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: May 14, 2020

SUBJECT: OAG Comments to First Draft of Report First Draft of Report #51, Jury Demandable Offenses

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report First Draft of Report #51, Jury Demandable Offenses.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 16-705. JURY TRIAL; TRIAL BY COURT

The revised statute replaces D.C. Code § 16-705(b)(1). It states:

> (b) In any case where the defendant is not under the Constitution of the United States entitled to a trial by jury, the trial shall be by a single judge without a jury, except that if:
>
> (1) (A) The defendant is charged with an offense that is punishable by a fine or penalty of more than $1,000 or by imprisonment for more than 90 days (or for more than six months in the case of the offense of contempt of court);

[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.

(B) The defendant is charged with an attempt, conspiracy, or solicitation to commit an offense specified in subparagraph (b)(1)(A) of this section;

(C) The defendant is charged with an offense under Chapter 12 [Chapter 12. Robbery, Assault, and Threats] of Title 22E in which the person who is alleged to have been subjected to the criminal offense is a "law enforcement officer" as defined in D.C. Code § 22E-701;

(D) The defendant is charged with a "registration offense" as defined in D.C. Code § 22-4001(8);

(E) The defendant is charged with an offense that, if the defendant were a non-citizen and were convicted of the offense, could result in the defendant's deportation from the United States under federal immigration law; or

(F) The defendant is charged with 2 or more offenses which are punishable by a cumulative fine or penalty of more than $4,000 or a cumulative term of imprisonment of more than 1 year; and

(2) The defendant demands a trial by jury, the trial shall be by jury, unless the defendant in open court expressly waives trial by jury and requests trial by the court, and the court and the prosecuting officer consent thereto. In the case of a trial by the court, the judge's verdict shall have the same force and effect as that of a jury.

OAG recognizes that the structure used above was modeled on D.C. Code § 16-705(b)(1), however we believe that the revised statute can be reworded so that each concept is in a separate subparagraph. This should make it more understandable to a lay person and easier for attorneys to argue in court when they have to refer to a specific provision. We suggest that this statute be reconfigured as follows:

(b)(1) In any case where the defendant is not under the Constitution of the United States entitled to a trial by jury, the trial shall be by a single judge without a jury.

(2) Notwithstanding paragraph (1) of this subsection, the trial shall be by jury:

(A) If:

(i) The defendant is charged with an offense that is punishable by a fine or penalty of more than $1,000 or by imprisonment for more than 90 days (or for more than six months in the case of the offense of contempt of court);

(ii) The defendant is charged with an attempt, conspiracy, or solicitation to commit an offense specified in subparagraph (b)(1)(A) of this section;

(iii) The defendant is charged with an offense under Chapter 12 [Chapter 12. Robbery, Assault, and Threats] of Title 22E in which the person who is alleged to have been subjected to the criminal offense is a "law enforcement officer" as defined in D.C. Code § 22E-701;

(iv) The defendant is charged with a "registration offense" as defined in D.C. Code § 22-4001(8);

(v) The defendant is charged with an offense that, if the defendant were a non-citizen and were convicted of the offense, could result in the defendant's deportation from the United States under federal immigration law; or

(vi) The defendant is charged with 2 or more offenses which are punishable by a cumulative fine or penalty of more than $4,000 or a cumulative term of imprisonment of more than 1 year.

(B) Unless the defendant in open court expressly waives trial by jury and requests trial by the court, and the court and the prosecuting officer consent thereto.

(3) In the case of a trial by the court, the judge's verdict shall have the same force and effect as that of a jury.

RCC § 16-705 (1)(A) grants a jury right when the "defendant is charged with an offense that is punishable by a fine or penalty of more than $1,000 or by imprisonment for more than 90 days…"[2] This provision, however, would result in organizational defendants, who by definition cannot be imprisoned, having a right to a jury trial for committing offenses that a person committing the same offense would not. The reason for this anomaly is that pursuant to the First Draft of Report #52, RCC § 22E-604 (b)(2), organizational defendants have alternative fines of "[u]p to three times the amount otherwise provided by statute…"[3] RCC § 22E-604 (a)(12) and (13) provide for authorized fines of $1,000 for a Class C misdemeanor and $500 for a Class D misdemeanor. As the fine for those offenses are not more than $1,000, an individual who commits either of them would not be entitled to a jury trial. However, an organizational defendant who commits these same offenses would be subject to a fine of $3,000 or $1,500, respectively, and would, therefore, be entitled to a jury trial.

To ensure that organizational defendants do not have a right to a jury trial for committing an offense that an individual would not, OAG recommends that RCC § 16-705 (b)(1)(A) be redrafted to say, "The defendant is charged with (i) a Class B misdemeanor, or (ii) an offense that is punishable by more than six months in the case of contempt of court."

[2] Notwithstanding that the Commentary states, " Subparagraph (b)(1)(A) of the revised statute permits a criminal defendant to demand a jury trial when charged with an offense punishable by imprisonment for more than 90 days", OAG reads the subparagraph in the revised statute as requiring a jury trial when there is "a fine or penalty of more than $1,000."

[3] OAG does not oppose organizational defendants having the proposed expanded fine exposure.

RCC § 16-705 (1)(C) grants a jury right to a defendant when "the person who is alleged to have been subjected to the criminal offense is a 'law enforcement officer'…"[4] This provision does not address situations where the victim's status as a law enforcement officer is in dispute. In other words, whose burden it is to establish if a person was or was not a law enforcement officer, at the time they were victimized and what standard of proof is required for that determination. For example, was the victim of the offense a licensed special police officer or was he or she not licensed or was the person an employee of a probation department or was that person an independent contractor or a consultant? As the right to a jury trial hangs on these determinations, this provision should clearly state how that determination should be made. As the Commission has not addressed these issues and OAG believes that the other members of the Advisory Group should weigh in before a determination is made, OAG is not making a recommendation at this time.[5]

RCC § 16-705 greatly expands the right to a jury trial in the District. See D.C. Code § 16-705. It does this in a number of ways. First, it triggers a right to a jury trial when the offense is punishable by imprisonment for more than 90 days, as opposed to the current trigger of 6 months. Second, no matter what the jail exposure is there is a right to a jury trial when a person is charged with attempt, conspiracy, or solicitation for an offense that, had it been completed, would have jail exposure of more than 90 days. Third, no matter what the jail exposure is, it

---

[4] RCC § 22E-701 states:
"Law enforcement officer" means:

(A) A sworn member, officer, reserve officer, or designated civilian employee of the Metropolitan Police Department, including any reserve officer or designated civilian employee of the Metropolitan Police Department;
(B) A sworn member or officer of the District of Columbia Protective Services;
(C) A licensed special police officer;
(D) The Director, deputy directors, officers, or employees of the District of Columbia Department of Corrections;
(E) Any officer or employee of the government of the District of Columbia charged with supervision of juveniles being confined pursuant to law in any facility of the District of Columbia regardless of whether such institution or facility is located within the District;
(F) Any probation, parole, supervised release, community supervision, or pretrial services officer or employee of the Department of Youth Rehabilitation Services, the Family Court Social Services Division of the Superior Court, the Court Services and Offender Supervision Agency, or the Pretrial Services Agency;
(G) Metro Transit police officers; and
(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, and probation and pretrial service officers.

[5] OAG recommends that these issues be made an agenda item for the next Commission meeting.

triggers a jury trial when a defendant is charged with Chapter 12 offenses (i.e., robbery, assault, and threats) when the victim is a law enforcement officer.

As OAG noted in our Memo regarding the First Draft of Report #41, Ordinal Ranking of Maximum Imprisonment Penalties, we support the RCC retaining the statutory expansion of the Constitutional right to a jury trial to offenses that carry a maximum penalty of more than six months. We do not support the Report's recommendation that specified completed and inchoate offenses that carry incarceration exposure of 90 days or less be made jury demandable. In fact, under this proposal, a person who is charged with the attempt of an offense that would have carried jail exposure of 180 days will get a jury trial even though they face exposure of only 90 days of incarceration – an amount of jail exposure that would not get someone a jury trial if the offense itself carried the potential of 90 days in jail. A corollary to the Commission's directive, under D.C. Code § 3–152 (6) that the Commission "Adjust penalties, fines, and the gradation of offenses to provide for proportionate penalties" is that defendants who are facing the same amount of time incarcerated should have the same rights to a jury trial.

If the Commission is not going to adopt OAG's overarching recommendation, then OAG has a specific recommendation pertaining subparagraph (b)(1)(C). That subparagraph states, "The defendant is charged with an offense under Chapter 12 [Chapter 12. Robbery, Assault, and Threats] of Title 22E in which the person who is alleged to have been subjected to the criminal offense is a "law enforcement officer" as defined in D.C. Code § 22E-701. [brackets in original] This provision does not distinguish between when an officer is on duty or off duty or whether the officer is in uniform or not. For example, say a law enforcement officer from New York brings her family to the District to view the monuments and the Smithsonian. While on vacation, she is the victim of an assault that would trigger subparagraph (b)(1)(C). There is no reason that the perpetrator should get a jury trial for assaulting this off duty police officer (who is not wearing a uniform), when the perpetrator would not get a jury trial if, instead, the police officer's husband had been the victim of the assault. This same objection applies equally to other people who are deemed law enforcement under 22E-701.[6]

To address this issue, OAG recommends that subparagraph (b)(1)(C) be redrafted to state, "The defendant is charged with an offense under Chapter 12 of Title 22E in which the person who is alleged to have been subjected to the criminal offense is a "law enforcement officer", as defined in D.C. Code § 22E-701, who is either working a tour of duty or in uniform."[7]

RCC § 16-705 (b)(1)(F) grants the right to a jury trial when "The defendant is charged with 2 or more offenses which are punishable by a cumulative fine or penalty of more than $4,000 or a cumulative term of imprisonment of more than 1 year..." Although this recommendation grants

[6]In paragraph (F) of the definition of a "law enforcement officer", in RCC 22E-701, (see footnote 2) it lists a District employee who supervises confined juveniles. There is no reason why a person who randomly assaults that off duty employee in the District should get a jury trial just because the employee happens to work with youth at New Beginnings in Maryland.

