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: January 29, 2021

SUBJECT: First Draft of Report 68 - Red-Ink Comparison and Attachments

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 68 - Red-Ink Comparison and Attachments.[1]

COMMENTS ON THE DRAFT REPORT

The first part of this memorandum focuses on OAG's proposed amendments to the RCC as contained in the First Draft of Report 68. The second part contains OAG's comments and recommendations concerning the CCRC's responses to previous comments, as reflected in Appendix D2, CCRC's Disposition of Advisory Group Comments & Other Draft Documents.

I. OAG's Proposed Amendments

RCC § 22E-102. Rules of Interpretation

In an attempt to make the RCC reader friendly, the CCRC has chosen to include a paragraph in many of the code sections entitled "Definitions." This paragraph cross-references terms and phrases used in the substantive paragraphs of the code provision with definitions for those terms and phrases found elsewhere in the RCC. However, during the review process OAG has noted instances in proposed code sections where a defined term or phrase was used, but where the "Definitions" paragraph failed to contain the definitional cross-reference or where a definitional

[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.

reference was included in the Definition's paragraph, but where the term or phrase was not used in the substantive provision. While OAG appreciates both the scope of this endeavor and the effort that the CCRC has made to appropriately include these cross-references, we want to ensure that the inclusion or absence of a cross-reference not affect the interpretation of the various code sections. Terms and phrases should be interpreted to be consistent with the plain meaning of the statute.[2] See *Pannell-Pringle v. D.C. Dep't of Emp't Servs.*, 806 A.2d 209, 213-14 (D.C. 2002). To accomplish this clarification, we propose that a new paragraph RCC § 22E-102 (d) be added that specifically addresses this issue. This provision should read:

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[2] For an example of litigation that was caused by the inclusion of a specific cross-reference see *D.C. Appleseed Ctr. for Law & Justice, Inc. v. D.C. Dep't of Ins.*, 54 A.3d 1188, 1215 (D.C. 2012). There, the Court of Appeals noted "When the final legislation was enacted by the Council, however, it included the "unreasonably large" language from the Maryland statute *and* kept the "maximum feasible extent" requirement from the initial Council draft, with the specific cross-reference to that mandate we have discussed in the provision charging the Commissioner to determine whether a corporation's surplus is "excessive." D.C. Act 17-704 §§ 2 (c) & (d), 56 D.C. Reg. at 1347, D.C. Code §§ 31-3505.01 & 31-3506(e). The legislative history and the Council's alterations of the MIEAA during the drafting process reinforce our reading of the statute's language that the Act was designed primarily to enforce the obligation of the corporation to reinvest in community health to the maximum extent consistent with its financial soundness. Viewing the language of the statute as a whole, and considering its legislative history and purpose, we hold that, as a matter of law, the two determinations required by § 31-3506(e)(2) — whether GHMSI's surplus is "unreasonably large" and whether the surplus is "inconsistent" with GHMSI's community health reinvestment obligations under § 31-3505.01 — must be made in tandem, not *seriatim*, to give full effect to the statute. Because in applying the statute, the Commissioner divorced these two determinations and focused first — and exclusively — on whether the surplus was "unreasonably large," we conclude that the Commissioner's interpretation is not faithful to the statute's language, overall structure, and purpose. However, we recognize that, beyond the essential requirement that the Commissioner's "unreasonably large" determination must consider the mandate to reinvest in the community to the "maximum extent feasible" consistent with financial soundness, there remain details as to how such a determination is to be made. As to the specification of how surplus and community reinvestment are to be calculated and balanced, we defer to the agency's reasonable discretion in light of its expertise in this subject matter. We, therefore, remand the case to the Department for an express interpretation of the MIEAA that captures all the relevant provisions, in light of the statute's legislative purpose. *Cf. District of Columbia Office of Human Rights*, 40 A.3d at 928 (noting that "special competence of the agency was not required" before engaging in de novo judicial review of regulations)."

(d) *Effect of definitional cross-references*.[3] Definitional cross-references that appear at the end of substantive code sections are included to aid in the interpretation of the provisions and unless a different meaning plainly is required, their inclusion or exclusion in a cross-reference shall not affect the provision's interpretation.[4]

RCC § 22E-301. Criminal Attempt

Paragraph (d) establishes the penalty structure for criminal attempts. Subparagraph (d)(1) now states, "An attempt to commit an offense is subject to not more than one-half the maximum term of imprisonment or fine…" [emphasis added] The Commentary, on pages 218 and 219 explains this sentence by saying that "the default rule governing the punishment of criminal attempts under the RCC: a fifty percent decrease in the maximum "punishment" applicable to the target offense" and then explains, in relevant part, that "'Punishment,' for purposes of this paragraph, should be understood to mean: (1) imprisonment and fine if both are applicable to the target offense; (2) imprisonment only if a fine is not applicable to the target offense; and (3) fine only if imprisonment is not applicable to the target offense." To make subparagraph (d)(1) clearer, OAG suggests that the "or" above be changed to an "and" so that (d)(1) read "An attempt to commit an offense is subject to not more than one-half the maximum term of imprisonment and fine…"[5]

RCC § 22E-408. Special Responsibility for Care, Discipline, or Safety Defense

Paragraph (a) provides for a parental defense that permits someone who is acting with the effective consent of a parent to "engage[] in conduct constituting the offense with intent to safeguard or promote the welfare of the complainant, including the prevention or punishment of the complainant's misconduct." However, parents frequently give limited effective consent to people who perform childcare. For example, parents do not always authorize persons caring for their child to administer corporal punishment. While OAG believes that the text of subparagraph (a)(1)(B)(ii) would make this defense unavailable to a babysitter who exceeded the scope of their effective consent, an example in the Commentary would aid the reader in understanding this point. OAG proposes the following example. "A parent leaves their four year-old child with a babysitter for three hours. The only instructions the parent gives to the babysitter is not to give

[3] To aid the reader, OAG has included as italicized text in this memo any italics that appear in a quoted portion of an RCC provision or CCRC response contained in the First Draft of Report 68 – Appendix D2, Disposition of Advisory Croup Comments.

[4] On a related note, the Report adds a new paragraph (b) to RCC § 22E-213, Withdrawal Defense to Legal Accountability, as it does to other provisions, that states, "Definitions. The term 'in fact' has the meaning specified in RCC § 22E-207." However, 22E-207 does not, strictly speaking, provide a meaning to the term "in fact." Rather paragraph 22E-207 (b) says that "A person is strictly liable for any result element or circumstance element in an offense…[t]hat is modified by the phrase 'in fact.'" If the RCC is going to have definitional cross-references in various statutes, to avoid confusion, those cross-references should be to actual definitions, like they are in most of the other statutes. OAG recommends that either the phrase "in fact" be defined or the cross-reference be reworded.

[5] OAG recommends that this change also be made to the relevant portions of RCC § 22E-302, Criminal Solicitation, and RCC § 22E-303, Criminal Conspiracy.

the child any snacks. While the parent is gone the babysitter sees the child with a bag of cookies in her hand and smudge of chocolate on her face. The babysitter spanks the child. When the parent returns home they see the bruise caused by the spanking. In this situation the babysitter would not be acting with the effective consent of the parent and so could not avail themselves of this defense."

RCC § 22E-505. Developmental Incapacity Affirmative Defense[6]

For persons who are under 12 years of age, OAG does not believe that these children should be prosecuted in the juvenile justice system. Instead of requiring a child of this age to mount an affirmative defense, OAG recommends that this provision be amended to state that "a child who is under 12 years of age does not commit a delinquent act."[7] However, because a child is not required to carry identification to show their age, or may lie about their age, police officers may nevertheless inadvertently arrest a child in this age group or may seize the child prior to making an arrest to confirm the child's age. As a result, OAG may bring charges against a child who is under the age of 12 and that prosecution would continue until such time as proof of age has been established. To ensure that there is no civil liability for such an act, OAG recommends that this provision also include the statement that "Nothing in this section shall be construed as creating a cause of action against the District of Columbia or any public official[8] for seizing, arresting, or prosecuting a child who is under 12 years of age."[9]

OAG reiterates its strong objection to this affirmative defense, or if the CCRC accepts our previous recommendation, a Minimum Age for Which a Child Can Commit a Delinquent Act provision, being codified within the RCC and not in Title 16. As stated in our memorandum concerning the First Draft of Report #58- Developmental Incapacity Defense:

> Proceedings about delinquency matters are codified in Title 16, Chapter 23 of the Code. This portion of the Code establishes who is a child eligible for prosecution in the Family Court, what a delinquent act is; how juvenile competency challenges are handled; and all other aspects of delinquency proceedings. Persons who litigate delinquency proceedings, and others who want to understand how

[6] Because of OAG's recommendation below, OAG recommends that this provision be retitled "Minimum Age for Which a Child Can Commit a Delinquent Act. D.C. Code § 16-2301 (7) states, "The term 'delinquent act' means an act [committed by a child] designated as an offense under the law of the District of Columbia, or of a State if the act occurred in a State, or under Federal law."

[7] OAG's recommendation is consistent with the relevant portion of the RCC's previous version of this defense. It read "An actor does not commit an offense when [] the actor is under 12 years of age."

[8] RCC § 22E-701 states, a "'Public official' means a government employee, government contractor, law enforcement officer, or public official as defined in D.C. Code § 1-1161.01(47)."

[9] As to children who are under 14 years of age, OAG renews its recommendation there not be a codified developmental immaturity defense at this time, pending further study of the issue. See page 31 of Appendix D2, Disposition of Advisory Group Comments & Other Changes to Draft Documents.

these proceedings work, look to D.C. Code § 16-2301, et. seq., for the statutory framework for delinquency proceedings. So, if the concepts in this proposal, or any portion of them, are adopted by the Commission, those changes should be incorporated into Title 16, not in Title 22E. [footnotes omitted]

RCC § 22E-608. Hate Crime Penalty Enhancement

Paragraph (a) states, "A hate crime penalty enhancement applies to an offense when the actor commits the offense with the purpose, in whole or part, of threatening, physically harming, damaging the property of, or causing a pecuniary loss to any person or group because of prejudice against the person's or group's perceived race, color, religion, national origin, sex, age, sexual orientation, homelessness, physical disability, political affiliation, or gender identity or expression as, in fact, defined in D.C. Code § 2-1401.02(12A)." [internal strikeouts removed] [emphasis added] The Commentary, on page 88, explains that "the revised statute extends liability for the penalty enhancement in some situations to a complainant who is not themselves perceived to have (or actually have) one of the protected characteristics." In footnote 13 it states, "For example, a hate crime penalty enhancement is applicable to an actor who destroys the office of a politically unaffiliated lawyer representing a political party when the actor's purpose was to engage in criminal damage to the property in part because of prejudice against the perceived political affiliation of the lawyer's client."

