theft Civil Provisions.

1. USAO recommends replacing each occurrence of "§ 22E-2206" with "§ 22E-2205".

Section 22E-2206 as currently drafted is self-referential; it appears that the references to 2206 are typographical errors, and should be updated to read "2205" (the immediately preceding provision dealing with criminal liability for identity theft).

F. RCC § 22E-2208. Financial Exploitation of a Vulnerable Adult or Elderly Person.

1. USAO recommends decreasing the number of gradations of Financial Exploitation of a Vulnerable Adult.

§ 22E-2208 currently provides for five gradations of Financial Exploitation of a Vulnerable Adult or Elderly Person ("FEVA"), separated by dollar value of the property at issue. The reliance on dollar value is of particular concern where the criminal conduct at issue is directed at individuals who are elderly or otherwise vulnerable. Indeed, by distinguishing the severity of the offense by the amount of property at issue, this proposed statute penalizes defendants less severely when they take advantage of elderly or vulnerable adults who are not wealthy. The focus should be on the fact that a defendant has taken advantage of someone who is potentially less able to fend for himself or herself – not on how much money the defendant managed to steal.

Moreover, as Appendix J acknowledges, "increasing the number of penalty gradations is not supported by national legal trends. Of the jurisdictions with analogous FEVA offenses, *a majority use either two or one penalty grades*." RCC App. J at 389-90 (emphasis added). Given the lack of support at the national level for including more than two gradations, as well as the practical effect of penalizing FEVA on the basis of the financial harm, USAO objects to including five gradations for this offense.

Finally, as a general matter, USAO believes that too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing. Of note, some other property provisions within the RCC include only two or three gradations (see RCC § 22E-2203 (two gradations of check fraud); RCC § 22E-2204 (three gradations of forgery)[8]).

2. USAO recommends striking "theft, extortion, forgery, fraud, or identity theft" from RCC § 22E-2208(e)(2) and inserting the following language: "arson, check fraud, criminal damage to property, criminal graffiti, extortion, fraud, forgery, identity theft, payment card fraud, possession of stolen property, reckless burning, shoplifting, theft, trafficking of stolen property, unauthorized use of a motor vehicle, or unauthorized use of property."

With USAO's changes, § 22E-2208(e)(2) would provide:

"(e)(2) Commits arson, check fraud, criminal damage to property, criminal graffiti, extortion, fraud, forgery, identity theft, payment card fraud, possession of stolen property,

[8] Indeed, forgery is cross-referenced in § 22E-2208(e)(2).

reckless burning, shoplifting, theft, trafficking of stolen property, unauthorized use of a motor vehicle, or unauthorized use of property with recklessness that the complainant is a vulnerable adult or elderly person."

§ 22E-2208(e)(2) currently incorporates by reference only a small subset of property-related offenses; that is, offenses where there is some sort of financial loss to the complainant. The Commentary offers no justification for limiting FEVA to the current subset of crimes and excluding crimes that clearly are related (for example, the current FEVA includes fraud, but excludes payment card fraud and check fraud). USAO believes that its proposal provides consistency.

XIII. Chapter 23. Extortion.

A. RCC § 22E-2301. Extortion.

1. USAO recommends decreasing the number of gradations of extortion.

§ 22E-2301 currently provides for five gradations of extortion, separated by dollar value of the property at issue. USAO believes that too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing. Of note, some other property provisions within the RCC include only two or three gradations (*see* RCC § 22E-2203 (two gradations of check fraud); RCC § 22E-2204 (three gradations of forgery)).