[7] OAG's recommendation employs the phrase "working a tour of duty" instead of "on duty" because an MPD police officer is deemed to always be on duty although relieved of routine performance. See 6 DCMR A200.4.

a right to a jury trial when a defendant faces a lower amount of jail exposure than under current law,[8] OAG does not believe that this recommendation goes far enough. Under RCC § 16-705 (b)(1)(A) a defendant would be entitled to a jury trial when they are charged with an offense that has a penalty of "imprisonment for more than 90 days." To a defendant who is sentenced to more than 90 days, it does not matter if that sentence was imposed because they were convicted of a single count or of multiple counts and, therefore, their desire for a jury trial would be as great for the later as for the former. In consideration of that fact, OAG recommends that RCC § 16-705 (b)(1)(F) be redrafted to grant the right to a jury trial when "The defendant is charged with 2 or more offenses which are punishable by a cumulative fine or penalty of more than $4,000 or a cumulative term of imprisonment of more than 90 days…"

[8] Under current law, D.C. Code § 16-705 (B) grants the right to a jury trial when "The defendant is charged with 2 or more offenses which are punishable by a cumulative fine or penalty of more than $4,000 or a cumulative term of imprisonment of more than 2 years."

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: May 15, 2020

SUBJECT: First Draft of Report #52, Cumulative Update to the Revised Criminal Code Chapter 6

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 #52, Cumulative Update to the Revised Criminal Code Chapter 6.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22E-601. OFFENSE CLASSIFICATIONS

RCC § 22E-601 breaks down all offenses into 14 felony and misdemeanor classes. Paragraph (b) states, "*Definitions.* The terms 'felony' and 'misdemeanor have the meanings specified in RCC § 22E-701.[2] The Commentary notes that "Subsection (b) cross-references definitions of "felony" and "misdemeanor" in RCC § 22E-701." However, subparagraph (h)(6) of RCC § 16-1022, Parental Kidnapping Criminal Offense, states, "*First and Second Degree Parental*

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

[2] The definitions are that the term "Felony" means an offense with an authorized term of imprisonment that is more than 1 year or, in other jurisdictions, death and term "Misdemeanor" means an offense with an authorized term of imprisonment that is 1 year or less.

Kidnapping Designated as Felonies. Notwithstanding the maximum authorized penalties, first and second degree parental kidnapping shall be deemed felonies for purposes of D.C. Code § 22-563." For clarity, OAG recommends that the Commentary to RCC § 22E-601(b) have a footnote that states that variance.

RCC § 22E-602. AUTHORIZED DISPOSITIONS

The Commentary notes that "To the extent that prosecutorial authority of the Attorney General for the District of Columbia may currently turns on this limitation, the revised statute preserves this limitation and the designation of prosecutorial authority." [sic][footnote omitted] To be clear, OAG recommends that at the conclusion of these sentences the Commentary state, "No substantive change in District law is intended."

RCC § 22E-604. AUTHORIZED FINES

As the Commentary points out, D.C. Code 22-3571.02(a), unlike the RCC, provides that specific offenses may state that they are exempt from the Fine Proportionality Act and state a different penalty. Notwithstanding that the RCC does not propose that any offenses have fines that vary from this provision, we should not assume that the Council will not enact any offenses that designate a different fine amount. Therefore, OAG suggests that a new paragraph (d) entitled "*Alternative fines when specified by law"* be added. It should say, "The authorized fines established in this section shall not apply when a law enacted after this Act creates or modifies an offense and such law, by specific reference, exempts the offense from the fines established in this section."[3]

RCC § 22E-606. REPEAT OFFENDER PENALTY ENHANCEMENT

OAG has two recommendations concerning paragraph (a). Paragraph (a) states:

> *Felony repeat offender penalty enhancement.* A felony repeat offender penalty enhancement applies to an offense when, in fact, the actor commits a felony offense and at the time has:
>
> (1) One or more prior convictions for a felony offense under Subtitle II of this title[4], or a comparable offense, not committed on the same occasion; or
>
> (2) Two or more prior convictions for District of Columbia felony offenses, or comparable offenses that were:
>
> (A) Committed within 10 years; and

[3]This proposal is based on provisions of the Fine Proportionality Act codified at D.C. Code § 22-3571.02(a). If the CCRC adopts this proposal then the definitions provision currently designated as paragraph (d) would have to be redesignated as paragraph (e).

[4] RCC § 22E-606 (a)(1) actually refers to Subtitle I. However, because Subtitle I is the General Part and Subtitle II is Offenses Against Persons, for purposes of this recommendation, OAG assumes that the Commission meant to reference Subtitle II in this subparagraph.

(B) Not committed on the same occasion. [emphasis added]

The first recommendation clarifies that a conviction for a felony offense under subparagraph (a)(2) does not include a conviction for a felony offense under (a)(1). The second is that the phrase "on the same occasion" appears to have different meanings in subparagraphs (a)(1) and (2). OAG, therefore, recommends that paragraph (a) be amended to say:

(1) One or more prior convictions for a felony offense under Subtitle II of this title, or a comparable offense, not committed on the same occasion as the offense for which the enhancement would apply; or
(2) Two or more prior convictions for any felony offenses under any other Subtitle of this title, or comparable offenses that were:
    (C) Committed within 10 years; and
    (D) Not committed on the same occasion as one another…[5] [emphasis added]

RCC § 22E-701. GENERALLY APPLICABLE DEFINITIONS

This provision defines "felony." While it lists the general definition for the term "felony", it does not provide for the special definition of the term in subparagraph (h) (6) of RCC § 16-1022, the Parental Kidnapping Criminal Offense.[6] RCC § 22E-701 states, "Felony" means:

(A) An offense punishable by a term of imprisonment that is more than one year; or
(B) In other jurisdictions, an offense punishable by death."

To account for the offense of Parental Kidnapping, OAG recommends that the following subparagraph be added to the definition above, "(C) First or Second Degree Parental Kidnapping pursuant to RCC § 16-1022 (h)(6).

[5] OAG recommends that this amendment also apply to the misdemeanor repeat offender penalty enhancement in subparagraph (b)(3).
[6] This subparagraph reads (h)(6) states, "First and Second Degree Parental Kidnapping Designated as Felonies. Notwithstanding the maximum authorized penalties, first and second degree parental kidnapping shall be deemed felonies for purposes of D.C. Code § 22-563."

MEMORANDUM

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	May 15, 2020
Re:	Comments on First Draft of Report No. 51, Jury Demandable Offenses and First Draft of Report No. 52, Cumulative Update to RCC Chapter 6 Offense Classes, Penalties, & Enhancements.

The Public Defender Service makes the following comments on the first drafts of Report No. 51 and Report No. 52.

Report No. 51

1. As PDS wrote in its comments of November 15, 2019, PDS believes that all offenses that permit a punishment that includes incarceration should be jury demandable. While the Court of Appeals held in *Bado v. United States*[1] that a defendant who faced a possible sentence of 180 days and deportation had a right to a jury trial, former Chief Judge Eric Washington provided compelling reasons why the right to a jury trial should be available in all instances when a defendant faces incarceration. [2] If the RCC does not provide a jury trial in each instance that a defendant faces incarceration, PDS submits the additional amendments to RCC § 16-705.

2. RCC § 16-705(b)(1)(D) would provide jury trials where the defendant is charged with a registration offense as defined in D.C. Code § 22-4001(8). Under D.C. Code § 22-4001(8), registration offenses are defined as sex offenses or offenses that involve sexual abuse, although non-sex offenses are charged. PDS recommends expanding this jury trial right to any charge that would subject the defendant to a registration requirement pursuant to either the laws of the District of Columbia or the United States. Currently, this would expand this provision to include gun offenses that require a convicted defendant to register as a gun offender.[3] The requirement of registration adds stigma, may foreclose employment and housing opportunities and could lead to future convictions for failing to register. Given the seriousness of the collateral consequences, jury trials should be afforded for all offenses that require registration, not just those offenses that

[1] *Bado v. United States*, 186 A.3d 1243 (D.C. 2018).

[2] *Id*. at 1251-52.

[3] D.C. Code § 7–2508.02.

require registration as a sex offender and not just those registration schemes in existence at the time of this writing. Rather than propose a true catch-all that would require a jury trial for an offense that could require a defendant to register in any jurisdiction, PDS is limiting its proposal to registries that could, in the event of a conviction, require the defendant to register while residing in the District of Columbia, that is to registries established by a law of the District of Columbia or of the United States.

PDS proposes the following language:

> The defendant is charged with an offense that, if the defendant were convicted of the offense, would subject the defendant to a requirement to register with a government entity pursuant to the laws of the District of Columbia or of the United States, including pursuant to ~~"registration offense" as defined in~~ D.C. Code § 22-4001 and pursuant to D.C. Code § 2508.01.

3. RCC § 16-705(b)(1)(E) provides the right to a jury trial if the offense, regardless of the defendant's immigration status, could result in the defendant's deportation. Granting a jury trial in these instances, based on the offense and without regard to the defendant's personal immigration status, is consistent with the District's decision to uphold sanctuary values[4], and addresses the concerns of former Chief Judge Eric Washington in *Bado*[5] about only granting jury trials to a subset of individuals charged with the same offense.

   PDS recommends an expansion of this language to include denial of naturalization in addition to deportation. There are offenses that may not result in deportation but that could result in a denial of naturalization for individuals who apply to become citizens. Individuals must demonstrate "good moral character" in order to become U.S. citizens. For example, engaging in prostitution or convictions for two or more gambling offenses would be a conditional bar to demonstrating good moral character.[6] On the other hand, an individual will be deportable for a range of offenses such as aggravated felonies and crimes of moral turpitude. "Crimes of moral turpitude" continues to be defined through case law and in some instances will not include offenses that would preclude a finding of good moral character required for naturalization. Citizenship is essential for family reunification, some employment, the freedom to travel outside of the country, voting, and access to critically important supports for older individuals and individuals with disabilities. Since both deportation and the denial of naturalization have devastating consequences, both standards should be used in determining when a defendant has a right to trial by jury.

   PDS proposes the following language:

---

[4] Sanctuary Values Emergency Declaration Resolution of 2019, available at: http://lims.dccouncil.us/downloads/LIMS/43362/Meeting1/Enrollment/PR23-0501-Enrollment.pdf

[5] *Bado v. United States*, 186 A.3d 1243, 1262 (D.C. 2018).