While OAG agrees that the penalty enhancement should apply to the persons harmed as described in the Commentary and footnote, the text of RCC § 608 does not accomplish that goal. In the example cited, the offense was committed against the lawyer. However, the text of the provision requires that the offense had to be "because of prejudice against the person's or group's perceived race, color…" and there is no qualifying prejudice against the lawyer. [emphasis added]

In addition, while OAG agrees that this enhancement should apply when the offense was committed because of the perceived attributes of the victim, we, believe that it is important to note that these offenses are mostly committed against people because of their actual attributes. OAG's position is consistent with current law. See D.C. Official Code § 2-1402.11. This statute says, "It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, genetic information, disability, matriculation, political affiliation, status as a victim or family member of a victim of domestic violence, a sexual offense, or stalking, or credit information of any individual…" [emphasis added]

To accomplish the CCRC's goal as stated in the Commentary, and to amend this provision to add the term "actual," OAG suggests that the provision be amended to read as follows:

> *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 threatening, physically harming, damaging the property of, or causing a pecuniary loss to any person or group because of:

(1) prejudice against the person's or group's actual or perceived race, color, religion, national origin, sex, age, sexual orientation, homelessness, physical disability, political affiliation, or gender identity or expression as, in fact, defined in D.C. Code § 2-1401.02(12A) or
(2) that person's or groups actual or perceived business, personal, or supportive relationship to a person or group described in paragraph (a)(1).

RCC § 22E-1201. Robbery

Third Degree Robbery makes it an offense when the actor "Knowingly takes or exercises control over the property of another that the complainant possesses within the complainant's immediate physical control by … Applying physical force that moves or immobilizes another person present; or Removing property from the hand or arms of the complainant. The Commentary notes "Taking or exercising control over property from the person or from the immediate physical control of another without bodily injury, threats, or overpowering physical force is no longer criminalized as robbery in the RCC, but as a form of theft." It is unclear why the offense should be limited in this manner. See *Williams v. United States*, 113 A.3d 554, 560-61 (D.C. 2015) where it was held that:

> "[i]n the District of Columbia, robbery retains its common law elements," and that "the government must prove larceny and assault." *Lattimore, supra*, 684 A.2d at 359 (citations omitted). The elements of robbery are: "(1) a felonious taking, (2) accompanied by an asportation [or carrying away], of (3) personal property of value, (4) from the person of another or in his presence, (5) against his will, (6) by violence or by putting him in fear, (7) *animo furandi* [the intention to steal]." *Id.* (alteration in original) (citations omitted).[10] [emphasis added]

OAG supports limiting third degree robbery to where actual, as opposed to theoretical force is used. However, limiting the offense to where the victim was moved or immobilized or when the property was removed from the victim's hand or arms narrows the offense too much.

Consider the following examples. Victim 1 has a diamond broach valued at $2,000 attached to her blouse. The defendant walks up to the victim, reaches over and brazenly rips the broach from her blouse. Victim 2 is wearing a pocketbook on a strap hung across her body and the defendant grabs the pocketbook using enough force to break the strap, but not enough to move the victim.

[10] *In Williams v. United States*, 113 A.3d 554, 555 (D.C. 2015), the Court ruled that the government failed to prove the element of "violence or putting a person in fear" of robbery under D.C. Code § 22-2801 (2012), as the government's evidence established that the victim handed over his wallet after three young people walked by him, turned around and walked back to him, and two of the young people said, "what, what, what"; this evidence did not prove menacing conduct that would engender fear or some threatening act that would lead a reasonable person to believe he was in imminent danger of bodily harm. See also *In re Z.B.*, 131 A.3d 351, 355 (D.C. 2016) where the Court said, "However, it *is* possible to commit a robbery without committing verbal threats—that is, through the use of violence or conduct that puts one in fear." [italics in original]

Because in these examples the victim was not moved or immobilized nor was the broach or pocketbook in her hand or on her arm, the RCC would treat these as theft offenses. It equates these takings directly from the victim's body, with the victim's knowledge, to the taking of the broach or pocketbook from a table next to where the victim is sitting. It ignores that the taking of the broach or pocketbook from the victim's body would put the victim in fear and that it is just as traumatic for the victim, if not more so, then if she was jostled or if the broach or pocketbook was taken from her hand. The defendant's actions and mental states in these hypos are consistent with a taking directly from the victim's hand, or arm, or which causes the victim to move.

OAG recommends that the elements of this offense be amended to make it a robbery anytime the item is so attached to the victim or their clothing as to require actual force to effect its removal or when the victim is put in fear by the taking. The Commentary can make clear that the force has to be more than trivial.

While we agree that third degree robbery should not be broad enough to support a robbery complaint when the victim does not realize that the property was taken,[11] a victim who has had property taken directly from them certainly believes that they have been robbed and, they have been under current law.[12] Taking current law into account, OAG believes that anytime a person steals property directly from a victim that taking should be classified as a robbery. Therefore, OAG recommends that these types of robberies be included in a new RCC fourth degree robbery offense. In recognition that these robberies are not as heinous as those contemplated by first, second, and third degree robberies, OAG recommends that these robberies be classified as a class B misdemeanor which carries a maximum penalty of 180 days of imprisonment.[13]

RCC § 22E-1204. Criminal Threats

OAG recommends that the Commentary add a hypo that would help the reader better understand the parameters of this offense. The hypo should show that this offense includes the scenario where a threat is made to person A that they intend to harm person B, even if that threat is not

[11] For example when someone's pocket was picked or a hand that was surreptitiously slipped into a backpack and property taken.

[12] See page 54 of the First Draft of Report 68, Commentary Subtitle II, Offenses Against Persons where under the heading "Relation to Current District Law," the Report states, "First, the revised robbery offense does not criminalize non-violent pickpocketing or taking or exercising control over property without the use of bodily injury, overpowering physical force, or threats to cause bodily injury or to engage in a sexual act or sexual contact, or by taking property from a person's hands or arms. The current robbery and carjacking statutes criminalize all pickpocketing and other takings of property from the person or from the immediate physical control of another by sudden or stealthy seizure, or snatching, even when the complainant did not know the property was taken (and so was not menaced, let alone injured)," as well as the supportive Court of Appeals decisions found in footnote 38.

[13] Pursuant to First Draft of Report #69 - Cumulative Update to Class Imprisonment Terms and Classification of RCC Offenses, the CCRC is recommending that a third degree robbery be designated as a class 9 felony with a maximum penalty of two years imprisonment.

communicated to person B. As noted in the comment's section to Criminal Jury Instruction 4.130, threats:

> *Beard v. U.S.*, 535 A.2d 1373, 1378 (D.C. 1988), makes clear that the defendant need not intend that the threat be communicated to the victim and that it need not actually be communicated to the victim, so long as someone heard the threat. *See also U.S. v. Baish*, 460 A.2d 38, 42 (D.C. 1983); *Joiner v. U.S.*, 585 A.2d 176 (D.C. 1991).

RCC § 22E-1301. Sexual Assault

The Red-Ink Comparison of the second degree version of this offense states that one way of committing this offense is engaging in a sexual act when the complainant is "Asleep, unconscious, ~~paralyzed~~, or passing in and out of consciousness."[14] [strikeout in original] See RCC § 22E-1301 (b)(2)((B)(1). OAG believed that the term "paralyzed" was originally included to cover, among other scenarios, the following hypo. A woman has a spinal cord injury that prevents her from being able to move any part of her body. She is in a long term nursing facility and her ex-boyfriend comes into her room and has sexual intercourse with her against her will. OAG believes that this behavior should remain covered by second degree sexual assault and, therefore, recommends that the term "paralyzed" be added back in this subparagraph.[15]

In addition, OAG recommends that the rape of a paralyzed victim should also be a first degree sexual assault. That provision reads as follows:

(a) *First degree*. An actor commits first degree sexual assault when ~~that~~ the actor:
  (1) Knowingly engages in a sexual act with the complainant or causes the complainant to engage in or submit to a sexual act;
  (2) In one or more of the following ways:
    (A) By ~~using physical force that~~ causing~~'s~~ bodily injury to the complainant, ~~overcomes,~~ or by using physical force that moves or immobilizes ~~restrains~~ the complainant ~~any person~~;
    (B) By ~~threatening~~ communicating to the complainant, explicitly or implicitly, that the actor will cause:
      (i) The complainant to suffer a bodily injury, confinement or death, ~~kill, kidnap, or cause bodily injury to any person, or to commit a sexual act against any person~~; or
      (ii) A third party to suffer a bodily injury, sexual act, sexual contact, confinement, or death; or

[14] Throughout this memo OAG has included the red-ink changes that appear in the "First Draft of Report 68 – Red Ink Comparison when we felt that their inclusion would aid the reader in understanding the issues OAG has raised.

[15] The term "paralyzed" was also deleted from fourth degree sexual assault. See RCC § 22E-1301 (d)(2)((B)(1). OAG's recommends that the term be re-added to this subparagraph as well.

(C) By administering or causing to be administered to the complainant, without the complainant's effective consent, a drug, intoxicant, or other substance:
  (i) With intent to impair the complainant's ability to express willingness or unwillingness to engage in the sexual act; and
  (ii) In fact, the drug, intoxicant, or other substance renders the complainant:
    (a) Asleep, unconscious, substantially paralyzed, or passing in and out of consciousness;
    (b) Substantially incapable of appraising the nature of the sexual act; or
    (c) Substantially incapable of communicating willingness or unwillingness to engage in the sexual act.

