MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	April 11, 2019
Re:	Comments on First Draft of Report No. 35, Cumulative update to sections 201-213 of the Revised Criminal Code

PDS has the following comments about causation, RCC § 22E-204.

PDS has concerns that as drafted, the legal cause requirement in RCC § 22E-204(c) is vague and leaves juries ill-equipped to apply a defined legal standard to the facts of a case. Under RCC § 22E-204, a person's conduct is the legal cause of a result if the result is *not too unforeseeable* in its manner of occurrence and *not too dependent* upon another's volitional conduct to have a *just bearing* on the person's liability. The terms "not too dependent" and "not too unforeseeable" are indeterminate and are not further defined within causation or elsewhere in the RCC or commentary. And the term "just bearing" injects a completely subjective element of moral judgment that would lead to arbitrary and unpredictable results.

The current language raises issues of vagueness, fair notice, and arbitrariness that would likely run afoul of the Due Process Clause. Because RCC § 22E-204(c) does not indicate what it means for something to be "not too unforeseeable" or "not too dependent upon another's volitional conduct to have a just bearing," "lower courts would be left to guess." *Burrage v. United States*, 134 S. Ct. 881, 892 (2014). In *Burrage*, the Supreme Court rejected an analogous causation standard that would "exclude[]causes that are 'not important enough' or '*too insubstantial*.'" *Id.* (emphasis added) (citation omitted). Recognizing that no one could definitively say what it means for a cause to be "too insubstantial," the Court held that "[u]ncertainty of that kind cannot be squared with the beyond-a-reasonable-doubt standard applicable in criminal trials or with the need to express criminal laws in terms ordinary persons can comprehend." *Id.* Given the Supreme Court's rejection of a "too insubstantial" causation standard as unconstitutional, it is highly likely that the phrases "not too unforeseeable . . . and not too dependent . . . to have a just bearing" would be unconstitutional as well. *See id.*; *see also Seward v. Minneapolis Ry. Co.*, 25 N.W.2d 221, 224 (Minn. 1946) (rejecting vague "substantial factor" test because it "leave[s] the jury afloat without a rudder," "would leave a jury free to include remote causes or conditions as proximate causes and to decide the case according to whim rather than law"). Other precedent adds to this concern. In *Kolender v. Lawson*, 461 U.S. 352, 360 (1983), the Supreme Court considered a California statute that required individuals to

provide, when stopped by police, identification that was "credible and reliable," and that provided a "reasonable assurance of its authenticity." The Supreme Court found this statute – which is considerably more descriptive than "not too unforeseeable" and "not too dependent" to be void for vagueness. The language, without standards or precise definitions, left complete enforcement discretion to police. *Id*. at 361; *see also Smith v. Goguen*, 415 U.S. 566, 575 (1974) ("Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law."). Similarly, in the context of punitive damages awards, the Supreme Court has held that due process requires states to provide a legal standard that "will cabin the jury's discretionary authority." *Philip Morris USA v. Williams*, 549 U.S. 346, 352 (2007). Otherwise, a "punitive damages system may deprive a defendant of 'fair notice . . . of the severity of the penalty that a State may impose'; [and] it may threaten 'arbitrary punishments,' *i.e.*, punishments that reflect not an 'application of law' but 'a decisionmaker's caprice.'" *Id.* (citations omitted). The concepts of "not too unforeseeable" and "not too dependent" to have a "just bearing" require law enforcement and jurors to proceed on a personal and highly subjective notion of fairness rather than a clear legal standard. Legal scholars have criticized a "just bearing" standard of causation for this reason. *See, e.g.*, Don Stuart, *Supporting Gen. Principles for Criminal Responsibility in the Model Penal Code with Suggestions for Reconsideration: A Canadian Perspective*, 4 Buff. Crim. L. Rev 13, 43 (2000) ("There is also reason to be concerned at the vagueness of the 'just bearing' formulation. Although nobody has been able to suggest a totally satisfactory approach; lawyers and triers of fact need a more workable test."); George P. Fletcher, *Dogmas of the Model Penal Code*, 2 Buff. Crim. L. Rev 3, 6 (1998) ("Including the word 'just' in this proviso, of course, leaves all the difficult problems unresolved, and therefore the attempted verbal compassing of the concept turns out to be words with little constraining effect.").

PDS agrees that the underlying purpose of the doctrine of legal causation is fairness, but that purpose should be served by the development of clear, definitive standards rather than an open appeal to the factfinder decide a case based on subjective moral intuition. While some jurists have described legal causation in terms such as "a rough sense of justice,"*Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 352 (1928) (Andrews, J., dissenting), these descriptions are generally pejorative rather than aspirational, *see id.* at 354 ("We draw an uncertain and wavering line, but *draw it we must as best we can*. Once again, it is all a question of fair judgment, always keeping in mind the fact that *we endeavor to make a rule in each case that will be practical* and in keeping with the general understanding of mankind." (emphasis added)). And in light of the constitutional concerns described above, such an open appeal to a sense of fairness is not a viable legal framework.