[6] https://www.uscis.gov/policy-manual/volume-12-part-f-chapter-5

> The defendant is charged with an offense that, if the defendant were a non-citizen and were convicted of the offense, could result in the defendant's deportation from the United States or denial of naturalization under federal immigration law;

4. RCC § 16-705(b)(1)(F) grants the defendant the right to a jury trial if the defendant is charged with 2 or more offenses that are punishable by a cumulative fine or penalty of more than $4,000 or a cumulative term of imprisonment of more than 1 year. PDS recommends eliminating the disparity between cumulative sentences for multiple offenses and statutory maxima for a single offense.

   PDS objects to having a higher threshold for a jury trial when the defendant is charged with multiple offenses that each carry less than 90 days or fines of less than $1,000. PDS recommends setting the threshold at 90 days and $1,000 regardless of whether the 90-day mark is reached through a single offense or by adding the statutory maxima of multiple offenses. A defendant who reaches a cumulative maximum short of 1 year may do so after being charged in a joint trial with a variety of offenses that occurred on different days. That defendant may be subject to consecutive sentences for those offenses and could be incarcerated for significantly longer than an individual who faces a single, more serious charge that carries more than 90 days. Defendants in both of these instances should be afforded a jury trial.

   PDS recommends the following language:

   > The defendant is charged with 2 or more offenses which are punishable by a cumulative fine or penalty of more than ~~$4,000~~ $1,000 or a cumulative term of imprisonment of more than ~~1 year~~ 90 days.

Report No. 52

1. PDS proposes lowering the statutory maximum for Class 1 offenses to 30 years, Class 2 to a statutory maximum of 28 years, and Class 3 to a statutory maximum of 26 years. Classes 4-9 would remain unchanged pursuant to this recommendation. The RCC proposes a statutory maximum of 60 years, 48 years, and 36 years for Classes 1, 2, and 3 respectively. The sentences proposed in the RCC are simply too long. They will perpetuate the mass incarceration that has caused the United States to have the highest incarceration rate in the world.[7] In the District, it will further an incredible racial disparity in incarceration, given that in 2019, 93% of all individuals sentenced on a felony offenses in the District were Black.[8] Decades-long sentences

[7] Equal Justice Initiative, The United States Still Has the Highest Rates of Incarceration in the World, April 26, 2019. Available at: https://eji.org/news/united-states-still-has-highest-incarceration-rate-world/

[8] D.C. Sentencing Commission, Annual Report 2019. Available at: https://scdc.dc.gov/sites/default/files/dc/sites/scdc/page_content/attachments/Final%202019%20Annual%20Report.pdf. In 2018, 96% of all individuals sentenced on felonies were Black. Annual Report 2018. Available at:

for violent offenses are in part to blame for mass incarceration in the United States. While reducing sentences for non-violent offenses is an important step in ending the cruelty of mass incarceration, it cannot be undone without reducing sentences for violent offenses.[9]

Multi-decade sentences devastate not only the individual serving the sentence but the communities and families of incarcerated individuals. Nationally, 54 percent of incarcerated people are parents. Nationwide, one in nine African-American children have an incarcerated parent – a number that may be higher in the District. A child's prospects for economic mobility, graduating high school, attending college, and securing meaningful employment are all negatively impacted by the incarceration of a parent.[10] The incarceration of a parent will also exact a heavy emotional toll and an immediate toll in terms of household stability and income.

Sentences that last more than 30 years cannot be justified from a public safety perspective. A 20 year old who is sentenced to 30 years of incarceration would be close to 50 years old at the time of release. It is now uncontroverted that individuals age out of crime. [11] Crimes are predominately committed by young people and as people age, they steadily become at lower risk for committing future crime. A 60-year sentence as permitted by the RCC would effectively be a life sentence even for a young person who committed a crime.

As the District advocates for statehood and moves toward it, it also should consider the wisdom of a criminal code that would have it bear the direct financial cost of incarcerating individuals who are nearly senior citizens and who pose minimal risk to public safety. By incarcerating individuals who are well into their 50s and who do not pose a risk to public safety, the District would in fact decrease public safety by diverting funds that could be spent on education and public health to instead funding the care of individuals aging in prison. The incarceration of middle aged and elderly individuals who pose limited risk to the community would come at the

https://scdc.dc.gov/sites/default/files/dc/sites/scdc/page_content/attachments/Sentencing%20Commission%202018%20Annual%20Report.pdf

[9] *See generally*, James Forman Jr., Locking Up Our Own: Crime and Punishment in Black America, epilogue (2018).

[10] See, e.g., The Pew Charitable Trusts, Collateral Costs: Incarceration's Effect on Economic Mobility (Washington, DC: Pew Charitable Trusts, 2010), https://perma.cc/XHL8-KHVA

[11] Laurence Steinberg, Elizabeth Cauffman, and Kathryn C. Monahan, *Psychosocial Maturity and Desistance from Crime in a Sample of Serious Juvenile Offenders*, JUVENILE JUSTICE BULLETIN 8 (2015) ("Age-based desistence is intrinsically linked to brain development. The essential brain development that occurs in late teens and early twenties affects criminal activity because "[b]etween ages 14 and 25, youth continue to develop an increasing ability to control impulses, suppress aggression, consider the impact of their behavior on others, consider the future consequences of their behavior, take personal responsibility for their actions, and resist the influence of peers."); Michael Rocque, Chad Posick, & Justin Hoyle, *Age and Crime, in* THE ENCYCLOPEDIA OF CRIME AND PUNISHMENT, 1 (Wesley G. Jennings ed., John Wiley & Sons, Inc., 1st ed., 2016) (the peak and then decline of crime that follows aging "has been termed the 'age-crime curve,'[and] is not questioned by scholars.").

expense of programs that could have an impact in reducing crime and empowering parents and communities such as nurse-family partnerships, school-based programs, mental health services, substance abuse treatment, job training, and affordable housing. Further, sentences of the length proposed in the RCC are not universally supported by victims. A comprehensive national survey on crime victims' views found that "the overwhelming majority of crime victims believe that the criminal justice system relies too heavily on incarceration and strongly prefer investments in prevention and treatment to more spending on prisons and jail."[12]

There is also no evidence that statutory maxima of 60 years as opposed to 30 years or 28 years would provide any meaningful additional deterrent effect. Many individuals who commit crimes are under the influence of drugs or alcohol, or are young and have yet to develop the reasoning skills, impulse inhibition, and resistance to peer influence to contemplate the precise length of a sentence in deciding whether to commit a crime. The "limited impact of extending sentence length becomes even more attenuated for long-term incarceration." If the penalty for murder is increased from 30 years to 60 years, few individuals would be undeterred by a sentence of "only" 30 years, but deterred by a sentence of 60 years.[13]

2. PDS opposes enhancements based on prior offenses.[14] Individuals who have previously been convicted of offenses received sentences for those prior offenses and served the sentence deemed appropriate by the judge. The prior conviction will also be scored on the Sentencing Guidelines and used to increase the severity of the sentence for the new offense. While the RCC has tried to avoid instances of double counting and overlap, sentencing enhancements create triple counting of a prior offense. Nationally, repeat conviction enhancements have created injustices like the sentencing of an individual to 25 years to life for the non-violent theft of golf clubs.[15] Reform in the District should mean jettisoning these enhancements.

3. If the RCC retains RCC § 22E-606, the Repeat Offender Penalty Enhancement, PDS recommends a substantial narrowing of the provision. As currently drafted, an individual will be subject to an enhancement every time the individual commits a felony offense and has any prior offense against persons. Therefore, an individual who is convicted of felony drug distribution who has a prior felony offense for robbery would be subject to an enhancement. The enhancement would apply despite the lack of connection between the two crimes. If the reason for the enhancement is the belief that there is additional culpability when an individual commits the same offense or harms the same persons or community, then the RCC's proposal is

[12] Alliance for Safety and Justice, Report: Crime Survivors Speak: The First-Ever National Survey of Victims' Views on Safety and Justice (2016). Available at: https://allianceforsafetyandjustice.org/wp-content/uploads/2019/04/Crime-Survivors-Speak-Report-1.pdf

[13] See Marc Mauer, Long-Term Sentences: Time to Reconsider the Scale of Punishment, UMKC Law Review, Vol. 87:1. (2018). Available at: https://www.sentencingproject.org/publications/long-term-sentences-time-reconsider-scale-punishment/

[14] PDS also detailed its objections to sentencing enhancements for individuals previously convicted of crimes in its comments on First Draft of Report No. 6: Recommendations for Chapter 8 of the Revised Criminal Code: Penalty Enhancements, submitted to CCRC on July 18, 2017.

[15] *Ewing v. California*, 538 U.S. 11 (2003).

unmoored from that justification. As currently drafted, the enhancement simply punishes the person again for the prior offense – the exact thing the Sentencing Guidelines already do and what the judge in the prior case already did.

To narrow this provision, PDS recommends the changes below:

RCC § 22E-606. Repeat Offender Penalty Enhancement

(a) Felony repeat offender penalty enhancement. A felony repeat offender penalty enhancement applies to an offense when, in fact, the actor commits a felony offense under Subtitle II[16] of this title and at the time has:

(1) One or more prior convictions for the same or comparable felony offense as the instant offense ~~a felony offense under Subtitle I of this title, or a comparable offense, not committed on the same occasion; or~~

~~(2) Two or more prior convictions for District of Columbia felony offenses, or comparable offenses that were:~~

(A) Committed within the prior10 years; and

(B) Not committed on the same occasion.

(b) *Misdemeanor repeat offender penalty enhancement.* A misdemeanor repeat offender penalty enhancement applies to an offense when, in fact, the actor commits a misdemeanor offense under Subtitle II of this title and at the time has:

(1) Two or more prior convictions for the same or comparable misdemeanor offense as the instant offense ~~a misdemeanor offense under Subtitle I of this title, or a comparable offense, not committed on the same occasion;~~

~~(2) One or more prior convictions for a felony offense under Subtitle I of this title, or a comparable offense, not committed on the same occasion; or~~

~~(3) Two or more prior convictions for District of Columbia felony offenses, or comparable offenses that were:~~

(A) Committed within the prior ten years; and

(B) Not committed on the same occasion.