As drafted, a person commits a first degree sexual assault when they administer a drug to impair the victim's ability to express their unwillingness to have sex and where the drug renders the victim "Asleep, unconscious, substantially paralyzed, or passing in and out of consciousness; substantially incapable of appraising the nature of the sexual act; or substantially incapable of communicating willingness or unwillingness to engage in the sexual act." [emphasis added] While OAG agrees that drugging a victim to have sex with them under these circumstances should be a first degree sexual assault, we believe that raping someone who is paralyzed should also be a first degree sexual assault. While having sex with a victim who is drugged so that they are asleep or unable to appraise the nature of the sexual act is reprehensible, under these situations the victim is at least not aware of the rape as it is occurring. When a victim is paralyzed on the other hand, the victim is aware that the rape is taking place and is traumatized to a greater degree. The perpetrator does not need to use physical force or a drug to immobilize the victim because the perpetrator is taking advantage of the victim's preexisting paralysis.[16]

RCC § 22E-1303. Sexual Abuse by Exploitation

As to the class of people to whom this offense applies, both first and second degree sexual abuse by exploitation, state that the actor "is a coach, not including a coach who is a secondary school student, a teacher, counselor, principal, administrator, nurse, or security officer at a secondary school, working as an employee, contract employee, or volunteer …" See paragraphs (a)(2)(A) and (b)(2)(B). As drafted, it is ambiguous as to whether the phrase "not including a coach who is" only modifies the phrase "is a secondary school student" or if it also exempts "a teacher, counselor, principal, administrator, nurse, coach, or security officer at a secondary school, working as an employee, contract employee, or volunteer …"

To clarify that teachers, counselors, etc., do fall withing the purview of this provision, OAG recommends that the punctuation in this subparagraph be modified to read "is a coach, not including a coach who is a secondary school student; a teacher; counselor; principal;

[16] For the reasons stated here, OAG also recommends that the other degrees of sexual assault, that previously contained the term "paralyzed," be similarly amended.

administrator; nurse; or security officer at a secondary school; working as an employee; contract employee; or volunteer …"

RCC § 22E-1307. Nonconsensual Sexual Conduct

Both first and second degree nonconsensual sexual conduct contain the element that the actor act "Reckless as to the fact that the actor lacks the complainant's effective consent." Paragraph (c) contains the exclusions from liability. It states that "An actor does not commit an offense under this section when, in fact, the actor uses deception, unless it is deception as to the nature of the sexual act or sexual contact." [emphasis added] Footnote 6, on page 256 of the Commentary states, in relevant part "In addition, deception as to the nature of the sexual act or sexual contact includes a practice known as "stealthing," generally understood as removing a condom without the consent of the sexual partner. See, e.g., https://www.newsweek.com/what-stealthing-lawmakers-california-and-wisconsin-want-answer-be-rape-61098.[17] In the RCC, "stealthing" is sufficient for nonconsensual sexual conduct, if the other requirements of the offense are met."

OAG agrees that if consent to sexual intercourse is premised on the male partner wearing a condom then the surreptitious removal of the condom vitiates that consent. As noted in one article "Stealthing is considered sexual assault by sexual violence prevention experts because it essentially turns a consensual sexual encounter (protected sex) into a nonconsensual one (unprotected sex). Stealthing is a clear violation of informed consent." [internal quotations omitted][18] The nonconsensual removal of a condom exposes the victim to an unwanted risk of pregnancy. The same argument, however, applies to the situation where a woman tells a man that she is using birth control before the two have sexual intercourse. In this situation, the consent to sexual intercourse is premised on the female partner using birth control and her misrepresentation, likewise, vitiates the male partner's consent. In addition, a woman who intentionally damages a female condom is subjecting the male to the risk of sexually transmitted diseases just as a male would expose the woman by stealthing. To be clear that this provision is not meant to be gender specific, OAG recommends that footnote 6 be amended to include these situations.

RCC § 22E-1309. Civil Provisions on the Duty to Report a Sex Crime

OAG recommends that the language in subparagraph (b)(1)(D) be amended so that it is clear that the exclusion from a sexual assault counselor's duty to report includes sexual contacts as well as sexual assaults as is currently required under the Sexual Assault Victims' Rights Amendment Act of 2019. Sub paragraph (b)(1)(D) states:

[17] OAG would note that it was unable to access the webpage cited. However, we were able to access, what we believe is the relevant article at https://www.newsweek.com/what-stealthing-lawmakers-california-and-wisconsin-want-answer-be-rape-610986. The Commission may want to cite to this source.

[18] See https://www.health.com/condition/sexual-assault/what-is-stealthing

(A) A sexual assault counselor, when the information or basis for the belief is disclosed in a confidential communication, unless the sexual assault counselor is aware of a substantial risk that:
(i) A sexual assault victim is under 13 years of age;
(ii) A perpetrator or alleged perpetrator of the predicate crime in subsection (a) is in a position of trust with or authority over the sexual assault victim; or
(iii)A perpetrator or alleged perpetrator of the predicate crime in subsection (a) is more than 4 years older than the sexual assault victim.

OAG recommends that it be amended to say:

(A) A sexual assault counselor, when the information or basis for the belief is disclosed in a confidential communication, unless the sexual assault counselor is aware of a substantial risk that:
(i) A victim of a sexual assault or sexual contact is under 13 years of age;
(ii) A perpetrator or alleged perpetrator of the predicate crime in subsection (a) is in a position of trust with or authority over the victim of a sexual assault or sexual contact; or
(iii) A perpetrator or alleged perpetrator of the predicate crime in subsection (a) is more than 4 years older than the victim of a sexual assault or sexual contact.

RCC § 22E-1401. Kidnapping

The elements of First Degree Kidnapping is:

(a) An actor commits first degree kidnapping when the actor:
(1) Knowingly and substantially confines or moves the complainant;
(2) Either:
(A) Without the complainant's effective consent; or
(B) By any means, including with acquiescence of the complainant, when the actor is:
(i) Reckless as to the facts that:
(I) The complainant is an incapacitated individual; and
(II) A person with legal authority over the complainant who is acting consistent with that authority has not given effective consent to the confinement or movement; or
(ii) In fact, 18 years of age or older and reckless as to the facts that:
(I) The complainant is under 16 years of age and four years younger than the actor; and
(II) A person with legal authority over the complainant who is acting consistent with that authority has not given effective consent to the confinement or movement; and
(3) With intent to:
(A) Hold the complainant for ransom or reward;
(B) Use the complainant as a shield or hostage;
(C) Facilitate the commission of any felony or flight thereafter;

(D) Inflict serious bodily injury upon the complainant;
(E) Commit a sexual offense defined in Chapter 13 of this Title against the complainant;
(F) Cause any person to believe that the complainant will not be released without suffering serious bodily injury, or a sex offense defined in Chapter 13 of this Title;
(G) Permanently deprive a person with legal authority over the complainant of custody of the complainant; or
(H) Confine or move the complainant for 72 hours or more.

OAG agrees that a person of any age who confines or moves a victim without the victim's effective consent for ransom (or for any of the other reasons listed in subparagraph (a)(3)) or when the victim is an incapacitated should fall within the gamut of first degree kidnapping. However, we see no reason why the additional means of committing first degree kidnapping, found in subparagraph (a)(2)(B)(ii), limits this offense to a person who is 18 years of age or older when the victim is under 16 years of age and four years younger than that person. Consider the following hypos. In the first, the actor is 17 years old. He takes a 15 year old child to his apartment and detains the child. He then sends a ransom note to the child's parent asking for $5,000 for the safe return of the child (or for any of the other reasons listed in subparagraph (a)(3)). In the second, the actor is 15 years old. He takes a 10 year old child to his apartment and detains the child. He also sends a ransom note to the child's parent asking for $5,000 for the safe return of the child. There is no reason why the 17 or 15 year olds in these examples, like an 18 year old, should not be guilty of First Degree Kidnapping. In these examples, the 17 year old and the 15 year old actors are in need of care and rehabilitation. This same analysis and recommendation applies to Second Degree Kidnapping.[19]

OAG recommends that (a)(2)(B)(ii) be deleted and that (a)(2)(B)(i)(I) be redrafted, and renumbered, to say "The complainant is an incapacitated individual or a person under the age of 16."

RCC § 22E-1402. Criminal Restraint

Pursuant to subparagraph (b)(2)(B) it is a defense when the actor "Is a person who moves the complainant solely by persuading the complainant to go to a location open to the general public to engage in a commercial or other legal activity." [emphasis added] This defense contains an internal contradiction. A person who persuades a complainant to go to a location has not moved the complainant. The complainant has moved themselves. No force was involved. The example given in the Commentary actually highlights this point. It states, "For example, a store owner who convinces a 12 year old child unaccompanied by a parent or guardian to enter the store would technically satisfy the elements of criminal restraint under subparagraph (a)(2)(B), by moving the complainant without consent of a person with legal authority over the complainant.

[19] OAG is not making the same recommendation concerning the same limitation found in RCC § 22E-1402 (a)(2)(B) Criminal Restraint. We do not believe that a 15 year old who confines or moves a 10 year old with the acquiescence of the 10 year old, but without the parent's permission, should be guilty of an offense.

This defense bars criminal liability for this conduct."[20] OAG does not agree that the store owner in this example has moved the child and so we disagree with the conclusion that the store owner would have technically satisfy the elements of (a)(2)(B).

The elements of this offense are:

(a) *Offense.* An actor commits criminal restraint when that actor knowingly and substantially confines or moves the complainant:
    (1) Without the complainant's effective consent; or
    (2) By any means, including with acquiescence of the complainant, when the actor is:
        (A) Reckless as to the facts that:
            (i) The complainant is an incapacitated individual; and
            (ii) A person with legal authority over the complainant who is acting consistent with that authority has not given effective consent to the confinement or movement; or
        (B) In fact, 18 years of age or older and reckless as to the facts that:
            (i) The complainant is under 16 years of age and four years younger than the actor; and
            (ii) A person with legal authority over the complainant who is acting consistent with that authority has not given effective consent to the confinement or movement. [emphasis added]

The gravamen of this offense is that the perpetrator confined or moved someone. A storekeeper who talks a 12 year old into coming in a store has neither confined nor moved the child. Therefore, the RCC should be amended to remove this newly proposed defense.

RCC § 22E-1403. Blackmail

For the reasons stated below, OAG recommends that the second of the affirmative defenses contained in paragraph (c) be deleted.

Pursuant to paragraph (a):

An actor commits blackmail when the actor:
    (1) Purposely causes another person to commit or refrain from any act,
    (2) By communicating, explicitly or implicitly, that if the person does not commit or refrain from the act, any person will:
        (A) Take or withhold action as an official, or cause an official to take or withhold action;
        (B) Accuse another person of a crime;
        (C) Expose a secret, publicize an asserted fact, or distribute a photograph, video or audio recording, regardless of the truth or authenticity of the secret, fact, or item, that tends to subject another person to, or perpetuate:

[20] See page 309 of the First Draft of Report 68 – Commentary Subtitle II, Offenses Against Persons.

(i) Hatred, contempt, ridicule, or other significant injury to personal reputation; or
(ii) Significant injury to credit or business reputation;
(D) Significantly impair the reputation of a deceased person;
(E) Notify a federal, state, or local government agency or official of, or publicize, another person's immigration or citizenship status;
(F) Restrict a person's access to a controlled substance that the person owns, or restrict a person's access to prescription medication that the person owns;
(G) Engage in conduct that, in fact, constitutes:
(i) An offense under Subtitle II of this title; or
(ii) A property offense as defined in subtitle III of this title (sic)

There are two affirmative offenses for blackmail. Paragraph (c) states:

(1) It is an affirmative defense to liability under this section committed by means of the conduct specified in subparagraphs (a)(1)(A)-(F) that:

(A) The actor reasonably believes the threatened official action to be justified, or the accusation, secret, or assertion to be true, or that the photograph, video, or audio recording is authentic, and
(B) Engages in the conduct with the purpose of compelling the other person to:
(i) Desist or refrain from criminal or tortious activity or behavior harmful to any person's physical or mental health,
(ii) Act or refrain from acting in a manner reasonably related to the wrong that is the subject of the accusation, assertion, invocation of official action, or photograph, video or audio recording; or
(iii) Refrain from taking any action or responsibility for which the actor believes the other unqualified.