2. USAO recommends replacing "that" with "an" in subparagraph 4 of each gradation of extortion.

With USAO's changes, each subsection of the extortion statute would read:

"(a) *[X] Degree*. A person commits [X] degree extortion when that person:
(1) Knowingly takes, obtains, transfers, or exercises control over property of another;
(2) With the consent of an owner;
(3) The consent being obtained by coercive threat;
(4) Win intent to deprive an ~~that~~ owner of the property; . . . ."[9]

As currently drafted, § 22E-2301 creates criminal liability for extortion only where a person has obtained property with the consent of *an owner* with the intent to deprive *that owner* of the property. Accordingly, the current language might fail to account for, among other things, extortion of an employee of a legal person (*e.g.*, businesses or corporations). Consider, for example, an employee of a business who has access to, but does not own, certain monies. A defendant who threatens a person by saying, "give me access to Company X's credit card, or I'll tell Company X that you did Y" will not be liable for extortion under the current formulation of § 22E-2301. USAO's proposed language addresses this gap.

[9] Of note, the current draft of RCC § 22E-2208(e)(1) (Financial Exploitation of a Vulnerable Adult or Elderly Person) follows the same format that USAO proposes here.

3 USAO recommends further considering the Extortion statute at the same time as the Blackmail statute.

Subsection (1) of each degree of Extortion limits the charge to exercising control "over the property of another." USAO cannot fully comment on this provision without seeing the proposed Blackmail statute, § 22E-1403, which has not yet been drafted. It is important that there is a statute that includes causing another to do or refrain from doing an act, which is not currently encompassed by Extortion, but may be encompassed by the future Blackmail statute.

XIV. Chapter 24. Stolen Property.

A. RCC § 22E-2401. Possession of Stolen Property.

1. USAO recommends decreasing the number of gradations of Possession of Stolen Property.

§ 22E-2401 currently provides for five gradations of Possession of Stolen Property, separated by dollar value of the property at issue. USAO believes that too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing. Of note, some other property provisions within the RCC include only two or three gradations (see RCC § 22E-2203 (two gradations of check fraud); RCC § 22E-2204 (three gradations of forgery)).

B. RCC § 22E-2402. Trafficking of Stolen Property.

1. USAO recommends decreasing the number of gradations of Trafficking of Stolen Property.

§ 22E-2402 currently provides for five gradations of Trafficking of Stolen Property, separated by dollar value of the property at issue. USAO believes that too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing. Of note, some other property provisions within the RCC include only two or three gradations (see RCC § 22E-2203 (two gradations of check fraud); RCC § 22E-2204 (three gradations of forgery)).

2. USAO recommends, in subsection (4) of each gradation of Trafficking of Stolen Property, changing the word "property" to the words "total property trafficked."

With USAO's changes, each subsection (4) would provide:

"(4) The total property trafficked, in fact, has a value of . . ."

As currently written, the statue is unclear as to whether each occasions involving trafficked property must have the monetary value listed, or whether the *total* amount trafficked must have the monetary value listed. USAO believes that, because the purpose of the statute is to encompass multiple instances of buying or possessing stolen property, the total value of the

trafficked property is a more relevant number than each individual transaction. USAO's changes would clarify this provision.

XV. Chapter 25. Property Damage.

A. RCC § 22E-2501. Arson.

1. USAO recommends (1) striking references to "a person who is not a participant in the crime" from RCC § 22E-2501(a)-(b), and (2) amending "dwelling or building" to read "dwelling, building, or vehicle".

   With USAO's changes, § 22E-2501(a)-(b) would read:

   "(a) *First Degree*. A person commits first degree arson when that person:
   (1) Knowingly starts a fire or causes an explosion that damages or destroys a dwelling, ~~or~~ building, or vehicle;
   (2) Reckless as to the fact that a person ~~who is not a participant in the crime~~ is present in the dwelling, ~~or~~ building, or vehicle; and
   (3) The fire or explosion, in fact, causes death or serious bodily injury to any person
   (4) ~~Who is not a participant in the crime.~~
   (b) *Second Degree.* A person commits second degree arson when that person:
   (1) Knowingly starts a fire or causes an explosion that damages or destroys a dwelling, ~~or~~ building, or vehicle;
   (2) Reckless as to the fact that a person ~~who is not a participant in the crime~~ is present in the dwelling, building, or vehicle."