4. PDS recommends lowering the penalties in §22E-606. As argued above, the repeat offender penalty enhancement when combined with the District's sentencing guidelines under which a prior conviction will increase both the minimum and maximum guidelines recommended prison sentence, results in a triple punishment for a prior conviction. If the CCRC carries forward this unfair system into the reform code, it should reduce the impact of the unfairness by reducing the penalty enhancement. PDS recommends the following:

[16] There is a typo in the statutory test in that it lists Subtitle I, but should read Subtitle II.

(1) For the felony repeat offender penalty -

(A) For a Class 1 or Class 2 felony, 5 years;

(B) For a Class 3 or Class 4 felony, 3 years;

(C) For a Class 5 or Class 6 felony, 2 years;

(D) For a Class 7 or Class 8 felony, 1 year; and

(E) For a Class 9 felony, 180 days.

(2) For the misdemeanor repeat offender penalty –

(A) For a Class A or Class B misdemeanor, 60 days; and

(B) For a Class C, Class D, or Class E misdemeanor, 10 days.

5. PDS opposes the inclusion of offenses committed while on release or a pretrial release penalty enhancement in the RCC. The offense of failing to follow a judicial order is already punishable as contempt. Beyond the potential act of being in contempt of a court order, it is not clear why an offense committed while on release should be subject to any greater penalty. Individuals charged with offenses are presumed innocent. Further, pretrial release is the statutory presumption under D.C. Code § 23-1321. Thus a defendant, who is arrested upon a mere showing of probable cause, and who is released based on the presumption of release in D.C. Code § 23-1321, and then constitutionally presumed to be innocent of the first offense, should not face an additional penalty when convicted of an second-in-time accusation. The RCC does not require conviction of the first-in-time offense for conviction of the enhancement. The enhancement amounts to punishing individuals for arrests, a process that has been shown to be at times infected with bias and where the lowest standard of proof in the criminal system allows a case to proceed.

   Further, there could be little deterrence value in this enhancement since the possibility of contempt or revocation of release conditions under D.C. Code § 23-1329 provide the same general deterrent effect.

6. The RCC doubles the statutory maximum from the current offense of offenses committed while on release.[17] This doubling does not reflect any additional harm caused by the act of committing a homicide while on release for unlawful use of a vehicle that is not present for the same homicide committed by someone on probation, or supervised release, or who has no prior police contacts. If the RCC retains this enhancement, PDS recommends reducing the associated penalties. The enhancement should be graded much closer to the contempt penalty at D.C. Code § 23-1329(c), which punishes the same conduct and serves the same purpose as this enhancement. PDS recommends punishing offenses committed while on release with a maximum penalty of 10 days of incarceration if the crime is committed while on release in a misdemeanor and 1 year if the crime committed while on release is a felony.

[17] D.C. Code § 23-1328, penalties for offenses committed while on release.

Memorandum

Timothy J. Shea
United States Attorney
District of Columbia

Subject: Comments to D.C. Criminal Code Reform Commission for First Draft of Reports #51–52, and Second Draft of Report #41	Date: May 15, 2020

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

From: U.S. Attorney's Office for the District of Columbia

The U.S. Attorney's Office for the District of Columbia (USAO) and other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the CCRC's First Draft of Reports #51–52, and the CCRC's Second Draft of Report #41. USAO reviewed these documents and makes the recommendations noted below.[1]

First Draft of Report #51—Jury Demandable Offenses

1. USAO recommends that, under subsections (b)(1)(A), (b)(1)(B), and (b)(1)(F), consistent with current law, offenses be jury demandable only when they are punishable by more than 180 days' imprisonment, or when a defendant is charged with 2 or more offenses that are punishable by a cumulative term of more than 2 years' imprisonment.[2]

As the CCRC states, the Supreme Court has held that "offenses involving penalties of more than six months are subject to a Sixth Amendment right to a jury trial, whereas offenses with lesser penalties generally are not." (Commentary to Report #52 at 6 & n.11 (citing *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 543 (1989)).) The CCRC notes that "nothing prevents a jurisdiction from voluntarily extending jury trial right to offenses subject to penalties of six months or less." (Commentary to Report #52 at 6.) As USAO recommended in its previous submission, however, the CCRC should follow the balance previously legislated by the D.C. Council.

The Commentary notes that "[t]he rationale for limiting a right to a jury to offenses punishable by 180 days or less is rooted in a specific factual context that no longer exists in the District." (Commentary at 4.) Many concerns that relate to judicial efficiency, however, remain

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

[2] Under the RCC's proposal, Class B misdemeanors, punishable by 180 days' imprisonment, are subject to a $2,500 fine. This contrasts with fines under current law, where offenses that are punishable by 180 days' imprisonment are subject to a $1,000 fine. USAO recommends that the fines align with USAO's recommendations so that a fine, in itself, would not trigger jury demandability.

in place. In 2009, Chief Judge Satterfield sent a letter to Vincent Gray, then the Chairman of the D.C. Council, regarding Bill 18-138, the Omnibus Anti-Crime Amendment Act of 2009. The provisions discussed in that letter were ultimately incorporated in Bill 18-151 (Law 18-88), the Public Safety and Justice Amendments Act of 2009, which made the offense of unlawful entry onto private property non-jury demandable. In his letter, Chief Judge Satterfield wrote the following:

> I am writing to alert you about the impact on judicial administration of Bill 18-138, the Omnibus Anti-Crime Amendment Act of 2009. Section 204(b) of the Act amends the penalty for the crime of unlawful entry by providing for imprisonment of not more than 180 days for unlawful entry on private property, while retaining the penalty of up to six months imprisonment for unlawful entry on public property.
>
> Treating every unlawful entry as a 180 days offense would decrease the burden of these cases on the already beleaguered jury pool in the District of Columbia. The current yield to juror summonses in the District of Columbia is approximately twenty-two percent of all the summonses sent. Although improvements have been taken and are being sought to increase that yield, it is still a fairly small number of citizens who are available to serve. As a result, citizens who respond to this civic duty are routinely called to serve every two years. Figures provided by the Jury Office show that in the last two years, a majority of jurors were summoned as soon as two years had lapsed from their last summons date. Judges in the Superior Court commonly hear complaints from residents that calls to District jury service are far more frequent than those from other jurisdictions. Further, our jurisdiction is unique in the jury service burdens it puts on its citizens, since the federal court draws its jury pool from the same municipal pool of citizens as the Superior Court. Drawing jurors from this limited pool for six month offenses makes it more difficult for the Court to maintain the necessary supply of jurors for the serious felony cases.

Letter from Lee F. Satterfield, Chief Judge, Superior Court of the District of Columbia, to Vincent Gray, Chairman, Council of the District of Columbia, Re: Bill 18-138, "Omnibus Anti-Crime Amendment Act of 2009" (March 18, 2009).[3]

Further, in the Commentary, the CCRC focuses on the number of jury trials that would actually take place under its proposal, noting that "[t]here is no reason to think that an expansion of the misdemeanor jury trial right would create a significant shift in these numbers beyond converting bench trials to jury trials." (Commentary at 7.) But the CCRC's proposal would have an impact on many other cases that are jury demandable, regardless of whether they actually go to trial. Even though most cases resolve with guilty pleas instead of trials, many cases that

[3] Chief Judge Satterfield wrote a similar letter on March 18, 2009, to Phil Mendelson, then the Chairman of the Committee on Public Safety and the Judiciary, discussing the impact on judicial administration of Bill 18-151, the Public Safety and Justice Amendments Act of 2009. That letter discussed concerns regarding the proposal to make disorderly conduct punishable by 6 months' imprisonment, rather than 180 days' imprisonment, which would create a similar burden on the jury pool in the District.

ultimately resolve with a guilty plea do not resolve with a guilty plea early in the case. Rather, many cases are initially scheduled for trial, and resolve with a guilty plea after the trial date has been set. Thus, even though the cases do not ultimately go to trial, scheduled trial dates must account for all of these cases. Because there are more jury trials on the docket, this will result in jury trials being set further out, which may result in delayed justice. There will also be significant fiscal impacts with more jury trials, including additional costs for court personnel, attorneys, juror fees, and MPD court-related overtime.

USAO also recommends that subsection (b)(1)(B) be deleted. In assessing jury demandability, the CCRC's recommendations in subsections (b)(1)(A) and (b)(1)(F) focus on the potential length of incarceration that a defendant faces as a result of a conviction for a given offense. These subsections do not focus on the type of conduct, but rather on the maximum penalty. Because a conviction for an attempt, conspiracy, or solicitation to commit an offense reduces the maximum penalty for that offense, offenses involving exposure to less incarceration should not be jury demandable.

2. <u>USAO recommends that subsection (b)(1)(E) be limited to align with the D.C. Court of Appeals' holding in *Bado v. United States*.</u>

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

   "The defendant is charged with an offense that, if the defendant ~~were a non-citizen and~~ were convicted of the offense, could result in ~~the~~ <u>that</u> defendant's deportation from the United States under federal immigration law;"

USAO recommends that the CCRC's proposal be limited to align with the holding and rationale of the D.C. Court of Appeals in *Bado v. United States*, 186 A.2d 1243 (D.C. 2018) (*en banc*)—that is, defendants who actually face the penalty of deportation as a result of a conviction for that offense have a right to demand a jury, but defendants who do not actually face such a penalty do not have an independent right to demand a jury.

In *Bado*, the *en banc* D.C. Court of Appeals addressed the question of "whether the Sixth Amendment guarantees a right to a jury trial to an accused who faces the penalty of removal/deportation as a result of a criminal conviction for an offense that is punishable by incarceration for up to 180 days," holding that "the penalty of deportation, when viewed together with a maximum period of incarceration that does not exceed six months, overcomes the presumption that the offense is petty and triggers the Sixth Amendment right to a trial by jury." 186 A.2d at 1246–47. In so holding, the court focused on the harms incurred by someone who is actually facing the possibility of deportation or is deported. *See id.* at 1250–51. The logic of the majority opinion, finding that this offense is not "petty" for purposes of the Sixth Amendment, would not extend to someone who would *not* face the possibility of deportation or actually be deported as a result of a conviction for that offense. *See id.* The court distinguished the situation of a defendant who would face deportation from the situation of a defendant who would not face deportation. *See id.* at 1250 ("Once the actual sentence is served (which could be for a term less than the six-month maximum, or even probation), a U.S. citizen can return home to family and community and take steps to resume and possibly, redirect his life. But when a person faces

deportation, serving the sentence is only the first step following conviction; once the sentence is completed, the person faces the burdens and anxiety that attend detention pending removal proceedings. . . . As the [Supreme] Court has recognized, removal is considered by many immigrants to be worse than incarceration, such that preserving the right to remain in the United States may be more important than any potential sentence." (internal citations omitted)). Both the holding and the rationale underlying the majority opinion in *Bado*, therefore, would only apply to those actually facing the possibility of deportation—not to all defendants, regardless of their citizenship status.