(2) It is an affirmative defense to liability under this section that, in fact, the actor reasonably believes that the complainant gives effective consent to the actor to engage in the conduct constituting the offense.

OAG summits that the affirmative defense contained in subparagraph (c)(2) would never. occur.[21] Either the substance of what the actor communicated to the complainant is true or it is not. If it is not true, then it is incomprehensible that the complainant would give effective

[21] How can a person consent to being coerced by another person? Isn't that a contradiction in terms? The Commentary states "While it may be highly unusual for a person to give effective consent to another to cause them to engage in an act by the specified types of communication, should such effective consent exist it would negate the harm the blackmail offense is intended to address." It does not give any examples, let alone real world examples of when this would occur. See page 131 of the First Draft of Report 68 – Commentary Subtitle II, Offenses Against Persons.

consent to the actor to blackmail him or her using an untrue allegation.[22] If the communication is true, then the other affirmative defense contained in subparagraph (c)(1) would apply. Then even if the actor was acting with the effective consent of the complainant, the actor would have necessarily believed that the accusation, etc., is true. In addition the actor's motivation would have been done for one of the purposes outlined in subparagraph (c)(1)(i) through (iii).

In addition, it is unclear what circumstances would trigger that affirmative defense. How can a person consent to being coerced by another person? Isn't that a contradiction in terms? The Commentary states "While it may be highly unusual for a person to give effective consent to another to cause them to engage in an act by the specified types of communication, should such effective consent exist it would negate the harm the blackmail offense is intended to address."[23]

RCC § 22E-1809. Arranging a Live Sexual Performance of a Minor

This offense, like many of the adjacent offenses, contain an affirmative defense that states:

> (2) It is an affirmative defense to liability under subparagraphs (a)(1)(A), (a)(1)(B), (b)(1)(A), and (b)(1)(B) of this section that, in fact:
>
> (A) The actor is under 18 years of age; and
>
> (B) Either:
>
> (i) The actor is the only person under 18 years of age who is, or who will be, depicted in the live performance; or
>
> (ii) The actor reasonably believes that-every person under 18 years of age who is, or who will be, depicted in the live performance gives effective consent to the actor to engage in the conduct constituting the offense.

OAG agrees with the CCRC that youth who are of similar age should not be prosecuted for engaging in consensual activity. However, the RCC states that children under the age of 12 are developmentally incapacitated such that they should be precluded from prosecution for their violation of any criminal offense. See RCC § 22E-505, Developmental Incapacity Affirmative Defense. There is tension between the proposition that a child may be developmentally incapacitated, yet have the requisite ability to give effective consent. Take the following hypo. Actor A is 17 years of age. Victim 1 is 10 years of age and Victim 2 is 8 years of age. Actor A talks the two victims into performing oral sex in front of an audience. Despite the age and developmental differences between the actor and the victims, the affirmative defense stated above would apply because the actor and both victims are under the age of 18. OAG does not believe that it should. To resolve the tension between the competing principles that youth who are of similar age should not be prosecuted for engaging in consensual activity and that children

[22] For example, when would a complainant consent to blackmail by giving an actor effective consent for the actor to threaten to state a lie to cause the complainant to commit an act by communicating to the complainant that if the complainant does not commit the act the actor will accuse another person of a crime? If the complainant was inclined to do the action requested, they would simply do it and not involve the actor.

[23] See page 131 of the First Draft of Report 68 – Commentary Subtitle II, Offenses Against Persons.

under the age of 12 are developmentally incapacitated, OAG recommends that this affirmative offense be amended to limit it to when there is a four year age difference between the actor and the victim(s), like it does in other RCC offenses that involve sexual activities between people under the age of 18 or 16.[24] For example, see the affirmative defense contained in subparagraph (c)(3) this offense.

RCC § 22E-2106. Unlawful Operation of a Recording Device in a Motion Picture Theater

While OAG generally agrees with the text of this offense, we make one recommendation that we believe will avoid litigation over whether, in one set of scenarios, the actor's actions constitute a completed offense or an attempt. Paragraph (a) states:

> (a) *Offense*. An actor commits unlawful operation of a recording device in a motion picture theater when the actor:
> (1) Knowingly operates a recording device within a motion picture theater;
> (2) Without the effective consent of an owner of the motion picture theater; and
> (3) With the intent to record a motion picture. [emphasis added]

The issue arises when the actor fails to record the entire motion picture. For example, when the actor begins recording the movie after it has started or otherwise records some, but not all, of it. We believe that in these situations, the offense should apply to the actor's behavior. However, because subparagraph (a)(3) refers to "a motion picture" there is an argument, no matter how weak, that to be liable for the completed offense, the actor must have intended to record the entire movie. To address this issue, OAG recommends that subparagraph (a)(3) be amended to state, "With the intent to record a motion picture, or any part of it."

RCC § 22E-2203. Check Fraud

The text of subparagraphs (a)(3) and (b)(3) state that a person has committed either first or second degree check fraud when, the other elements of the offense has been met and the amount of loss to the check holder is, in fact, $5,000 or more, in the case of the first degree, or if it is, in fact, $500 or more, in the case of second degree. What is unclear in this formulation is what is meant by "the amount of loss to the check holder." Take the following examples. A store owner offers to sell an item for $550. The item cost the store owner $450. The actor and another person are interested in purchasing the item. However, the actor acts first to "purchase" it by writing a fraudulent check for $550. Is the "amount of loss to the" store owner the $550 that they would have gotten if the other interested party had acted first or is the amount of loss the $450 dollars which represents the cost of the item to the store owner? Does the outcome change if only the actor is interested in "purchasing" the item at that time – even though the store usually sells the item for $550? To avoid litigation on what is meant by "loss to the check holder," the text of the

[24] For the reasons stated above, OAG suggests that this same recommendation be applied to the adjacent offenses that have similar affirmative defenses. For example, the affirmative defense found in RCC § 22E-1810(c)(2)(B)(ii) pertaining to Attending or Viewing a Live Sexual Performance of a Minor.

statute needs to be clear on these issues. OAG does not believe that the Commentary addresses these scenarios.

RCC § 22E-2601. Trespass

Paragraph (d)(1) establishes an exclusion from liability for trespass. It states, "An actor does not commit an offense under this section by violating a District of Columbia Housing Authority bar notice, unless the bar notice is lawfully issued pursuant to the District of Columbia Municipal Regulations on an objectively reasonable basis." The Commentary, on page 151, explains this paragraph. It states:

> Paragraph (d)(1) codifies the proof requirements in cases alleging unlawful entry onto the grounds of public housing. Where the government seeks to prove unlawful entry premised on a violation of a District of Columbia Housing Authority ("DCHA") barring notice, it must prove that the barring notice was issued for a reason described in DCHA regulations. Additionally, the government must offer evidence that the DCHA official who issued the barring notice had an objectively reasonable basis for believing that the criteria identified in the relevant regulation were satisfied. Even if sufficient cause for barring in fact exists, the issuance of a DCHA barring notice without objectively reasonable cause will render the notice invalid. [footnotes omitted]

Both the statutory text and the Commentary seem to limit the issuance of the barring notice to DCHA officials. However, because the Commentary does not flag this apparent limitation as a change to District law, it is unclear if this was intentional. OAG would note that under current law, other individuals have authority to issue barring notices at these properties. See 14 DCMR 9600.8 which states:

> Bar Notices shall only be issued by the following persons:
>
> (a) Members of the DCHA Office of Public Safety including sworn officers and special police officers;
> (b) Members of the Metropolitan Police Department;
> (c) Members of cooperative law enforcement task forces as may be authorized by the Chief of DCHA Office of Public Safety; and
> (d) Private security providers contracted by DCHA or DCHA's agent. 14 DCMR 9600.8.

To clarify that no change in law was intended, OAG recommends that paragraph (d)(1) be amended to state "An actor does not commit an offense under this section by violating a barring notice issued for District of Columbia Housing Authority properties, unless the bar notice is lawfully issued pursuant to the District of Columbia Municipal Regulations on an objectively reasonable basis." And, we recommend that the Commentary be similarly redrafted to say:

> Paragraph (d)(1) codifies the proof requirements in cases alleging unlawful entry onto the grounds of public housing. Where the government seeks to prove

> unlawful entry premised on a violation of a barring notice for District of Columbia Housing Authority ("DCHA") property, it must prove that the barring notice was issued for a reason described in DCHA regulations. Additionally, the government must offer evidence that the individual who issued the barring notice had an objectively reasonable basis for believing that the criteria identified in the relevant regulation were satisfied. Even if sufficient cause for barring in fact exists, the issuance of the barring notice without objectively reasonable cause will render the notice invalid. [footnotes omitted][25]

RCC § 22E-2701. Burglary

Both first and second degree burglary contain the element that an actor enter the property "Reckless as to the fact that a person who is not a participant in the burglary is inside and directly perceives the actor or is entering with the actor." [emphasis added] See paragraph (a)(1) and sub-subparagraph (b)(1)(B)(ii). The Commentary, on page 162, explains "Paragraph (a)(1) and sub-subparagraph (b)(1)(B)(ii) further require that a non-participant directly perceive the actor, by sight or sound or touch.[26] Entering a building undetected is punished as third degree burglary but not as second degree." [footnotes omitted]. OAG would note that pursuant to First Draft of Report 69, Cumulative Update to Class Imprisonment Terms and Classification of RCC Offenses, the penalty for third degree burglary is 1 year.

Footnote 23 of the Commentary explains the text above. It states, "Consider, for example, a person who enters the lobby and mailroom of a large building, undetected by an employee on the fifth floor." While OAG does not disagree with the outcome highlighted by this footnote, we do disagree with the requirement that in other situations an actor is only guilty of third degree burglary when they are inside an occupied home, but are not directly perceived by the victim. Take the following two examples. In the first, the actor breaks into a woman's home at 3:00 am. He goes into her bedroom where she is sleeping. He searches her nightstand, taking her jewelry, and steals other things from her dresser and closet. He also ransacks the rest of her apartment stealing other items. When the victim wakes up she sees the condition of her nightstand and the rest of her bedroom and then she sees the condition the actor left the rest of her apartment. The second example is the same as the first, but instead of the victim being asleep at 3:00 am, she is in her bathtub soaking at 8:00 pm while her premises are being ransacked.