With respect to persons who are participants in the crime: As acknowledged in Appendix J, "There is limited support in the 50 states for including, with strict liability, that a person other than a participant was killed or suffered serious bodily injury as does the revised aggravated arson gradation." RCC App. J at 408. The Commentary provides no justification for this departure, which serves only to treat the loss of some human life as more important than others. Absent a much clearer justification, USAO urges the Commission to amend the proposed arson statute as suggested above.

With respect to including vehicles as objects of arson: § 22E-2501 currently addresses only dwellings or buildings, presumably because fires in/on structures or property "that are not dwellings do not endanger human life the same way as fires in buildings or dwellings" (Commentary at 109). However, the Commentary's rationale does not account for the idea that vehicles are intended for use by people, and thus people might be in or near vehicles even if those vehicles are not being used as dwellings. By way of example, a person who sets explosives underneath a vehicle and lies in wait until the vehicle is occupied before detonating the device would not be liable for arson under the current statute. USAO thus recommends the inclusion of vehicles in the arson statute to fully encompass the range of conduct that could put human life in danger.

2. USAO recommends that a protected person enhancement be added to this provision, consistent with the language proposed in the General Comments, above.

Under D.C. Code § 23-1331(4), arson is expressly included as a crime of violence. Of course, it can cause serious injury or death to a victim, so it is certainly a serious crime. Although it is included in the "Property Damage" chapter of the RCC, first degree arson requires the element of "death of serious bodily injury." When the victim of any arson is a protected person, that crime should be punished more severely. Thus, it is appropriate to include an enhancement for committing arson against a protected person.

B. RCC § 22E-2502. Reckless Burning.

1. USAO recommends renumbering the paragraphs of § 22E-2502.

Section 22E-2502 as currently drafted begins with paragraph (3), which appears to be a typographical error. USAO recommends renumbering the statute to begin with paragraph (1).

2. USAO recommends amending "dwelling or building" to read "dwelling, building, or vehicle" in § 22E-2502(a).

With USAO's changes, § 22E-2502(a) would read:

"(a) *Offense.* A person commits reckless burning when that person:
(1) Knowingly starts a fire or causes an explosion;
(2) With recklessness as to the fact that the fire or explosion damages or destroys a dwelling, ~~or~~ building, or vehicle."

§ 22E-2502(a) currently addresses only dwellings or buildings, presumably because fires in/on structures or property "that are not dwellings do not endanger human life the same way as fires in buildings or dwellings" (Commentary at 116). However, the Commentary's rationale does not account for the idea that vehicles are intended for use by people, and thus people might be in or near vehicles even if those vehicles are not being used as dwellings. USAO thus recommends the inclusion of vehicles in the reckless burning statute to fully encompass the range of conduct that could put human life in danger.

C. RCC § 22E-2503. Criminal Damage to Property.

1. USAO recommends decreasing the number of gradations of Criminal Damage to Property.

§ 22E-2503 currently provides for five gradations of Criminal Damage to Property, separated by dollar value of the property at issue. USAO believes that too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing. Of note, some other property provisions within the RCC include only two or three gradations (see RCC § 22E-2203 (two gradations of check fraud); RCC § 22E-2204 (three gradations of forgery)).

XVI. Chapter 26. Trespass.

A. RCC § 22E-2601. Trespass.

1. USAO recommends, in subsections (a)(2), (b)(2), and (c)(2), removing the words "under civil law."

With USAO's changes, subsections (a)(2), (b)(2), and (c)(2) would provide:

"(2) Without a privilege or license to do so ~~under civil law~~"

The requirement that a person be without a privilege or license "under civil law" is a confusing standard that could lead to inconsistent application of the law and require consultation with civil law in order to determine criminal liability under the statute. USAO believes that simply including the language "without a privilege or license to do so" is more clear and will be subject to less confusion.