The Commentary cites to Judge Washington's concurring opinion in *Bado* as support for expanding the *Bado* holding to all defendants, regardless of citizenship status. (Commentary at 12.) *Bado*, however, was an *en banc* decision, and no other judge joined Judge Washington's concurrence in support of expanding *Bado*.

Further, the expansion proposed by the CCRC still leaves the difficult task of determining what offenses carry immigration consequences, and does not address the difference in the list of deportable offenses for those who were admitted to the United States and those who were not. *Compare* 8 U.S.C. § 1182 *with* 8 U.S.C. § 1229. For example, although possession of a controlled substance is not inherently jury demandable under the RCC's proposal—as it is either a Class C or Class D misdemeanor, depending on the type of controlled substance—it is one of the offenses that is deportable regardless of immigration status, and therefore would be jury demandable for all under the RCC's proposed expansion of *Bado*. As the D.C. Court of Appeals noted in *Bado*:

> A person who is deportable as a result of conviction for any crime identified in 8 U.S.C. § 1227 (a)(2) will be placed in removal proceedings under 8 U.S.C. § 1229a. 8 U.S.C. § 1229a (a)(1) & (2) (2012). Those convicted of an aggravated felony who were removed under 8 U.S.C. § 1229a are rendered ineligible for readmission to the United States, meaning they are forever barred from entering the country unless the Attorney General consents to the application for admission. *Id.* § 1182 (a)(9)(A)(ii)(II) (2012). Those convicted of a crime involving moral turpitude or a crime related to a controlled substance are similarly permanently inadmissible and deportable. *Id.* §§ 1182 (a)(2)(A), 1227 (a)(2)(A)(i), & 1227 (a)(2)(B)(i) (2012). Those who were removed for other grounds are eligible to apply for readmission after ten years (following a first order of removal) and twenty years (following a second order of removal). *Id.* § 1182 (a)(9)(A)(ii) (2012).

186 A.3d at 1251 n.14. As the RCC Commentary notes, "[t]he application of federal immigration law to District statutes is complex and constantly evolving. Establishing a definitive list of the District's deportable misdemeanor offenses would be an immense and likely fruitless undertaking. Consequently, the revised statute codifies a clear, flexible standard that courts can evaluate as needed as federal law changes." (Commentary at 2 n.2.) Due to the noted complex nature of federal immigration law, however, the question of whether an offense is jury demandable will be the subject of extensive litigation in misdemeanor cases.

3. USAO recommends that subsection (b)(1)(D) be removed.

As the Commentary states, "[t]he DCCA has previously held that, as a matter of law, a right to a jury does not exists for a charge of misdemeanor child sexual abuse under current law. *Thomas v. United States*, 942 A.2d 1180, 1186 (D.C. 2008)." (Commentary at 12 n.72.) The court in *Thomas* held that, under controlling Supreme Court case law, an offense is deemed "petty" if punishable by a sentence of no more than 180 days incarceration, and a jury trial is only demandable if a defendant can show that any additional penalties "are so severe that they clearly reflect a legislative determination that the offense in question is a serious one." *Thomas*, 942 A.2d at 1186 (citing to *Blanton*, 489 U.S. at 541; *Smith v. United States*, 768 A.2d 577, 579 (D.C. 2001); *Foote v. United States*, 670 A.2d 366, 371 (D.C. 1996)). In holding that a right to a jury does not exist for misdemeanor child sexual abuse, the *Thomas* court analyzed the legislative intent of the D.C. Council in enacting the current misdemeanor child sexual abuse law, which, certainly, the D.C. Council could supersede with enactment of the RCC. However, the discussion of sex offender registration in *Thomas* is a relevant prudential consideration in ascertaining whether to create this new right to a jury trial for defendants convicted of offenses that require sex offender registration pursuant to D.C. Code § 22-4001(8). The court in *Thomas* held that "SORA is a remedial regulatory enactment, not a penal law, that was adopted to protect the community, especially minors, from the threat of recidivism posed by sex offenders who have been released into the community. Because registration with SORA is an administrative requirement and not penal in nature, we conclude that the Sixth Amendment does not require that we divert in this case from the statute that calls for jury trial in only these cases where the maximum penalty exceeds 180 days." 942 A.2d at 1186 (citation omitted). USAO recommends that the CCRC follow the prudential considerations of the *Thomas* court, and remove the provision that an offense is inherently jury demandable if it is a registration offense as defined in D.C. Code § 22-4001(8).

Moreover, the language proposed in subsection (b)(1)(D) was considered by the D.C. Council in the Omnibus Public Safety Act of 2005 (Law 16-306) and ultimately rejected. As USAO wrote in a letter during the Committee's consideration of the bill:

> If enacted, this provision would apply only in cases where a child or minor is the victim of a misdemeanor sex offense because sex offender registration is not required in misdemeanor sexual abuse cases where the victim is an adult. D.C. Code § 22-4016(b)(3). In some cases, this Office charges a misdemeanor even though the conduct would support a felony charge because we believe that a particular child victim would be unduly traumatized by testifying in front of a jury. Under the draft Committee Print, we may elect not to proceed with prosecutions because the prospective damage to the child will be too great; and in those cases where we do proceed, the child may be emotionally harmed. Furthermore, if we proceed with a case, it is likely that we would bring the most significant felony charges available. A defendant who is entitled to a jury trial for a misdemeanor under the Committee's proposed amendment thus would risk being convicted of a felony instead.

> The conduct prohibited under the new offense of Misdemeanor Sexual Abuse of a Child or Minor would not support a felony charge, but there is an equally important reason for retaining these cases on a non-jury calendar: non-jury calendars move at a much faster pace than jury calendars. This means that a resolution of a sex offense can be obtained in a few weeks rather than several months, or longer. Particularly when children or minors are involved, an expeditious disposition of their cases spares them the on-going trauma that the prospect of testifying entails and guards against the loss of memory that could impair their ability to testify fully about what happened to them.

Letter from Patricia A. Riley, Special Counsel to the U.S. Attorney, U.S. Attorney's Office for the District of Columbia, to Phil Mendelson, Chairman, Committee on the Judiciary, Re: Bill 16-247, "Omnibus Public Safety Act of 2005" (April 18, 2006).[4]

First Draft of Report #52—Cumulative Update to the Revised Criminal Code Chapter 6

RCC § 22E-603. Authorized Terms of Imprisonment.

1. USAO recommends that a Class 7 felony be punishable by a maximum of 10 years' incarceration.

Under the RCC's proposal, a Class 7 felony is punishable by a maximum of 8 years' incarceration. As currently drafted, Class 7 felonies include the following offenses, among others, which have the following maximum penalties under current law:

- 3rd Degree Robbery (comparable to Armed Robbery under D.C. Code §§ 22-2801, -4502, which has a maximum of 30 years' incarceration, where bodily injury results from a dangerous weapon or to a protected person; and Armed Carjacking under D.C. Code § 22-2803, which has a maximum of 30 years' incarceration, unless certain conditions are met that could increase the maximum)[5]
- 2nd Degree Assault (comparable to Aggravated Assault under D.C. Code § 22-404.01, which has a maximum of 10 years' incarceration; and Assault with Significant Bodily Injury While Armed under D.C. Code §§ 22-404(a)(2), -4502, which has a maximum of 30 years' incarceration)
- 5th Degree Sexual Abuse of a Minor (comparable to 2nd Degree Child Sexual Abuse where the child is over 12 years old under D.C. Code § 22-3009, which has a maximum of 10 years' incarceration)
- 1st Degree Sexual Exploitation of an Adult (comparable to 1st Degree Sexual Abuse of a Secondary Education Student under D.C. Code § 22-3009.03, which has a maximum of 10 years' incarceration; 1st Degree Sexual Abuse of a Ward, Patient, Client, or Prisoner under D.C. Code § 22-3013, which has a maximum of

[4] USAO also continues to recommend that a version of Nonconsensual Sexual Conduct and Sexually Suggestive Conduct with a Minor not be jury demandable. The rationale set forth here applies to that recommendation as well.

[5] USAO previously recommended that each gradation of Robbery be increased, and that Carjacking be an independent offense. USAO reiterates those recommendations here.

10 years' incarceration; and 1st Degree Sexual Abuse of a Patient or Client under D.C. Code § 22-3015, which has a maximum of 10 years' incarceration)

- 1st Degree Arranging a Live Performance of a Minor (comparable to Sexual Performance Using Minors under D.C. Code § 22-3101 *et seq.*, which has a maximum of 10 years' incarceration)
- Enhanced 1st Degree Burglary (comparable to 1st Degree Burglary While Armed under D.C. Code §§ 22-801, -4502, which has a maximum of 30 years' incarceration)[6]
- 2nd Degree Arson (comparable to Arson under D.C. Code § 22-301, which has a maximum of 10 years' incarceration, where a person is present)
- Involuntary Manslaughter (comparable to Manslaughter under D.C. Code § 22-2105, which has a maximum of 30 years' incarceration)[7]

Many of the comparable offenses under current law have a maximum of 10 years' incarceration. The CCRC's proposal would therefore have the effect of lowering the maximum penalties for many serious offenses—including child sexual abuse; sexual abuse of a secondary education student; sexual abuse of a ward, patient, or prisoner; sexual abuse of a patient or client; arson; and aggravated assault—from current law. USAO does not believe that the maximum penalties for those offenses should be lowered from 10 years' incarceration to 8 years' incarceration, and recommends that Class 7 felonies have a maximum of 10 years' incarceration.