In situations similar to the examples above, the victims of these offenses have been extremely traumatized by the burglary. Even though the victims were not sexually assaulted, the perpetrator's proximity to them while they were vulnerable have exasperated the trauma that they experienced. One can never know what could have happened to them had they perceived the burglar and the burglar reacted to that perception. OAG does not believe that such intrusions should be relegated to a third degree burglary with a penalty of 1 year in prison. To distinguish OAG's example from that in footnote 23, OAG recommends that first and second degree

[25] There may be other places in the Commentary that has to be amended to be consistent with this clarification.

[26] Given the sensory limitations of some District residents, it is unclear why the sense of smell is excluded from this list. OAG recommends that it be added.

burglary be amended to make an exception to the requirement that the victim directly perceive the perpetrator when the burglary is in a dwelling.[27]

RCC § 22E-3401. Escape from a Correctional Facility or Officer

The elements of second degree escape from a correctional facility or officer are contained in subparagraph (b). That subparagraph states:

> (b) An actor commits second degree escape from an institution or officer when that actor:
> (1) In fact, is in the lawful custody of a law enforcement officer <u>of the District of Columbia or of the United States;</u> and
> (2) Knowingly, without the effective consent of the law enforcement officer, leaves custody. [emphasis added]

Paragraph (f) states that the phrase "law enforcement officer" has the meaning specified in RCC § 22E-701. This provision states:

> "Law enforcement officer" means:
> (A) An officer or member of the Metropolitan Police Department of the District of Columbia, or of any other police force operating in the District of Columbia;
> (B) An investigative officer or agent of the United States;
> (C) An on-duty, civilian employee of the Metropolitan Police Department;
> (D) An on-duty, licensed special police officer;
> (E) An on-duty, licensed campus police officer;
> (F) An on-duty employee of the Department of Corrections or Department of Youth Rehabilitation Services; or
> (G) An on-duty employee of the Court Services and Offender Supervision Agency, Pretrial Services Agency, or Family Court Social Services Division.

Notwithstanding the scope of the definition of a law enforcement officer stated above, RCC § 22E-3401 (b), by its terms, would limit this offense to a "law enforcement officer <u>of the District of Columbia or of the United States</u>." [emphasis added] Escaping from an on-duty, licensed special police officer or campus police officer would not be covered. OAG believes that this limitation may have been inadvertent as the Commentary, on page 13, states, "The term "law enforcement officer" is defined in RCC § 22E-701 and includes persons with limited arrest powers, such as special police officers and community supervision officers acting in their official capacity, but excludes private actors who are performing a citizen's arrest." To comport the text of paragraph (b) with the explanation in the Commentary, OAG recommends that the phrase "of the District of Columbia or of the United States" be deleted.

[27] OAG's recommendation would move the RCC closer to the current burglary offense. The current offence distinguishes between occupied residences on the one hand and unoccupied residences and buildings on the other. See D.C. Code § 22-801.

RCC § 22E-4105. Possession of a Firearm by an Unauthorized Person

Paragraph (c) contains the exclusions from liability for this offense. It states, "A person does not commit an offense under this section for possession of a firearm within the first 24 hours of the prior conviction or service of the protection order." On page 33 of the Commentary it states, "…the revised statute provides a 24-hour grace period between the time the person is convicted or served with a protection order. The current D.C. Code § 22-4503(a)(5) provides no exception for having a reasonable opportunity to safely dispose of a firearm after a protection order goes into effect. In contrast, the revised statute ensures that a law-abiding gun owner does not commit an offense the moment their status changes to a someone who is now unauthorized to possess a firearm. The person may retrieve and safely transport the firearm and relinquish ownership."

OAG agrees that a person who is subject to this offense should have a reasonable time to dispossess themselves of their firearm and relinquish ownership. However, we submit that the risk that some of these individuals pose by possessing a firearm for 24 hours is too great and a judge who presided over the sentencing for the prior conviction or at the hearing for the protection order should be able to limit the time that the defendant has to dispose of the firearm as is necessary for the protection of a person or the community based upon the individual facts of each case. Take for example when a judicial officer finds that there is good cause to believe the actor has threatened to shoot the petitioner and the actor is known to have a gun, a bad temper, and is angry that the petitioner obtained the protection order. In that situation, the law should not arbitrarily give that actor 24 hours to dispose of their gun. The risk to the petitioner is too great. To account for special circumstances where the risk to the safety of the community, generally, or to a petitioner, in particular, warrants, a judicial officer should be able limit the timeframe for the actor to turn in their gun and the actor's defiance of this order should expose the actor to the offense of possession of a firearm by an unauthorized person. Therefore OAG recommends that paragraph (c) be amended to say, "A person does not commit an offense under this section for possession of a firearm within the first 24 hours of the prior conviction or service of the protection order, unless the judicial officer sentencing the actor or issuing the protection order specifically orders a shorter period of time for the actor to retrieve and safely transport the firearm or relinquish ownership."

RCC § 22E-4117. Civil Provisions for Taking and Destruction of Dangerous Articles

This provision declares a "dangerous article," as defined therein, to be a nuisance. It authorizes designated individuals to seize a dangerous article and then establishes procedures for its return, if authorized by the provision; its destruction; or for the Mayor to otherwise dispose of it.

Subparagraph (g)(2) defines a dangerous article as a firearm, restricted explosive, firearm silencer, bump stock, or large capacity ammunition feeding device. Subparagraph (g)(1) refers the reader to RCC § 22E-701 for the definition of a firearm. RCC § 22E-701 states, in relevant part, that a "firearm" "has the meaning specified in D.C. Code § 7-2501.01." However, D.C. Code § 7-2501.01 excludes an antique firearm from the definition of a firearm. While OAG agrees that for the purposes of Title 7 an antique firearm should be excluded from the definition of a firearm, because the use of an antique firearm can still be lethal, OAG recommends that

when they are unlawfully owned, possessed, or carried that they too should be declared to be a nuisance, subject to the procedures for their return, destruction, or disposition from the Mayor.

RCC § 22E-4119. Limitation on Convictions for Multiple Related Weapon Offenses

OAG disagrees with three aspects of this provision. RCC § 22E-4119 states:

(a) The court shall not enter a judgment of conviction for more than one of the following District offenses based on the same act or course of conduct:
  (1) Possession of an Unregistered Firearm, Destructive Device, or Ammunition under RCC § 7-2502.01A;
  (2) Possession of a Stun Gun under RCC § 7-2502.15;
  (3) Carrying an Air or Spring Gun under RCC § 7-2502.17;
  (4) Carrying a Dangerous Weapon under RCC § 22E-4102;
  (5) Possession of a Dangerous Weapon with Intent to Commit Crime under RCC § 22E-4103; and
  (6) Possession of a Dangerous Weapon During a Crime under RCC § 22E-4104.

(b) The court shall not enter a judgment of conviction for more than one of the following District offenses based on the same act or course of conduct:
  (1) Possession of a Dangerous Weapon with Intent to Commit Crime under RCC § 22E-4103;
  (2) Possession of a Dangerous Weapon During a Crime under RCC § 22E-4104; and
  (3) Any offense under Subtitle II of this title that includes as an element, of any gradation, that the person displayed or used a dangerous weapon.

(c) Where subsection (a) or (b) of this section prohibits multiple convictions, the court shall enter a judgment of conviction in accordance with the procedures specified in [RCC § 22E-22E-214 (c)-(d)].[28]

(d) *Definitions*. The term "act" has the meaning specified in RCC § 22E-701.

RCC § 22E-22E-214 (c) and (d) state:

(c) *Rule of priority.* When 2 or more convictions for different offenses arising from the same course of conduct merge, the conviction that remains shall be the conviction for:
  (1) The offense with the highest statutory maximum among the offenses in question; or
  (2) If the offenses have the same statutory maximum, any offense that the court deems appropriate.

[28] The reference in paragraph (c), in Report 68, contains a typo and actually says RCC § 22E-212(d)-(e). However, RCC § 22E-212, is entitled "Exclusions from Liability for Conduct of Another Person." OAG is substituting RCC § 22E-22E-214 (c)-(d) for this reference after consulting with the Commission.

(d) *Final judgment of liability.* A person may be found guilty of 2 or more offenses that merge under this section; however, no person may be subject to a conviction for more than one of those offenses after:

(1) The time for appeal has expired; or

(2) The judgment appealed from has been decided.

First, RCC § 22E-4119 (a) and (b) prohibit a court from entering a judgment of conviction for more than one of the specified weapons offenses. It is unclear how this will work in practice. A hypo may help explain the issue. The trier of fact finds the actor guilty of carrying a dangerous weapon in violation of RCC § 22E-4102. They also find the actor guilty of possession of an unregistered firearm, in violation of RCC § 7-2502.01A. Pursuant to RCC § 22E-4119 (a), the court cannot enter a judgment of conviction for both. So, pursuant to RCC § 22E-22E-214 (c) the court will only enter a conviction for carrying a dangerous weapon[29]. If initially the court only enters a single conviction for carrying a dangerous weapon, then the trier of fact's finding the defendant was guilty of unregistered firearm would not be reviewed by the Court of Appeals. This makes RCC § 22E-22E-214 (d)'s merger provisions superfluous. To fix this issue, OAG has two recommendations. First, the text of RCC § 22E-4119 (a) and (b) should be amended to state that the trier of fact shall initially enter a judgment for more than one of the listed offenses based on the same act or course of conduct, however, pursuant to RCC § 22E-22E-214 (c) and (d) only the conviction for the most serious offense will remain after the time for appeal has run or an appeal has been decided. Second, to ensure that a defendant does not serve additional time pending an appeal, or for the time to appeal to have expired, OAG also recommends that any sentences issued pursuant to this paragraph run concurrently.

Second, it is unclear whether under this provision a person can have multiple convictions for carrying more than one unregistered firearm. OAG states this because the Commentary, on page 72, incorrectly states, "Under current District case law, multiple convictions for a possession of an unregistered firearm merge ..." [footnotes omitted] while in footnote 11, it states, "Under current District law, there are different units of prosecution for possessing than for carrying multiple weapons without permission. *Hammond v. United States*, 77 A.3d 964, 968 (D.C. 2013) (the unit of prosecution for possessing an unregistered firearm is each weapon)." [emphasis added] So, under District case law, multiple convictions for possession of unregistered firearms do not merge. As the Court of Appeals stated in *Hammond*, "Since the UF statute is not ambiguous, the rule of lenity does not apply and we affirm appellant's conviction for two counts of possession of an unregistered firearm. *See Murray v. United States*, 358 A.2d 314, 321 (D.C. 1976) (holding that the rule of lenity did not apply where "the language and logic of the statute reflect the legislature's intent" as to the unit of prosecution)."