The current standard under D.C. Code § 22-3302 is: "against the will of the lawful occupant or of the person lawfully in charge thereof, or being therein or thereon, without lawful authority to remain therein or thereon shall refuse to quit the same on the demand of the lawful occupant, or of the person lawfully in charge thereof." In the alternative, USAO recommends retaining the current standard or revising the proposed standard to, "against the will of the lawful occupant, or being without lawful authority to remain."

2. USAO recommends narrowing the category of offenses entitled to a jury trial to those offenses which impact an individual's constitutional rights.

§ 22E-2601(f)(1) allows a defendant to demand a jury trial for any trespass or attempted trespass, in a location "owned or occupied by a government, government agency, or government-owned corporation." § 22E-2601(f)(2) allows a defendant charged with committing any trespass or any attempted trespass by violating a District of Columbia Housing Authority barring notice to demand a jury trial. In recognizing the right of a jury trial to all trespasses in public buildings, the D.C. Court of Appeals in *United States v. Frey*, 137 A.3d 1000, 1004 (D.C. 2016) commented that the language of the current trespass statute does not impose a temporal (when the building is closed to the public) or spatial limit (private sections closed to the public of an otherwise public building). The court commented that had the D.C. Council intended such restrictions, it would have specifically listed them in the statute. While USAO recognizes the constitutional issues involved, USAO recommends imposing a temporal and spatial limit to narrow the category of offenses entitled to a jury trial in order to streamline prosecutions under this section. USAO recommends removing trespasses in private areas of public buildings or trespasses in public buildings after they are closed to the public from the category of offenses entitled to a jury trial. USAO also recommends removing trespasses in violation of a DCHA baring notice from the category of offenses entitled to a jury trial. Because an individual does not have a right to access a private area of a public building or a public building after it is closed to the public, USAO's proposed revision should not impact an individual's constitutional rights.

DCHA often issues barring notices to individuals whose conduct fails to abide by the regulations or whose conduct endangers the safety and welfare of other occupants.

XVII. Chapter 27. Burglary.

1. USAO recommends adding a "while armed" penalty enhancement, consistent with the language proposed in the General Comments, above.

Although several RCC statutes, including Assault and Robbery, contain offense gradations that account for the use of a dangerous weapon, Burglary contains no such gradation. Thus, under the RCC, a defendant is equally culpable for an armed burglary and an unarmed burglary. There should be a distinction between these two offenses, and a defendant who commits an armed burglary should be subject to a higher penalty than a defendant who commits an unarmed burglary. In addition to the increased fear or injury that a burglary victim may experience if a defendant has a gun or other weapon, a defendant creates an increased risk of danger by introducing a weapon to an offense. A firearm could either intentionally or inadvertently discharge, and a complainant could suffer additional either intentional or inadvertent injury as a result of that weapon.

Further, USAO believes that it is more clear to include this provision as an enhancement, rather than as an offense gradation. The RCC Sexual Assault statute includes this provision as an enhancement, and the Burglary statute should as well. This is more clear to a member of the public reading the elements of these offenses, and to a member of the public when used to describe the name of the charge (for example, Second Degree Burglary While Armed, instead of a potential corollary offense of First Degree Burglary).

2. USAO recommends, in subsections (a)(3), (b)(1)(A), (b)(1)(B), (c)(1)(A), and (c)(2), removing the words "under civil law."

With USAO's changes, subsections (a)(3), (b)(1)(A), (b)(1)(B), (c)(1)(A), and (c)(2) would provide:

"[W]ithout a privilege or license to do so ~~under civil law~~"

The requirement that a person be without a privilege or license "under civil law" is a confusing standard that could lead to inconsistent application of the law and require consultation with civil law in order to determine criminal liability under the statute. USAO believes that simply including the language "without a privilege or license to do so" is more clear and will be subject to less confusion.