2. <u>USAO recommends that a Class 6 felony be punishable by a maximum of 15 years' incarceration.</u>

Under the RCC's proposal, a Class 6 felony is punishable by a maximum of 10 years' incarceration. As currently drafted, Class 6 felonies include the following offenses, among others, which have the following maximum penalties under current law:

- 1st Degree Assault (comparable to Aggravated Assault While Armed under D.C. Code §§ 22-404.01, -4502, which has a maximum of 30 years' incarceration, and Aggravated Assault with other enhancements)
- 3rd Degree Sexual Abuse of a Minor (comparable to 1st Degree Sexual Abuse of a Minor under D.C. Code § 22-3009.01, which has a maximum of 15 years' incarceration)
- 4th Degree Sexual Abuse of a Minor (comparable to 2nd Degree Sexual Abuse of a Child under D.C. Code §§ 3009, -3020 where the child is under 12 years old, which has a maximum of 15 years' incarceration)
- 1st Degree Criminal Abuse of a Minor (comparable to 1st Degree Child Cruelty under D.C. Code § 22-1101, which has a maximum of 15 years' incarceration)
- Enhanced Involuntary Manslaughter (comparable to Manslaughter under D.C. Code §§ 22-2105, which has a maximum of 30 years' incarceration, with certain enhancements)

[6] As discussed below, USAO continues to recommend that the penalty for Burglary be increased.

[7] USAO previously recommended—and continues to recommend—that Involuntary Manslaughter be categorized as a Class 5 felony with a maximum of 20 years' incarceration.

Many of the comparable offenses under current law have a maximum of 15 years' incarceration. The CCRC's proposal would therefore have the effect of lowering the maximum penalties for many serious offenses—including child sexual abuse, child physical abuse, and aggravated assault while armed—from current law. USAO does not believe that the maximum penalties for those offenses should be lowered from 15 years' incarceration to 10 years' incarceration, and recommends that Class 6 felonies have a maximum of 15 years' incarceration.

3. <u>USAO recommends that a Class 5 felony be punishable by a maximum of 20 years' incarceration.</u>

Under the RCC's proposal, a Class 5 felony is punishable by a maximum of 18 years' incarceration. As currently drafted, Class 5 felonies include the following offenses, among others, which have the following maximum penalties under current law:

- 2nd Degree Sexual Assault (comparable to 2nd Degree Sexual Abuse under D.C. Code § 22-3003, which has a maximum of 20 years' incarceration)
- 2nd Degree Sexual Abuse of a Minor (comparable to 1st Degree Child Sexual Abuse where the child is over 12 years old under D.C. Code § 22-3008, which has a maximum of 30 years' incarceration)
- Kidnapping (comparable to Kidnapping under D.C. Code § 22-2001, which has a maximum of 30 years' incarceration)
- 1st Degree Arson (comparable to Arson under D.C. Code § 22-301, which has a maximum of 10 years' incarceration, with the added requirement of causing death or serious bodily injury)
- Voluntary Manslaughter (comparable to Manslaughter under D.C. Code § 22-2105, which has a maximum of 30 years' incarceration[8])

The CCRC's proposal would have the effect of lowering the maximum penalties for many serious offenses—including 2nd degree sexual abuse and 1st degree child sexual abuse of a child over 12 years old—from current law. USAO does not believe that the maximum penalties for those offenses should be lowered to 15 years' incarceration, and recommends that Class 5 felonies have a maximum of 20 years' incarceration.

4. <u>USAO recommends that a Class 4 felony be punishable by a maximum of 30 years' incarceration.</u>

Under the RCC's proposal, a Class 4 felony is punishable by a maximum of 24 years' incarceration. As currently drafted, Class 4 felonies include the following offenses, among others, which have the following maximum penalties under current law:

[8] USAO previously recommended—and continues to recommend—that Voluntary Manslaughter be categorized as a Class 4 felony with a maximum of 30 years' incarceration. USAO reiterates its other previous recommendations as well.

- 1st Degree Sexual Assault (comparable to 1st Degree Sexual Abuse under D.C. Code § 22-3002, which has a maximum of 30 years' incarceration, unless certain conditions are met that could increase the maximum)
- Enhanced 2nd Degree Sexual Assault (comparable to 2nd Degree Sexual Abuse with enhancements under D.C. Code §§ 22-3003, -3020, which has a maximum of 30 years' incarceration)
- 1st Degree Sexual Abuse of a Minor (comparable to comparable to 1st Degree Child Sexual Abuse where the child is under 12 years old under D.C. Code §§ 22-3008, -3020, which has a maximum of life imprisonment)
- Enhanced 2nd Degree Sexual Abuse of a Minor (comparable to 1st Degree Child Sexual Abuse where the child is over 12 years old, with enhancements, under D.C. Code §§ 22-3008, -3020, which has a maximum of life imprisonment)[9]
- 2nd Degree Murder (comparable to 2nd Degree Murder under D.C. Code §§ 22-2103, -2104, which has a maximum of 40 years' incarceration, unless certain conditions are met that could increase the maximum; and to 1st Degree Murder with respect to felony murder under D.C. Code §§ 22-2101, -2014, which has a maximum of 60 years' incarceration, unless certain conditions are met that could increase the maximum)
- Enhanced Voluntary Manslaughter (comparable to Manslaughter under D.C. Code §§ 22-2105, which has a maximum of 30 years' incarceration, with certain enhancements)

The CCRC's proposal would have the effect of lowering the maximum penalties for many serious offenses—including 1st degree sexual abuse, 1st degree sexual abuse of a minor, and murder—from current law. USAO does not believe that the maximum penalties for those offenses should be lowered to 24 years' incarceration, and recommends that Class 4 felonies have a maximum of 30 years' incarceration.

5. <u>USAO recommends that a Class 3 felony be punishable by a maximum of 40 years' incarceration.</u>

Under the RCC's proposal, a Class 3 felony is punishable by a maximum of 36 years' incarceration. As currently drafted, Class 3 felonies include the following offenses, among others, which have the following maximum penalties under current law:

- Enhanced 1st Degree Sexual Assault (comparable to 1st Degree Sexual Abuse with enhancements under D.C. Code §§ 22-3002, -3020, which has a maximum of life imprisonment)
- Enhanced 1st Degree Sexual Abuse of a Minor (comparable to 1st Degree Child Sexual Abuse where the child is under 12 years old, with enhancements, under D.C. Code §§ 22-3008, -3020, which has a maximum of life imprisonment)
- Enhanced 2nd Degree Murder (comparable to enhanced 2nd Degree Murder under D.C. Code §§ 22-2103, -2104; D.C. Code § 24-403.01(b-2), which has a

[9] As set forth below, USAO also recommends that Enhanced 2nd Degree Sexual Abuse of a Minor be increased in class.

maximum of life imprisonment; and to enhanced 1st Degree Murder with respect to felony murder under D.C. Code §§ 22-2101, -2014; D.C. Code § 24-403.01(b-2), which has a maximum of life imprisonment)

The CCRC's proposal would have the effect of lowering the maximum penalties for many serious offenses—including 1st degree sexual abuse with enhancements and 1st degree sexual abuse of a child with enhancements—from current law. USAO does not believe that the maximum penalties for those offenses should be lowered to 36 years' incarceration, and recommends that Class 4 felonies have a maximum of 40 years' incarceration.

6. USAO recommends that the Commentary to the CCRC codify the CCRC's intent to have an increased reliance on consecutive sentences, rather than concurrent sentences.

At the CCRC Advisory Group meeting on May 6, 2020, there was discussion between Advisory Group members and the CCRC about the intent to have increased reliance on consecutive sentences, rather than concurrent sentences. As noted in the minutes from that meeting, the purpose of this is to capture the full scope of a defendant's conduct, to ensure that one offense is not doing all of the work, and to evaluate each type of criminal behavior involved in the situation. USAO recommends that this intent be codified in the Commentary so that attorneys and judges can understand the CCRC's intent in this respect when sentencing defendants under the RCC.

7. USAO recommends maintaining the thirty-year minimum sentence for First Degree Murder.

The CCRC's proposals do not include a minimum sentence for first degree murder. District law has long provided for a thirty-year minimum sentence for that offense. *See* 22 D.C. Code § 2104. A minimum sentence is especially appropriate for premeditated first degree murder, which has been described by the DCCA—and in turn viewed by lawmakers—as the most serious of offenses. *See Butler v. United States*, 481 A.2d 431, 448–49 (D.C. 1984).

The lack of a minimum sentence for First Degree Murder would be unprecedented. Every other state imposes at least a minimum term of imprisonment. 32 states impose a minimum sentence of life or life without parole. Of the remaining states, the vast majority impose a very substantial minimum sentence. Only a few states impose a smaller minimum sentence (Texas imposes a five-year minimum, Alabama, Arkansas, and Montana impose a ten-year minimum). But no state (including the many states that have adopted part or all of the Model Penal Code) imposes no minimum sentence for first degree murder, as shown in the table below.