Limiting convictions for a person who has multiple unregistered firearms to a single conviction,[30] would be disproportionate. It would mean that a person who was found guilty of possessing 5 unregistered firearms would be subject to the same penalty as a person who was

[29] Assuming that the penalty for that offense is ultimately greater that the other offense upon passage of this legislation.

[30] If such a limitation is the Commission's intent.

found guilty of possessing one unregistered firearm. This provision should be redrafted to make it clear that the unit of prosecution and conviction for possessing an unregistered firearm remains each weapon.

Finally, OAG disagrees with the inclusion of unregistered firearm with the other offenses listed in RCC § 22E-4119. The social interests for this offense is not the same as the interests in the other offenses. The District has a legitimate interest in ensuring that all legal firearms are registered. Unsafe firearms should not be registerable. This is a separate interest from how a registered or unregistered firearm or the other weapons are used or whether the actor is licensed to carry the weapon. For example, the limitation on convictions apply to carrying a dangerous weapon, under RCC § 22E-4102, and possession of an unregistered firearm, under RCC § 7-2502.01A. One way to commit the offense of carrying a dangerous weapon includes the element that the person is carrying a pistol without a license. See RCC § 22E-4102 (a)(1)(B) and (b)(1)(B). To understand the difference, OAG submits that as to how licensing is concerned, carrying a pistol without a licensee is like driving a car with a license. Whereas, possessing an unregistered firearm, is comparable, as to the registration requirement, to driving an unregistered car. No one would argue that a person who is caught driving without a license should not also be convicted of driving an unregistered vehicle. Similarly, a person who is guilty of carrying a pistol without a license should, if the firearm is unregistered, also be able to be convicted for that offense; as should a person who does not have a license to carry a registered firearm. Because the interests to society is different, RCC § 22E-4119 should be amended to permit the multiple convictions for these offenses.

RCC § 22E-4201. Disorderly Conduct[31]

Paragraph (a)(1)(A) of this offense, like the introductory language to the current offense under D.C. Code § 22-1321, includes the requirement that the offense occur in a location that is open to the general public. In footnote 4 of the Commentary, on page 77, it states as to the RCC offense, "For example, in a Metro train station, a location outside the fare gates normally would be open to the general public during business hours, but a location inside the fare gates would not be open to the general public. The current statute, D.C. Code § 22-1321 could not have interpreted the phrase "open to the general public" in the way that the Commission appears to, because after that lead in language, the current law makes it an offense to "engage in loud, threatening or abusive language, or disruptive conduct, which reasonably impedes, disrupts, or disturbs the lawful use of a public conveyance…" People on public conveyances, e.g. a METRO train or bus, paid a fare to get through the gate or onto a bus.

[31] OAG believes that subparagraphs (a)(2)(A) through (C) have a typo that was caused by the striking of some of the language. For example, subparagraph (a)(2)(A) now states, "Recklessly, by conduct other than speech, causes any person present to reasonably believe that they are likely to suffer immediate criminal ~~harm involving~~ bodily injury, taking of property, or damage to property." OAG believes that the word "criminal," preceding the stricken language should also have been stricken. The word "criminal" is not needed in that, or the other subparagraphs. Similarly, OAG recommends that the term "criminal" be deleted from the rioting statute found in RCC § 22E-4301(a)(2).

The RCC language implies that while a person may be guilty of disorderly conduct when they are outside the fare gates, for example by requesting someone present to cause someone else immediate bodily injury or knowingly continuing to fight after receiving a law enforcement officer's order to stop,[32] this same behavior would not be disorderly conduct even though inside the METRO station the victim may actually be in more danger because of their proximity to the electrified train tracks, the possible fall from a lengthy escalator or from the middle level of the train station to the track level. Notwithstanding the fare requirements, most lay people think of the METRO station as open to the public. Similarly, the offense of disorderly conduct should apply to behavior that occurs on METRO trains and buses. People have the expectation that they can ride METRO trains and buses unmolested. METRO should be able to intervene in activities on their trains and buses before their passengers are actually hurt. Therefore, OAG recommends that paragraph (a)(1), which now states the offense only occurs when the actor:

(1) In fact, is in a location that is:
    (A) Open to the general public at the time of the offense; or
    (B) A communal area of multi-unit housing;

be amended to say:

(1) In fact, is in a location that is:
    (A) Open to the general public at the time of the offense;
    (B) Inside a METRO station, train, or bus; or
    (C) A communal area of multi-unit housing;

In addition, OAG is concerned about behavior on METRO trains and buses that prevent its passengers from peaceably enjoying their travel, notwithstanding that the behavior does not rise to the level of potential harm required by paragraphs (a)(2) of this offense. For example, OAG has seen cases where youth hang from bars on buses and trains preventing passengers from getting to their seats or exiting at their stop. Therefore, OAG recommends that this offense, or the offense of public nuisance, in RCC § 22E-4202, add back some of the language, mentioned above from the current law, so that it continues to be an offense to engage in disruptive conduct, which reasonably impedes or disrupts the lawful use of a public conveyance…"[33]

RCC § 22E-4203. Blocking a Public Way

This offense, like D.C. Code § 22-1307 requires that the person continues or resumes the blocking after receiving a law enforcement officer's order that, in fact, is lawful, to stop. At the hearings on D.C. Code § 22-1307 the issue came up as to whether repeated warning are necessary when the person is asked to stop blocking a location and then leaves, but keeps coming

[32] See RCC § 22E-4201 (a)(2) (B) and (D).
[33] OAG's recommendation does not include the term "disturbs" as we want to make clear that this offense should be reserved more than mere disturbance. In addition, if the CCRC adopts OAG's proposal to amend paragraph (a)(1) to include Metro trains and buses, then there is no reason for this paragraph to include "loud, threatening, or abusive" conduct as that behavior would be appropriately covered by the offenses proposed in paragraphs (a)(2).

back and blocking the location. To address this issue, the Council added to the legislative history the following:

> It is the Committee's intent that a person can be arrested if he or she reappears in the same place after warning, even if some time later- e.g., if the officer gives the warning, remains present, the person stops incommoding, but then the person resumes incommoding in the officer's presence. If a homeless person, as another example, is asked by the same officer to move day after day from blocking a store entrance, and then the officer says something to the effect that "I've told you to move every day, and if I come back here tomorrow and you are blocking this doorway again you will be arrested," the Committee expects that the person could be arrested without another warning.[34]

OAG recommends including this reference in the Commentary to forestall any arguments concerning whether repeated warnings are necessary prior to making an arrest for this offense.

Unlike the D.C. Code 22-1307, this provision does not make it an offense to block the entrance or exit of a non-government building.[35] The Commentary, on page 95, states:

> Second, the revised statute applies only to land or buildings owned by a government, government agency, or government-owned corporation. The current crowding, obstructing, or incommoding statute is unclear as to whether the streets, sidewalks, etc., or entrances to buildings covered by the statute must be on publicly owned property. However, while noting that it would be possible to construe the statute as covering only public locations where an unlawful entry charge could not be brought and recognizing the absence of any legislative history, the DCCA has upheld a conviction for blocking an area "inside a private inclosure on a private driveway leading to the door of a private building." In contrast, the RCC blocking a public way statute excludes conduct on or in all privately owned land and buildings. Unwanted entries onto private property remain separately criminalized as trespass. The revised statute's phrase "owned by a government, government agency, or government-owned corporation" makes clear that land or buildings owned by the Washington Metropolitan Area Transit Authority, Amtrak, and similar locations are within the scope of the revised statute. This change clarifies and reduces unnecessary overlap between revised offenses. [footnotes omitted] [emphasis added]

The Commentary quoted above misses one common scenario that the Council recognized in the legislative history noted above. The following hypo demonstrates this. A person stands on the sidewalk in front of a CVS drug store blocking people from entering and exiting the store.

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[34] See the Section-by-Section analysis regarding Section 2(a) contained in Report on Bill 18-425, the Disorderly Conduct Amendment Act of2010.

[35] D.C. Code 22-1307 (a) states, in relevant part, "It is unlawful for a person, alone or in concert with others [] [t]o crowd, obstruct, or incommode [] the entrance of any public or private building or enclosure." [emphasis added]

Because the CVS is not located in a government building, this offense does not apply. However, because the person is standing on the sidewalk, the offense of trespass does not apply. The person is not committing "Unwanted entries onto private property." To address the harm to store owners and others, OAG recommends that paragraph (a)(2) be amended to include, as the current law does, the blocking of entrances and exits to private property.

RCC § 22E-4206. Indecent Exposure

Paragraph (c)(1) states as one of the exclusions from liability that "A person does not commit an offense under this section when, in fact, that person is under 12 years of age." In light of Developmental Incapacity Affirmative Defense, found in RCC § 22E-505, OAG does not believe that this exclusion is necessary. RCC § 22E-505 (a) states, in relevant part, "It is a defense that, in fact, the actor [i]s under 12 years of age." RCC § 22E-505 relates to all criminal conduct.

RCC § 7-2502.15. Possession of a Stun Gun

Paragraph (e)(2) states, "*Administrative Disposition.* The Attorney General for the District of Columbia may, in its discretion, offer an administrative disposition under D.C. Code § 5-335.01 et seq. for a violation of this section." D.C. Code § 5-335.01 is titled "Enforcement of the post-and-forfeit procedure."