Moreover, a jury's sense of what is "just" would likely be skewed by entirely arbitrary and inappropriate factors. For example, a jury may be unaware that a defendant charged with a result-element offense could be charged and convicted of different offenses that lack the result element, including attempts. The jury may therefore erroneously believe that a guilty verdict is "just" because a culpable defendant would otherwise go unpunished. Similarly, the jury's sense of justice or fairness could be skewed by whether co-defendants are tried jointly or separately. Imagine, for example, a multi-car collision that kills a bystander. If all of the culpable drivers are tried jointly, then the jury's sense of fairness might lead it apportion blame amongst the different individuals and find that only the most directly responsible or culpable among them was the "legal cause" of the

death. If a driver is tried separately, however, then the jury's ability to apportion blame in this manner is curtailed, and the jury's sense of what is just might lead it to convict the only person that stands before them. Other unintended disparities would like arise. For example, the jury might deem it "just" to find that a principal is the legal cause of a result but not an accomplice, even though District of Columbia law "makes no distinction between one who acts as a principal and one who merely assists the commission of a crime as an aider and abettor." *Barker v. United States*, 373 A.2d 1215, 1219 (D.C. 1977). Or the jury might use *mens rea*, which is generally used to demarcate the degree of an offense, as a proxy for what is "just." Gradations of *mens rea* would not determine the degree of the offense of conviction, but whether a defendant is convicted at all.

An additional concern is the confusing use of a double negative in the phrase "not too unforeseeable." PDS proposes rephrasing this as "reasonably foreseeable," which eliminates the double negative. The "reasonably" qualifier also clarifies that the question is not whether it was *possible* to have foreseen the manner of occurrence (which would almost always be the case), but whether a reasonable person would have foreseen it.

PDS is also concerned that the concepts of foreseeability and volitional conduct incorporated into RCC § 22E-204 do not capture the entire field of relevant considerations for legal causation. The Supreme Court has said that legal causation encompasses a set of "judicial tools," *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992), and took "many shapes . . . at common law," *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 12 (2010) (plurality). PDS agrees that foreseeability and volitional conduct of a third party are two of the most important of these "judicial tools" or "shapes," but they are not exclusive. The Supreme Court has also looked to whether the conduct caused a result directly or indirectly through a series of subsequent events, whether the conduct and the result are remote in time or space, and whether the causal connection was contingent on other events. *See, e.g.*, *Hemi Group*, 559 U.S. at 9 ("A link that is 'too remote,' 'purely contingent,' or 'indirec[t]' is insufficient." (quoting *Holmes*, 503 U.S. at 271, 274) (alteration in *Hemi Group*)). In several cases, the Supreme Court has held that legal causation was lacking without looking to either foreseeability or a third party's volitional conduct. In *Holmes*, for example, the Court held that defendants who defrauded stock broker-dealers, rendering them insolvent and unable to pay their customers, were not the legal cause of the customers' losses. *See Holmes*, 503 U.S. at 271. The notion that defrauding a broker-dealer of substantial sums would render the broker-dealer insolvent is certainly foreseeable. And the insolvency of the broker-dealers could hardly be deemed "volitional." Still, the Supreme Court held legal causation was lacking because "the link is too remote between the stock manipulation alleged and the customers' harm, being purely contingent on the harm suffered by the broker-dealers." *Id.* Similarly, in *Hemi Group*, the Court addressed a claim that a cigarette seller had caused New York City to lose tax revenue by refusing to provide a list of customers that would allow the city to collect unpaid taxes. *See* 559 U.S. at 5-6. The city's loss of tax revenue was certainly foreseeable — indeed, the seller's business model depended on its ability to undercut competitors who collected the tax from customers upfront. *See id.* at 12. And there was no indication that the customers' failure to pay the taxes was volitional — the customers may have been ignorant of their tax obligations, or perhaps merely negligent in failing to pay. Still, the Court held that the seller was not the legal cause of the tax loss because there were too many steps in the causal chain. *Id.* at 10 ("Because the City's theory of causation requires us to move well beyond the first step, that theory cannot meet [the] direct relationship requirement."). Both *Holmes* and *Hemi*

Group concerned application of a criminal statute, the Racketeer Influence and Corrupt Organizations Act, which also had a provision for civil damages. Given that, it is possible that criminal cases will arise in which legal causation would not be satisfied under present law, but would not be covered by the language in RCC § 22E-204(c). PDS therefore proposes that the language be broadened to include a "catch-all" provision that covers other concepts that the Supreme Court has held will defeat legal causation.

PDS recommends redrafting RCC § 22E-204 as below:

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

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

(1) The result would not have occurred but for the person's conduct; or

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

(c) *Legal Cause Defined.* A person's conduct is the legal cause of a result if:

(1) the result is ~~not~~ reasonably ~~too~~ ~~un~~foreseeable in its manner of occurrence, and

(2)(A) the result is not directly ~~not~~ ~~too~~ dependent upon another's volitional conduct~~, to have a just bearing on the person's liability~~, or

(B) the connection between the conduct and the result is not otherwise remote, indirect, or purely contingent on other factual causes.

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