State	Minimum Sentence	Source
Alabama	10 years	Ala. Code §§ 13A-5-6, 13A-6-2(c)
Alaska	30 years	AS §§ 12.55.125(a), 11.41.100(b)
Arizona	Life	AZ ST § 13-1105(D)
Arkansas	10 years	A.C.A. §§ 5-4-401(a)(1), 5-10-102(c)(1)
California	25 years	Cal. Penal Code § 190(a)
Colorado	Life	C.R.S.A. §§ 18-1.3-401, 18-3-102(3)

Connecticut	25 years	C.G.S.A. §§ 53a-35a, 53a-54a
Delaware	Life without release	11 Del.C. §§ 636, 4209(a)
Florida	Life without parole	F.S.A. §§ 775.082, 782.04(1)(a)
Georgia	Life	Ga. Code Ann. § 16-5-1(e)(1)
Hawaii	Life without parole	HRS §§ 706-656(1), 707-701(2)
Idaho	Life (eligible for parole after 10 years)	I.C. § 18-4004
Illinois	20 years	720 ILCS 5/5-4.5-20(a), 5/9-1(g)
Indiana	45 years	IC 35-50-2-3
Iowa	Life without parole	I.C.A. §§ 707.2(2), 902.1(1)
Kansas	Life (eligible for parole after 25 years)	K.S.A. 21-6620(c)(2)(A)
Kentucky	20 years	KRS §§ 507.020(2), 532.030(1)
Louisiana	Life without parole	LSA-R.S. 14:30(C)(2)
Maine	25 years	17-A M.R.S.A. § 1603(1)
Maryland	Life	MD Code, Criminal Law, § 2-304
Massachusetts	Life without parole	M.G.L.A. 265 § 2(a)
Michigan	Life without parole	M.C.L.A. 750.316(1)
Minnesota	Life	M.S.A. § 609.185(a)
Mississippi	Life	Miss. Code Ann. § 97-3-21(1)
Missouri	Life without parole	V.A.M.S. 565.020(1)
Montana	10 years	MCA 45-5-102(2)
Nebraska	Life	Neb.Rev.St. §§ 28-303, 29-2522
Nevada	50 years (eligible for parole after 20 years)	N.R.S. 200.030(4)(b)(3)
New Hampshire	Life without parole	N.H. Rev. Stat. § 630:1-a(III)
New Jersey	30 years	N.J.S.A 2C:11-3(b)(1)
New Mexico	Life	N.M.S.A. §§ 30-2-1(A), 31-18-14
New York*	15 years	McKinney's Penal Law §§ 70.00(3)(a)(i), 125.25
North Carolina	Life without parole	N.C.G.S.A. § 14-17
North Dakota	Life	NDCC, 12.1-16-01(1), 12.1-32-01(1)
Ohio	Life	R.C. §§ 2903.01(G), 2929.02
Oklahoma	Life	21 Okl.St.Ann. § 701.9(A)
Oregon	Life	O.R.S. § 163.115(5)(a)
Pennsylvania	Life	42 Pa.C.S.A. § 9711
Rhode Island	Life	Gen.Laws 1956, § 11-23-2
South Carolina	30 years	Code 1976 § 16-3-20
South Dakota	Life	SDCL §§ 22-6-1(1), 22-16-12
Tennessee	Life	T.C.A. § 39-13-202(c)(3)
Texas	5 years	V.T.C.A., Penal Code §§ 12.32(a), 19.02(c)
Utah	15 years	U.C.A. 1953 § 76-5-203(3)(b)
Vermont	35 years	13 V.S.A. § 2303(a)(1)(A)
Virginia	20 years	VA Code Ann. §§ 18.2-10(b), 18.2-32
Washington	Life	West's RCWA 9A.32.040

West Virginia	Life	W. Va. Code, § 61-2-2
Wisconsin	Life	W.S.A. 939.50(3)(a), 940.01(1)(a)
Wyoming	Life	W.S.1977 § 6-2-101

*New York's Second Degree Murder Statute is most analogous to the District's First Degree Murder Statute

The District's existing 30-year minimum sentence for first degree murder is thus very much in the mainstream when compared to the other states (including states that have adopted the Model Penal Code) and should be retained.

CCRC cites to recommendations from the Judicial Conference of the United States, the American Law Institute, and the American Bar Association, which all oppose mandatory minimum sentencing schemes. (*See* Advisory Group Memo 32, App. D2 at 4.) However, the Judicial Conference of the United States *Letter to the U.S. Sentencing Commission dated July 31, 2017* makes no reference to homicide offenses. American Bar Association Resolution 10(b) also gives no indication that minimum sentences for homicide offense were considered. Perhaps most tellingly, the American Law Institute has previously reported sharp criticism of mandatory minimum sentences by a federal judge *because they required the judge to impose a sentence greater than the judge would give to a murderer*. *See* American Law Institute, Model Penal Code: Sentencing § 6.06, Proposed Final Draft (April 10, 2017), Comment m. As detailed therein:

> [R]ecently I had to sentence a first-time offender, Mr. Weldon Angelos, to more than 55 years in prison for carrying (but not using or displaying) a gun at several marijuana deals. The sentence that Angelos received far exceeded what he would have received for committing such heinous crimes as aircraft hijacking, second degree murder, espionage, kidnapping, aggravated assault, and rape. Indeed, the very same day I sentenced Weldon Angelos, I gave a second-degree murderer 22 years in prison—the maximum suggested by the [U.S.] Sentencing Guidelines. It is irrational that Mr. Angelos will be spending 30 years longer in prison for carrying a gun to several marijuana deals than will a defendant who murdered an elderly woman by hitting her over the head with a log.

Id. The other comments from the ALI suggest that perhaps the most salient criticism of mandatory minimum sentencing schemes is that they adversely impact proportionality: "Mandatory-minimum-penalty laws are at war with the Code's tenets of proportionality in punishment." *Id.* But this concern does not apply to first degree murder, which already is the most serious criminal offense contemplated by the criminal code. Mandatory minimum sentencing has remained a topic of debate in recent years, but the criticism has not focused on minimum sentencing schemes for adults convicted of first degree murder. A minimum sentence of 30 years for premeditated first degree murder appropriately signals society's abiding belief in the inherent value of human life and should be maintained.

8. USAO opposes the elimination of other mandatory minimums.

In addition to the elimination of a mandatory minimum for First Degree Murder, the CCRC proposes eliminating mandatory minimums for all other offenses, including Unlawful Possession of a Firearm under D.C. Code § 22-4503, Possession of Weapons During Commission of a Crime of Violence under D.C. Code § 22-4504(b), Carjacking under D.C. Code § 22-2803; and the Additional Penalty for Committing Crime when Armed under D.C. Code § 22-4502, as well as other "soft" minimums throughout the D.C. Code, *see, e.g.*, D.C. Code § 22-801 (Burglary); D.C. Code § 23-1327 (Failure to Appear). Under federal law, many firearms offenses are subject to a mandatory minimum. *See, e.g.*, 18 U.S.C. § 924(c)(1)(A)(i) (5-year minimum for using or carrying a firearm during a crime of violence); 18 U.S.C. § 924(c)(1)(A)(ii) (7-year minimum for brandishing a firearm during a crime of violence); 18 U.S.C. § 924(e) (15-year minimum for possessing a firearm after 3 convictions for violent felonies or drug offenses).

In its comments on the First Draft of Report #41, USAO noted that, in a time of increased gun violence,[10] an increase in homicides in the District, and a need to reduce the number of guns in the District, the RCC should not lower penalties for firearms offenses—USAO reiterates those concerns here. Firearm violence is a critical public safety issue, and the firearms that lead to that violence should not be treated lightly. As USAO noted in its comments regarding the proposed maximum penalties for Possession of a Firearm by an Unauthorized Person, crucially, persons convicted of this offense not only carried a firearm, but also had been previously convicted of a felony or crime of domestic violence, or a prior crime of violence. Persons previously convicted of these offenses should not be permitted to carry firearms, and should be subject to penalties commensurate with their actions. As USAO noted in its comments regarding the proposed maximum penalties for Possession of a Dangerous Weapon During a Crime, this offense involves not just possession of firearms, but possession of firearms when the firearms are being used to commit offenses against others. The RCC's proposal does not adequately deter either possession of firearms or the use of firearms during the commission of offenses against others.

RCC § 22E-606. Repeat Offender Penalty Enhancement.

1. USAO recommends that, in subsections (a)(1) and (b)(2), the CCRC add Burglary and Arson.

   With USAO's changes, subsections (a)(1) and (b)(2) would provide:

   "One or more prior convictions for a felony offense under Subtitle I of this title, or a comparable offense, not committed on the same occasion, or a conviction for Burglary under RCC § 22E-2701 or Arson under RCC § 2501, or a comparable offense, not committed on the same occasion; or"

As the Commentary acknowledges, "[f]elony offenses in Subtitle I of Title 22E include offenses that are comparable to those currently deemed a 'crime of violence' as defined in D.C. Code § 23-1331(4), except for property crimes of arson and burglary, which are not in Subtitle

[10] https://cdn.americanprogress.org/content/uploads/2019/11/18070707/WashingtonDCGunViolence-Factsheet.pdf

I." (Commentary at 16 n.39.) USAO recommends that the RCC treat all offenses that are currently categorized as crimes of violence under D.C. Code § 22-1331(4) the same under this enhancements. USAO therefore recommends that the CCRC include Burglary (RCC § 22E-2701) and Arson (RCC § 22E-2501) in the list of offenses that require only one prior conviction for the enhancement to apply. Burglary and Arson are both serious offenses that can involve serious harms, and should be treated the same as other offenses listed in this subsection.

2. <u>USAO recommends that the Commentary be revised to state that a conviction under current District law is a "comparable offense."</u>

In its discussion of "comparable offenses" under this enhancement, the Commentary states: "The determination of whether another jurisdiction's statute *(or an older District statute)* is equivalent to a current District offense is a question of law." (Commentary at 16 (emphasis added).) RCC statutes will inherently have different elements from statutes under current law, so the current versions of those offenses will, in many cases, not have "elements that would necessarily prove the elements of a corresponding" RCC crime. *See* RCC § 22E-701 (definition of "comparable offense"). The Commentary notes that this is a change in law but, in its discussion, focuses only on conduct in another jurisdiction that may not translate into a comparable offense in the District. (Commentary at 21.) The Commentary does not further discuss how this would impact prior convictions under current law in the District.

USAO wants to ensure that convictions under the current D.C. Code could be used as prior convictions for purpose of this enhancement (or for purposes of liability for offenses such as Possession of a Firearm by an Unauthorized Person under RCC § 22E-4105). For example, the elements of robbery under current law are different from the elements of robbery under the RCC. If a defendant perpetrated an armed robbery under current law, that defendant's conviction would not "necessarily prove the elements" of the RCC armed robbery offense, even if the defendant's actual conduct for which he was convicted would be subject to liability under the comparable RCC offense. *Compare* D.C. Code §§ 22-2801, -4502 *with* RCC § 22E-1201(d)(2)(A)(ii). This is similarly true for other offenses, as the RCC has elementized each offense in more detail, and added elements to many offenses that may not exist in current law. This Commentary therefore creates a gap in liability, as many defendants who should be eligible for this enhancement—and held liable for offenses that rely on a prior conviction or "comparable offense"—will not be held accountable for those enhancements and offenses.

To address this concern, the Commentary could indicate that, unless otherwise specified, the predecessor offense under current law is a "comparable offense" to the RCC version of that offense.