OAG objects to the inclusion of paragraph (e)(2). D.C. Code § 5-335.01 authorizes the post-and-forfeit procedure to ANY offense that meets the eligibility criteria established by OAG. See D.C. Code § 5-335.01 (c)(1). The inclusion of the authorization in paragraph (e)(2) is at best redundant to OAG's authority, or at worst, the failure of other offenses to contain this reference could be viewed as a limitation on OAG's authority to grant post-and-forfeits as a way of resolving its other offenses.[36]

RCC § 7-2509.06A. Carrying a Pistol in an Unlawful Manner

Subparagraph (4)(A) states that for one way of committing the offense, the actor must possess:

[36]OAG acknowledges that Footnote 7, on page 12 of the Commentary states, "Although diversion would be permissible without this statutory language, codifying the Council's intent to afford a noncriminal negotiated resolution to many (or most) people charged with this offense provides better notice to the public and criminal justice system actors." First, the offer of post-and-forfeits are not "negotiated." If the person qualifies they are offered this way of resolving the case short of being prosecuted. They can either accept or not accept the offer. In addition, applying the logic of the statement, the D.C. Code should be amended to include that statement to the over 300 non-traffic offenses and approximately 50 traffic offenses for which OAG has authorized the post-and-forfeit procedure. The statement ignores that OAG may place limits on the offering of post-and-forfeits, including the number of times that a person may avail themselves of this option (e.g. a limitation on the number of times a vendor can use the post-and-forfeit option to resolve the charge of vending without a license such that forfeiting collateral does not become the cost of doing business). In addition OAG is concerned that the inclusion of this language may inadvertently make people think that they will be able to use this option.

ammunition that is conveniently accessible and within reach and is either:
(i) More than is required to fully load the pistol twice; or
(ii) More than 20 rounds;

When reviewing this provision, OAG debated whether the requirement applied to the lesser or greater number of rounds listed. In reviewing the Commentary, on page 27, OAG saw the following statement. "A person carries a pistol unlawfully if they are outside their home or business and have conveniently accessible and within reach more ammunition than will fully load the pistol twice or if they have more than 20 rounds of ammunition, whichever is least." [footnotes omitted] To ensure that the rule of lenity does not apply when the court is interpreting the actual text of paragraph (4)(A), OAG recommends that the phrase "whichever is least" be added to subparagraph (4)(A).

RCC § 16-1022. Parental Kidnapping Criminal Offense

Paragraph (e) contains exclusions from liability for this offense. It includes when the act constituting the offense is taken by a parent fleeing from imminent physical harm to the parent. See subparagraph (e)(1). OAG notes that there is no reasonableness standard attached to the parent's belief that they are fleeing from imminent harm.[37] A parent who unreasonably feels that they are fleeing from imminent physical harm should not be able to avail themselves of this exclusion when they take a child from the child's lawful custodian. To avoid litigation over this issue, OAG recommends that subparagraph (e)(1) include a reasonableness standard.

II. OAG's comments concerning the CCRC's responses to previous comments, as reflected in Appendix D2, CCRC's Disposition of Advisory Group Comments & Other Draft Documents.

RCC § 22E-204. Causation Requirement

The text of RCC § 22E-204 is as follows:

(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) When the conduct of 2 or more persons contributes to a result, the conduct of each alone would have been sufficient to produce that result.
(c) *"Legal cause" defined.* A person's conduct is the legal cause of a result if:
(1) The result is reasonably foreseeable in its manner of occurrence; and
(2) When the result depends on another person's volitional conduct, the actor is justly held responsible for the result.
(d) *Definitions*.
(1) "Result element" has the meaning specified in RCC § 22E-201(d)(2).

[37] The Commentary does not address this issue.

On page 2, comment 2 the CCRC responded as follows:

> *OAG, App. C at 556-557, recommends that if RCC § 22E-204 retains paragraph (c)(2), that the term "volitional conduct" be defined in statute, and that the phrase "justly held responsible for the result" be amended to "articulate a discernible standard." In its written comments OAG did not provide any recommended alternate language.*
> The RCC does not incorporate this recommendation at this time. With respect to the term "volitional conduct," the commentary to RCC § 22E-204 states that paragraph (c)(2) relates to the "free, deliberate, and informed conduct of a third party or the victim." The term "volitional conduct" and the accompanying commentary is sufficiently clear to guide fact finders. With respect to the phrase "justly held responsible for the result," the commentary notes that ultimately whether a person may be held liable for the volitional conduct of another is a normative judgment. As discussed above, an objective standard premised solely on reasonable foreseeability may produce unjust results. The commentary provides several factors to guide fact finders in determining whether an actor may be "justly held liable" for volitional conduct of another. Although paragraph (c)(2) does not provide a clear bright line rule, it does define the basic principle of legal causation when there is intervening volitional conduct: the actor should only be held legally responsible when it is *just* to do so, given the surrounding facts of a given case. Although the RCC does not incorporate this recommendation at this time, CCRC staff will continue to evaluate principles of legal causation and will consider recommending updated language at a later date. The CCRC would welcome Advisory Group members' further comments on possible statutory language accounts for factors besides reasonable foreseeability and provides more guidance to factfinders.

As noted above, OAG expressed concerns about both the phrase "volitional conduct" and "justly held responsible." While the reply addresses the first concern, it leaves the second one unanswered. In fact, OAG believes that it underscores our concern by noting that "justly" is a normative inquiry. We do not see what discernible principle guides that inquiry, and since this is a determinant of whether someone can be held criminally responsible for something, this is deeply problematic.

RCC § 22E-403. Defense of Self or Another Person
On page 13, comment 2, the CCRC stated:

> *OAG, App. C at 612, recommends revising the statutory text or commentary to clarify "what it means to 'reasonably believe' something in the* heat of passion*."*
>
> - The RCC incorporates this recommendation by revising the commentary to state, "It may be reasonable for person acting in the heat of passion to believe a greater degree of force is necessary than would seem necessary to a calm mind." This change clarifies the revised commentary.

While OAG appreciates the CCRC amending the commentary as noted above, we do not believe that this response is sufficient. The defining characteristic of acting in the heat of passion is that one is not acting reasonably.

RCC § 22E-501. Duress

On page 20, comment 2, the CCRC stated:

> *OAG, App. C at 614, recommends that the commentary on paragraph (b)(1) of the defense describe the contours of the phrase "brings about" and give examples of situations that fall within and without that requirement.*
>
> > The RCC partially incorporates this recommendation by adding description in the commentary on the phrase "recklessly brings about the situation requiring a choice of harms." Specifically, the commentary now includes the statement that, "The term 'brings about' requires that the actor caused the situation requiring the defense. The actor's conduct must have been a but-for cause of the situation, and the situation must have been reasonably foreseeable. An actor can bring about the situation either by instigating others, or by placing him or herself in circumstances in which others pose a risk of harm." Also, the commentary already states: "For example, if a defendant agrees to engage in a highly dangerous criminal endeavor, and a co-conspirator then threatens the defendant to commit an additional crime in furtherance of the conspiracy, the duress defense may not be available, if the defendant was aware of a substantial risk that a co-conspirator would compel him to commit an additional crime." This change clarifies the RCC commentary. [footnotes omitted]

OAG believes that the addition to the commentary, noted above, does aid the reader to understand what is meant by the offense language. However, based on the CCRC's reasoning, OAG wonders why the RCC does not simply say in the text of the defense that the actor "causes the situation," if "causes" is what the CCRC means by "brings about."

RCC § 22E-701. Generally Applicable Definitions

On page 46, comment 1, the CCRC stated:

> *CCRC recommends replacing the phrase "District crime" with the phrase "current District offense." The term includes any crime committed against the District of Columbia under laws predating the RCC that would necessarily prove the elements of a corresponding RCC offense.*

OAG believes that the phrase "current District offense" invites the question: current as of when? Does this mean current as of when the RCC was enacted, when the offense took place, when the person was charged, or when the trial took place. OAG recommends that this ambiguity be resolved by clarifying that the proper reference point is when the offense took place.

On page 46, comment 2, the CCRC stated:

> *The CCRC recommends codifying a new subparagraph (C) in the definition of "consent": that consent "Has not been withdrawn, explicitly or implicitly, by a*

subsequent word or act." This change makes clear that consent, once given, can be changed.

While OAG agrees with the addition of a new subparagraph (C), we submit that the phrase "by a subsequent word or act" is superfluous. After all, if the consent was withdrawn before the offense, there would be no issue of consent. OAG recommends that the new subparagraph (C) be amended to read that consent "Has not been withdrawn, explicitly or implicitly."

On page 59, comment 9, the CCRC stated:

> *The CCRC recommends replacing "contractor" with "contract employee" in subsection (F) of the revised definition of "position of trust with or authority over." The RCC incorporated "contractor" in the previous draft based on a written comment from the Advisory Group. However, "contract employee" appears more accurate because it refers to the individual hired on a contract basis as opposed to the individual that does that the hiring. The current D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes include a "contract employee, as does the RCC sexual abuse by exploitation statute (RCC § 22E-1303).* [footnote omitted]

The CCRC quote above contains a footnote which states, "See, e.g., D.C. Code § 22-3013 (first degree sexual abuse of a ward, patient, client, or prisoner statute referring to "[a]ny member, employee, contract employee, consultant, or volunteer at a hospital, treatment facility, detention or correctional facility, group home, or other institution . . . ."). [emphasis added]. Despite the fact that the change is consistent with D.C. Code § 22-3013, the change from "contractor" to "contract employee" is not correct. It blurs the distinction between a contractor and an employee. And the suggestion that the word "contractor" could refer to the one doing the contracting rather than the person whose services are contracted is incorrect. A contractor is "a person or company that undertakes a contract to provide materials or labor to perform a service or do a job."[38]

RCC § 22E-1202. Assault

On page 75, comment 6, the CCRC stated:

> *The CCRC recommends codifying an exclusion from liability in what is now subsection (e): "An actor does not commit an offense under this section when, in fact, the actor's conduct is specifically permitted by a District statute or regulation." This exclusion resolves any apparent conflict within District laws. For example, Title 22, Health, of the current D.C. Municipal Regulations, has regulations that specifically refer to immunity from assault liability that clearly will satisfy this exclusion from liability.* [footnotes omitted] [emphasis added]

[38] See https://www.bing.com/search?q=contractor+defined&form=PRLNC8&src=IE11TR&pc=LJSE

While OAG does not oppose codifying an exclusion from liability when District law specifically permits the actor's actions, the new language should say simply "District statute," not "District statute or regulation." An agency cannot, by rule, carve out an exemption to a criminal statute.[39]

RCC § 22E-1301. Sexual Assault

On pages 90 and 91 , comment 15, the CCRC stated:

> *The CCRC recommends deleting what was previously paragraph (e)(3) from the effective consent affirmative defense: "The actor is not at least 4 years older than a complainant who is under 16 years of age." The current D.C. Code consent defense to the general sexual abuse statutes does not have such an age requirement, although the DCCA has held that the defense is not available when the defendant is an adult at least four years older than a complainant under 16 years of age. However, it is unclear if the DCCA holding is still good law, and by codifying this requirement, the previous version of the RCC effective consent defense conflated consent to the use of force with consent to sexual activity. Striking the age requirement allows an effective consent affirmative defense to the use of force when the complainant is under 16 years of age and the actor is at least four years older. If the defense is successful, there is no liability for forceful sexual assault, but there would still be liability for RCC sexual abuse of a minor, which does not require force, and relies on the ages and relationship between the parties to impose liability. For example, if a 20 year old actor has sex with a 15 year old complainant and the complainant gives effective consent to being tied up during sex, there is no liability for sexual assault, but there would be liability for second degree sexual abuse of a minor. In practice, the definition of "consent" in RCC § 22E-701 may preclude a complainant sufficiently under the age of 16 years from giving consent to the use of force by an actor that is at least four years older because the definition excludes consent given by a person who "is legally incompetent to authorize the conduct charged to constitute the offense or to the result thereof" or "because of youth . . . is believed by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct." While the RCC provides no bright-line as to what age may render a youth unable to give consent under this provision, the flexible standard would allow for sex assault (not just sexual abuse) charges in some cases. The commentary to the RCC sexual assault statute has been updated to reflect that this is a possible change in law.* [footnotes omitted]

OAG objects to the deletion of paragraph (e)(3). Applying the same carve-out to two kinds of consent does not "conflate" one kind of consent with the other; it acknowledges that the same kind of bright line makes sense for both. The language above acknowledges that "the DCCA has held that the defense is not available when the defendant is an adult at least four years older than

[39]That is not to say, of course, that a regulation cannot repeat an existing statutory exemption – just that, in that case, the exemption comes from the statute, not from the regulation. And it, also, does not mean a regulation cannot define, for instance, the factual predicates for an offense, such as whether a certain occupation is "lawful." OAG recommends this same amendment wherever else this new language is added in this context.

a complainant under 16 years of age." The CCRC should not remove this defense because it believes that the DCCA might overrule this holding.