XVIII. Chapter 34. Government Custody.

A. RCC § 22E-3401. Escape from a Correctional Facility or Officer.

1. USAO recommends clarifying that all gradations of escape will remain felony offenses.

Subsections (a) through (c) divide the offense of Escape into three gradations. USAO has no objection to differentiating between different types of Escape. Because the RCC has not yet addressed penalties, the draft statute does not specify whether third degree Escape is a felony or a misdemeanor. The comments, however, seem to imply that it could be prosecuted as a misdemeanor. USAO believes that walking away from or failing to return to a Halfway House should remain a felony offense, as it currently is. This is especially true where the underlying offense for which a defendant was sent to the Halfway House is itself a felony.

B. RCC § 22E-3402. Tampering with a Detection Device.

With all of USAO's proposed edits and additions, this statute would provide:

"RCC § 22E-3402. Tampering with a Detection Device.

(a) *Offense*. A person commits tampering with a detection device when that person:
(1) Knows he or she is required to wear a detection device while:
(A) Subject to a District of Columbia protection order;
(B) On pretrial release either:
(i) in a District of Columbia case; or
(ii) under the supervision of the Pretrial Services Agency for the District of Columbia;
(C) On presentence or predisposition release in a District of Columbia case;
(D) Committed to the Department of Youth Rehabilitation Services or incarcerated, in a District of Columbia case; or
(E) On supervised release, probation, or parole either:
(i) in a District of Columbia criminal case; or
(ii) under the supervision of the Court Services and Offender Supervision Agency for the District of Columbia; and
(2) ~~Purposely~~ Intentionally:
(A) Removes the detection device or allows an unauthorized person to do so; or
(B) Interferes with the operation of the detection device or allows an unauthorized person to do so.
(b) *Penalty*. Tampering with a detection device is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(c) *Definitions.*
(1) The terms "knows" and "~~purposely~~ intentionally" have the meaning specified in RCC § 22E-206;

(2) The terms "detection device," and "protection order" have the meanings specified in RCC § 22E-701;
(3) The phrase "interferes with the operation of the detection device" applies to any form of interference with the emission or detection of the device's signal and includes failing to charge the power for the device or allowing the device to lose the power required to operate.

(d) *Evidence of Guilt*. For purposes of adjudicating a defendant's guilt under this section, neither D.C. Code § 23-1303(d) nor any other provision of the D.C. Code shall be interpreted to preclude the admissibility of relevant evidence that is owned, possessed, or accessible by the Pretrial Services Agency for the District of Columbia.

(e) *Jurisdiction*. The offense of tampering with a detection device shall be deemed to be committed in the District of Columbia, regardless of whether the offender is physically present in the District of Columbia, if, at the time of the offense, he or she is required to wear a detection device under any of the circumstances listed in subsections (a)(1)(A)-(E) of this section."

1. USAO recommends amending subsections (a)(1)(B) and (a)(1)(E) to cover defendants in non-D.C. criminal cases who are supervised by D.C. agencies.

With USAO's changes, subsection (a)(1)(B) would apply to those "either [o]n pretrial release (i) in a District of Columbia case, or (ii) under the supervision of the Pretrial Services Agency for the District of Columbia." Subsection (a)(1)(E) would apply to those "[o]n supervised release, probation, or parole (i) in a District of Columbia criminal case, or (ii) under the supervision of the Court Services and Offender Supervision Agency for the District of Columbia."

These modifications account for the fact that D.C. residents charged with crimes in other jurisdictions may return to D.C. and be placed under the supervision of a local agency. For example, under the Interstate Compact for the Supervision of Probationers and Parolees, the Court Services and Offender Supervision Agency (CSOSA) supervises offenders "whose originating offenses and sentencing occurred in other jurisdictions." CSOSA Supervision Services Operations Manual, Ch. XIII, p. 1, available at https://www.csosa .gov/wp-content/uploads/bsk-pdf-manager/2018/08/CSS-Operations-Manual.pdf. Similarly, the Pretrial Services Agency (PSA) has informed USAO that, in some cases, it will supervise individuals with pending criminal cases in other jurisdictions. As with all individuals they supervise, CSOSA and PSA have the discretion to order these offenders to wear a detection device as a condition of release. The offenders may also be ordered to wear a detection device by the judges presiding over their non-D.C. criminal cases.