<u>RCC § 22E-608. Hate Crime Penalty Enhancement.</u>

USAO proposes the following changes:

"(a) *Hate crime penalty enhancement.* A hate crime penalty enhancement applies to an offense when the actor commits the offense with the purpose, in whole or part, of ~~intimidating, physically harming, damaging the property of, or causing a pecuniary loss~~

~~to any person or group of persons~~ committing the offense ~~because of~~ motivated by prejudice against the perceived race, color, religion, national origin, sex, age, sexual orientation, gender identity or expression as defined in D.C. Code § 2-1401.02(12A), homelessness, physical disability, ~~or~~ political affiliation, marital status, personal appearance, family responsibility, or matriculation of a person or a group of persons."

1. USAO recommends changing the words "because of" to "motivated by."

Changing the standard to "because of" would represent a change from current law. The Commentary acknowledges that this may constitute a substantive change of law. (Commentary at 31.) The CCRC should not incorporate any change from current law that could limit liability under this enhancement.

The most natural reading of the current statute at D.C. Code § 22-3701(1), as the text and legislative history indicate, is that an act "demonstrates an accused's prejudice" if the accused's prejudice is a "contributing cause" of the crime or, put another way, if the crime was motivated by the accused's prejudice. The statutory language requires that the criminal act itself "demonstrate" the defendant's prejudice, which conveys the need for a causal nexus between the crime and the defendant's prejudice. *See Shepherd v. United States*, 905 A.2d 260, 262–63 (D.C. 2006) (finding that the court need not "definitively" review the constitutionality of § 22-3701 because "[t]he trial court implicitly applied the statute as requiring a clear nexus between the bias identified in the statute and the assault" such that "it was appellant's assaultive conduct motivated by bias, not his homophobic prejudice as such, that was subject to criminal sanction"). Indeed, the legislative history for the current hate crimes statute demonstrates that the statute was enacted as a response "to an alarming increase in crimes *motivated by* bigotry and prejudice in the District." Report from the Committee on the Judiciary, Bill 8-168, the "Bias-Related Crimes Act of 1989" at 2 (Oct. 18, 1989) (emphasis added). Notably, the question of whether the current statute requires that the defendant's prejudice be a "contributing cause" of the offense or a "but-for cause" of the offense is pending before the D.C. Court of Appeals.

2. USAO opposes removal of marital status, personal appearance, family responsibility, and matriculation as potential bases for a hate crime penalty enhancement.

USAO wants to ensure that the hate crime penalty enhancement is robust and can be applied in all appropriate situations. The CCRC notes that MPD has no record of these crimes in recent years, and that criminal cases involving this conduct may be rare. (Commentary at 30 & n.78.) This does not, however, foreclose the possibility that, in the future, an individual could commit an offense while motivated by one of these factors, and should be held accountable for that behavior as a hate crime. The CCRC also notes that prejudice based on those characteristics may "be difficult to distinguish from individual dislikes and hatred (as compared to a categorical prejudice against an identifiable class)." (Commentary at 30.) This concern, however, goes to the government's ability to prove this enhancement beyond a reasonable doubt, rather than to whether the possibility of this enhancement should exist in the law.

3. USAO recommends changing the words "intimidating, physically harming, damaging the property of, or causing a pecuniary loss to any person or group of persons" to "committing the offense."

Although the words "pecuniary loss" and "property" are defined in RCC § 22E-701, the words "intimating," "physically harming," and "damaging the property of" are not defined in the RCC. This will lead to unnecessary confusion about what these terms mean, and whether certain offenses are included within these terms. Rather, consistent with the DCCA's ruling in *Aboye v. United States*, 121 A.3d 1245 (D.C. 2015), it is appropriate to apply a hate crime to *any* offense. Although the CCRC notes in the Commentary that a hate crime enhancement can apply to any offense (*see* Commentary at 31–32), USAO wants to ensure that the plain language of the statute does not limit the offenses that are subject to this enhancement.

4. USAO recommends amending the Commentary.

Page 27 of the Commentary provides: "This general penalty provides a penalty enhancement where the defendant selected the target of the offense because of prejudice against certain perceived attributes of the target" (emphasis added). The enhancement, however, does not require that the defendant select the target of the offense because of prejudice; rather it requires that the defendant commit the offense because of (or, as USAO recommends, motivated by) prejudice. USAO recommends that this sentence of the Commentary be revised to read: "This general penalty provides a penalty enhancement where the defendant committed the offense motivated by prejudice against certain perceived attributes of the target."

Second Draft of Report #41—Ordinal Ranking of Maximum Imprisonment Penalties

1. USAO continues to recommends that the penalty for Burglary be increased.

USAO reiterates its comments that it previously filed regarding the relative penalty for Burglary. USAO continues to believe that the CCRC understates the seriousness of Burglary in its ranking of maximum penalties, and continues to recommend that, at a minimum, 1st Degree Burglary and Enhanced 1st Degree Burglary both be increased in class. USAO appreciates that the CCRC accepted USAO's recommendation to create a penalty enhancement for committing burglary while armed, which made Enhanced 1st Degree Burglary a Class 7 felony. But that means that the RCC equivalent of 1st Degree Burglary While Armed is still subject only to a maximum of 8 years' incarceration (or 10 years' incarceration under USAO's recommendation above), and unarmed 1st Degree Burglary is subject only to a maximum of 5 years' incarceration. 1st Degree Burglary is, in essence, a home invasion. The fact that this invasion takes place in a dwelling, when a person is home, makes the offense very serious. A person's home should be a place where a person feels most secure, and a burglary can shatter that feeling of safety and security. Homes are where people live, where they raise their children, and where their most valuable and sentimental possessions are stored. A penalty for the invasion of that space should recognize that a burglary violates the sanctity of that space. USAO therefore recommends that the CCRC increase this penalty to be commensurate with the harms caused by this type of invasion of a home.

2. USAO recommends that Enhanced Second Degree Sexual Abuse of a Minor be recategorized as a Class 3 felony.[11]

USAO recommends that Enhanced Second Degree Sexual Abuse of a Minor be increased to a Class 3 felony. Under the CCRC's proposal, Second Degree Sexual Abuse of a Minor is a Class 5 felony, and First Degree Sexual Abuse of a Minor is a Class 4 felony. The only distinction between First and Second Degree Sexual Abuse of a Minor is the age of the victim (under 12 years old versus over 12 years old). USAO recommends that the Enhanced version of both of these offenses, however, be classified as a Class 3 felony. Without the enhancement, it is logical to distinguish between conduct involving a child under 12 and conduct involving a child over 12. But an enhancement applies, among other situations, to a situation where the actor is in a position of trust with or authority over the complainant. If this relationship exists, and the defendant engages in a sexual act with the complainant, the defendant should be equally culpable, regardless of whether the complainant is under 12 or over 12. For example, if a defendant engages in sexual intercourse with his biological daughter, the defendant should be equally culpable regardless of whether the victim was 11 years old or 13 years old. In both situations, the defendant exploited his position of trust and authority over his child, and likely used that trust or authority as a way to cajole the victim into engaging in sexual intercourse.

This would also put the Enhanced version of both of these offenses at the same level as Enhanced 1st Degree Sexual Assault, which is appropriate. As USAO articulated in previous comments, child sexual abuse often does not require the use of force, so it is appropriate to place the most serious versions of forced assault and non-forced abuse of a child at the same gradation. A perpetrator often uses various forms of grooming to induce the child victim's submission to the sexual acts. Non-forced abuse of a child can often result in significant emotional distress, both when the child is under 12 or over 12, and should be penalized accordingly.

3. USAO recommends increasing the penalty for Incest.

The CCRC has classified Incest as a Class A misdemeanor. USAO recommends that Incest be a felony, and that it have a penalty consistent with current law. Under current law, Incest is punishable by a maximum of 12 years' incarceration. D.C. Code § 22-1901. The RCC's proposal would be a steep drop in liability. Incest takes place in a variety of situations, which can include sexual activity between consenting adults, but can also include sexual activity between two relatives where there is a power imbalance, including where one person is a child, or where the abuse began when one person is a child and continued when they became adults. A higher maximum recognizes the potential severity of this offense.

4. USAO recommends increasing the penalty for Creating or Trafficking an Obscene Image of a Minor, and for Possession of an Obscene Image of a Minor.

Under federal law, child pornography offenses carry significant statutory penalties, and USAO recommends that these RCC offenses align more closely with federal law. For example, a first time offender convicted of producing child pornography under 18 U.S.C. § 2251 faces a

[11] Consistent with previous comments, USAO continues to recommend that this offense and other offenses be subject to a maximum sentence of life imprisonment, but makes this argument as an alternative.

minimum of 15 years' incarceration, and a maximum of 30 years' incarceration. A first time offender convicted of possessing child pornography under 18 U.S.C. § 2252(a)(4) faces a maximum of 10 years' incarceration, unless the offense involved a child under 12 years old, in which case they face a maximum of 20 years' incarceration.

5. USAO recommends that Unauthorized Disclosure of a Sexual Recording be recategorized as a Class B misdemeanor.[12]

Under the RCC's proposal, Unauthorized Disclosure of a Sexual Recording is a Class A misdemeanor, and Enhanced Unauthorized Disclosure of a Sexual Recording is a Class 9 felony. Under current law, 1st Degree Unlawful Publication is a felony with a maximum of 3 years' incarceration, D.C. Code § 22-3053, 2nd Degree Unlawful Publication is a misdemeanor with a maximum of 180 days' incarceration, D.C. Code § 22-3054, and Unlawful Disclosure is a misdemeanor with a maximum of 180 days' incarceration, D.C. Code § 22-3052. These offenses and their respective penalties only recently became law in the Criminalization of Non-Consensual Pornography Act of 2014 (L20-275) (eff. May 7, 2015). USAO recommends that the RCC offense track the penalties in current law, which expressly created a non-jury demandable, misdemeanor version of this offense. In a trial for this offense, a victim must discuss sexually explicit photos or videos of herself or himself, which is much more difficult to process emotionally in front of a group of 14 jurors than in front of 1 judge. A victim can be essentially re-victimized during a trial by having these images displayed in front of a factfinder, and if the unenhanced version of that offense results in a misdemeanor conviction (Class A), it will be less traumatizing for a victim to have the misdemeanor tried before a judge instead of a jury.

[12] USAO makes this recommendation consistent with its recommendation above that offenses, including Class B misdemeanors, be jury demandable only when they are punishable by more than 180 days' imprisonment.