The CCRC's proposed language limits the statute's reach to those on release in "District of Columbia" cases, which means the statute would not apply to those with non-D.C. criminal cases who are supervised by CSOSA or PSA. This change would deprive the government of a means by which it can deter certain offenders from violating their terms of release. Removing this tool could jeopardize the safety of the community, since the offenders assigned to GPS

monitoring are typically those accused or convicted of serious offenses and/or at high risk of violating their release conditions.

2. USAO recommends replacing the word "purposely" with the word "intentionally" in subsections (a)(2) and (c)(1).

USAO recommends making no change to the required *mens rea* of the offense, which currently criminalizes "intentionally" tampering with a detection device. Under RCC § 22E-206(c), "[a] person acts intentionally with respect to a result when the person believes that conduct is practically certain to cause the result." USAO opposes raising the required mental state to purposefulness, which RCC § 22E-206(a) defines as the "conscious[] desire[]" that one's actions bring about a certain result. This change would deprive the government of the ability to prosecute those who act with deliberate indifference to the fact that their detection device will stop functioning. Two hypothetical examples illustrate the types of cases the statute would no longer reach under a "purpose" standard:

Example 1: The defendant knows he must charge the device immediately if it is in "low battery mode," during which the device vibrates every ten minutes, or else the device will go dead. The defendant receives a low-battery warning but plans to leave home that night and does not wish to be bothered staying home to charge the device. He is indifferent to whether the device dies, but he goes out believing it is practically certain that the battery will run dead before he has a chance to charge again. Later that evening, the device goes dead. Under the RCC, the defendant's conduct would not satisfy a standard of purposefulness, because the defendant did not "desire" the device to go dead.

Example 2: The defendant knows, from the instructions he received and the contract he signed when his GPS device was installed, that he must not submerge the device in water, such as a bathtub, hot tub, or swimming pool. The defendant is invited to join some friends in a hot tub. He knows or believes it is practically certain that his GPS device will be damaged if he submerges it in water, but he is indifferent to whether this damage actually occurs. The defendant elects to sit in the hot tub for an hour, and his device stops working. Under the RCC, the defendant's conduct would not violate the tampering statute because he had not acted with a "desire" to hinder the device's operation.

USAO believes criminal liability should attach in cases where the government can prove the defendant knew his acts or omissions would cause his device to stop working and made a conscious decision to take or not take those actions. The intentionality *mens rea* will allow the government to continue deterring supervised offenders from allowing their detection devices to fail, while at the same time ensuring that offenders are not punished for unwittingly allowing their devices to stop working.

An intentionality *mens rea* is more consistent with national trends than one of purposefulness. The commission's commentary in Appendix J notes that of the 12 reform jurisdictions with similar GPS-tampering statutes, seven specify the requisite mental state and require either "knowing or intentional conduct." But of those seven, only two, Indiana and Tennessee, require a *mens rea* that is equivalent to purposefulness as defined under the RCC.

Those statutes, moreover, are narrower in scope, in that they do not criminalize all forms of interference, such as failures to charge the device's battery. *See* Ind. Code Ann. § 35-44.1-3-4(b) (criminalizing "intentionally remov[ing]" a GPS device); Tenn. Code Ann. § 40-39-304(a) (criminalizing "[i]ntentional tampering with, removal of, or vandalism to a device"). Of the remaining five states, four use "knowledge" or "intentionality" standards that are akin to the intentionality standard USAO proposes here. *See* Ark. Code Ann. § 12-12-923(e)(1) ("knowingly"); Colo. Rev. Stat. Ann. § 17-27.5-104(1)-(2) ("knowingly"); Wash. Rev. Code Ann. § 9A.76.130 (1)(b) ("knowingly"); Wis. Stat. Ann. § 946.465 ("intentionally," defined under Wisc. Stat. Ann. § 939.23(3) as the equivalent of "knowingly"). Missouri requires intentionality but does not define the term. Thus, of the jurisdictions whose GPS-tampering statutes can fairly be compared to the District's, the majority require a mental state akin to what USAO proposes here.

3. USAO recommends defining the phrase "interferes with the operation of the detection device" in the body of the statute rather than in the commentary.

USAO agrees with OAG that the term "interfere" goes to the heart of the offense and should therefore be defined in the statute rather than in the commentary. The CCRC's draft statute no longer explicitly criminalizes failures to charge the device's power, even though many of the prosecutions that USAO brings under the statute are for failures to charge. The definition section of the statute should therefore make clear that "the phrase 'interferes with the operation of the detection device' applies to any form of interference with the emission or detection of the device's signal and includes failing to charge the power for the device or allowing the device to lose the power required to operate."

4. USAO recommends an additional provision clarifying that D.C. Code § 23-1303(d) has no impact on GPS-interference cases.

USAO recommends adding a separate subsection providing that "[f]or purposes of adjudicating a defendant's guilt under this section, neither D.C. Code § 23-1303(d) nor any other provision of the D.C. Code shall be interpreted to preclude the admissibility of relevant evidence that is owned, possessed, or accessible by the Pretrial Services Agency for the District of Columbia." This will clarify that no otherwise admissible evidence of pretrial GPS tampering should be excluded on account of § 23-1303(d), which provides that "any information contained in [PSA]'s files . . . shall not be admissible on the issue of guilt in any judicial proceeding . . .". First codified in 1966, § 23-1303(d), was meant to apply only to information collected by PSA during interviews with defendants, which were performed for the purpose of advising the court on pretrial release determinations. The statute long predates D.C. Code § 22-1211, the current GPS-tampering statute, which was first enacted in 2009 and expressly criminalizes GPS-tampering committed "while on pretrial release." *Id.* at § 22-1211(a)(1). The Council therefore clearly did not intend for § 23-1303(d) to affect the admissibility of evidence in GPS-tampering cases, which the statute should reflect.

5. USAO recommends an additional subsection providing that D.C. has jurisdiction when an offender interferes with a detection device across state lines.

USAO suggests additional language providing that "[t]he offense of tampering with a detection device shall be deemed to be committed in the District of Columbia, regardless of whether the offender is physically present in the District of Columbia, if, at the time of the offense, he or she is required to wear a detection device under any of the circumstances listed in subsections (a)(1)(A)-(E) of this section."

The Council has enacted similar jurisdictional provisions in at least two other statutes. D.C. Code § 22-3227.06 states that in specified circumstances, "[t]he offense of identity theft shall be deemed to be committed in the District of Columbia, regardless of whether the offender is physically present in the District of Columbia." D.C. Code § 22-3224.01 uses identical language with respect to credit card fraud, specifically providing for jurisdiction whenever (1) the credit card holder is a resident of D.C., (2) the person defrauded is located in D.C. at the time of the fraud, or (3) the loss occurs in D.C. *Id*.

In any case where the defendant's GPS-monitoring requirement was imposed or enforced in the District of Columbia, the D.C. Superior Court should have jurisdiction. USAO has taken the position that under the current statute, jurisdiction exists in these cases regardless of where the tampering event takes place, because another element of the crime – the imposition of the requirement that the defendant wear the device – takes place in D.C. Still, a jurisdictional provision would provide much needed clarity. Without it, individuals intent on tampering with their detection devices may be incentivized to do so across jurisdictional lines in the hopes of evading criminal liability.

C. RCC § 22E-3403. Correctional Facility Contraband.

1. USAO opposes the removal of the consecutive sentencing requirement.

Under current law, all sentences for contraband offenses must be imposed consecutively either to the sentence being served or to the sentence imposed on the matter for which the defendant was pending trial. The RCC proposal removes this requirement, claiming that it unnecessarily impinges on judicial discretion. But other statutes, such as the proposed RCC Escape statute, RCC § 22E-3401(e)(4), and the current Bail Reform Act statute, D.C. Code § 23-1327(d), require consecutive sentences. USAO believes that allowing this crime to be punished by concurrent sentences would invalidate the deterrent effect of the statute, as it only applies to individuals who are already confined to a correctional facility.

XIX. Chapter 43. Group Misconduct.

A. RCC §§ 22E-4301. Rioting.

1. USAO recommends aligning the number of persons required to trigger liability for Rioting and Failure to Disperse.

§ 22E-4301(a)(2) currently provides for criminal liability for rioting where a person is "reckless to the fact that seven or more people . . ." are engaging in specified conduct, while § 22E-4302(a)(2) provides for criminal liability for failure to disperse where a person is "reckless to the fact that eight or more people . . ." are engaging in the specified conduct. Given that the two crimes are related, USAO believes that the number of persons required to trigger liability should be the same.

2. USAO recommends reincorporating liability for inciting a riot by revising § 22E-4301(a)(1) to include language covering person who "urge or incite other persons" to engage in rioting.

With USAO's changes, subsection (a)(1) would provide

"(1) Knowingly attempts to commit or commits, or urges or incites another person to commit, a District crime . . . ."

Current law prohibits both rioting and inciting or urging to riot. D.C. Code § 22-1322. As written, the RCC no longer includes criminal liability for inciting or urging others to riot. Although the Commentary (at 29-30) suggests that inciting others to riot might be accounted for pursuant to the general accomplice liability provisions, USAO believes that specific provisions are warranted. USAO is concerned that dispensing with specifically enumerated criminal liability for inciting others to riot will create gaps in the ability of law enforcement to address situations where a person or persons are actively encouraging others toward criminal behavior.

3. USAO recommends including both misdemeanor and felony gradations of rioting.

As written, the RCC includes a single gradation for rioting and, because the penalty provision has not yet been drafted, it is unclear whether that single gradation will make rioting a felony or a misdemeanor. Regardless, USAO believes there should be both misdemeanor and felony liability for rioting. Under current law, there are misdemeanor and felony gradations for rioting, based on the level of injury and property damage caused. D.C. Code § 22-1322. Further, as acknowledged in Appendix J, half of the reform jurisdictions include gradations for rioting. *See* RCC App. J at 446. USAO believes that, consistent with those jurisdictions, gradations are appropriate.

4. USAO opposes making all rioting offenses jury demandable.

Under current law, as stated above, there are misdemeanor and felony gradations of rioting. D.C. Code § 22-1322. Under current law, misdemeanor rioting is not jury demandable. *Id.* USAO recommends that the revised statute track current law.

B. RCC § 22E-4302. Failure to Disperse.

1. USAO recommends aligning the number of persons required to trigger liability for Rioting and Failure to Disperse

§ 22E-4301(a)(2) currently provides for criminal liability for rioting where a person is "reckless to the fact that seven or more people . . ." are engaging in specified conduct, while § 22E-4302(a)(2) provides for criminal liability for failure to disperse where a person is "reckless to the fact that eight or more people . . ." are engaging in the specified conduct. Given that the two crimes are related, USAO believes that the number of persons required to trigger liability should be the same.

2. USAO opposes making all failure to disperse offenses jury demandable.

Under current law, the equivalent offense for failure to disperse is subject only to a civil fine, which is not jury demandable. D.C.M.R. § 18-2000.2, 18-2000.9. USAO recommends that the revised statute track current law with respect to jury demandability.