On pages 138 and 139 , comment 1, the CCRC stated, in relevant part:

> The RCC partially incorporates this recommendation by revising subparagraph (a)(1)(B) of the RCC offense to require that the actor give effective consent "to a third party" to engage in sexual activity with a minor complainant or cause a minor complainant to engage in the sexual activity, as opposed to giving effective consent "for the complainant" to engage in sexual activity in the previous version. The revised language categorically excludes from the offense a parent or other responsible individual giving effective consent to the minor to engage in sexual activity, regardless of whether the sexual activity is legal or illegal (e.g.., violates the RCC sexual abuse of a minor statute (RCC § 22E-1302)). The RCC arranging for sexual conduct statute requires a "knowingly" culpable mental state and does not require that sexual activity actually occur. While the updated statute does not criminalize a parent or other responsible individual "knowingly" giving a minor effective consent to engage in sexual activity that is illegal (i.e. giving a 14 year old complainant effective consent to have sex with the complainant's 19 year old boyfriend), there may be liability under the RCC criminal abuse of a minor (RCC § 22E-1501) or RCC criminal neglect of a minor (RCC § 22E-1502) statutes if there is harm or a risk of harm to the minor. In addition, if the parent or other individual "purposely" gives a minor effective consent to engage in sexual activity that is illegal, the person may be charged (and it is more proportionate to charge this conduct) as an accomplice under other provisions in the RCC that have more severe penalties than the RCC arranging for sexual conduct offense. This change improves the consistency and proportionality of the revised statutes. The commentary to the RCC arranging has been updated to reflect that this revision is a change in law.
>
> The RCC also partially incorporates this recommendation by requiring that the consented-to sexual activity between the complainant and the third party or between the complainant and another person violates the RCC sexual abuse of a minor statute. (The previous RCC version of this offense only required that the complainant be under the age of 18 years). The updated arranging statute language consequently excludes from the offense consented-to sexual activity that is legal. For example, the revised language excludes a parent giving effective consent to a 17 year old boyfriend to engage in consensual sexual activity with the parent's 15 year old child, but includes a parent giving effective consent to a 17 year old boyfriend if the child were 12 years of age. This change improves the clarity, consistency, and proportionality of the revised offense. The commentary to the RCC arranging has been updated to reflect that this revision is a change in law. [emphasis added]

OAG objects to "exclude[ing] from the offense a parent or other responsible individual giving effective consent to the minor to engage in sexual activity, regardless of whether the sexual activity is legal or illegal." It is one thing to amend this provision so that the RCC does not

inadvertently criminalize "a parent who knowingly gives effective consent for her 17-year-old daughter to engage in or submit to a sexual act or contact with the teenager's boyfriend when she hands her daughter a package of condoms and lectures her about safe sex,"[40] and another for the parent to give effective consent to the minor to engage in sexual activity that is illegal. There is no reason to permit the parent to be complacent in this form of child abuse.[41]

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

On page 178 , comment 4, the CCRC stated:

> For the comparatively low-level harms required in second degree and third degree of the revised criminal abuse of vulnerable adult or elderly person statute, the new defenses continue to provide a defense when the actor inflicts the injury in a lawful sport or occupation when the injury is a "reasonably foreseeable hazard" of those activities. However, the new defenses also apply when the actor inflicts the injury as a "reasonably foreseeable hazard" of "other concerted activity." This change clarifies that informal activities such as sparring, playing "catch" with a baseball, or helping someone repair their car all are within the scope of the defense when the other defense requirements are satisfied. The "or other concerted activity" tracks the language in the Model Penal Code and several other jurisdictions. [emphasis added][footnote omitted]

OAG recommends noting that, under the statutory text, this other activity must, like an occupation or sport, be lawful.[42]

RCC § 22E-1801. Stalking

Starting with the last comment on the page 196, the CCRC stated:

> *The CCRC recommends requiring that the actor engage in a course of conduct negligent as to the fact that the course of conduct is without the complainant's effective consent. The RCC has been updated to eliminate the general defense for effective consent under RCC § 22E-409. Addition of this negligence element, however, performs a similar function in eliminating liability for conduct such as physically following, where the actor had a reasonable belief that he or she had the complainant's effective consent. The negligence culpable mental state does not require proof of any subjective awareness by the actor that the conduct was without the complainant's effective consent.*

[40] This is the example cited by PDS on page 138 of First Draft of Report 68 – Appendix D2. Disposition of Advisory Group comments.
[41] While the CCRC says the parent might be chargeable as an accomplice, that would only be true if the parent was acting in coordination with the actual perpetrator.
[42]The same note applies wherever else this "other concerted activity" language is added.

OAG is not sure that the CCRC is right to say that, if someone reasonably believes they have effective consent, they are not negligent as to the absence of effective consent, unless "reasonableness" and "should have known" are coextensive; are they? [43]

RCC § 22E-1803. Voyeurism

On page 199, comment 2, the CCRC stated, "The CCRC recommends specifying in a footnote to the commentary that the word "breast" excludes the chest of a transmasculine man. OAG is not certain this carve-out is consistent with the ordinary meaning of the word "breast" in this context. If a transmasculine man has a breast, as opposed to merely a chest, it is unclear why the voyeurism offense should not apply to images of these breasts. The invasion of privacy for the transmasculine man is just as great as if they had a different gender identity. To the extent that the CCRC believes a transmasculine man's breast, should they have any, not be covered by this offense, this carve-out needs to be incorporated into the statutory text.[44]

RCC § 22E-3401. Escape from a Correctional Facility or Officer

On page 245, comment 21, the CCRC states:

> *OAG, App. C at 477, recommends redrafting paragraph (b)(2) to state, "Knowingly leaves custody without the effective consent of the law enforcement officer" instead of "Knowingly, without the effective consent of the law enforcement officer, leaves custody."*
>
> - The RCC does not incorporate this recommendation because it would make the drafting of second degree escape from a correctional facility or officer inconsistent with the other degrees of the offense. Because there are multiple, alternative conduct elements for third degree escape, the circumstance element ("without effective consent") precedes a list. First and second degree mirror this formulation to avoid questions about whether the similar circumstance elements should be read differently, which they should not.

OAG asks the CCRC to reconsider its position. OAG's concern with the CCRC's current formulation is that, since the "without the effective consent" phrase is a prepositional phrase that follows "knowingly," it's not clear whether "knowingly" applies to it. If CCRC is concerned about consistency, it should make our proposed change throughout. For instance, first-degree escape could be amended to read "Knowingly leaves the correctional facility, juvenile detention facility, or cellblock with the consent of…."

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[43]OAG's comment also applies to wherever else this language appears.

[44] This issue arises because the RCC, like the current statute, refers to an image of a "female breast." Once concepts of being transgender are incorporated into the code, which OAG certainly does not object to, then the CCRC may want to consider defining what it means to be "female." Have other jurisdictions found it appropriate here to make a distinction based on an individual's gender identity, or to have that individual's gender identity something that a judge rules on as a factual matter?

RCC § 22E-4401. Prostitution

On page 245, comment 21, the CCRC states:

> *OAG, App. C at 558-560, recommends revising a sentence in paragraph (c)(1) to read "Discharge and dismissal under this subsection shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained. The sealing of the nonpublic record shall be in accordance to, and subject to the limitations of D.C. Code § 16-803(1)." The current sentence in paragraph (c)(1) reads, "Discharge and dismissal under this subsection shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, such person qualifies under this subsection." OAG states that the current sentence "does not, on its face, permit a prosecutor from retaining a copy of the records as a check on the court." OAG states that, "[i]n contrast, D.C. Code § 16-803, the District's sealing statute, addresses practical issues concerning the sealing of records and recognizes that law enforcement and prosecutors also need to retain and view nonpublic sealed records." In addition, because paragraphs (c)(1) and (c)(2) "use the term 'probation' to describe a defendant's supervision preadjudication," OAG recommends that "the Commentary make clear that the court's authority to expunge records pursuant to RCC § 22E-4401 is limited to situations where the person was not sentenced and that a person who was sentenced would have to avail themselves of the sealing provisions found in D.C. Code § 16-803."*
>
> - The RCC does not adopt this recommendation at this time. The D.C. Council is currently considering new legislation that would potentially include broader changes to record sealing laws in the District. The CCRC may re-visit this issue to determine if further changes are warranted in light of changes to District law governing record sealing. In addition, as is discussed above in the first entry, the RCC prostitution statute deletes the provision for the courts retaining a nonpublic record solely for use in determining whether or not, in subsequent proceedings, a defendant qualifies for the deferred disposition provision.

OAG believes that USAO is correct to note that the Council cannot regulate the records kept by a federal agency, or the form in which they are kept. That applies to current law as surely as it does to this provision. We would also emphasize, here and in the patronizing prostitution statute, that the expungement provisions cannot regulate federal agencies, or say that a person shall not be held guilty of a federal crime; it can only reach District agencies and District offenses.[45]

RCC § 22E-4601. Contributing to the Delinquency of a Minor

On page 293, comment 2, the CCRC states:

> *OAG, App. C at 606-607, recommends revising what was previously subparagraph (a)(3)(B) to read "Knowingly encourages the complainant to engage in specific conduct*

[45] OAG made this point with respect to RCC § 48-904.01a, Possession of a Controlled Substance, as is noted on p. 326, recommendation 4.

that, in fact, constitutes a District offense, including a violation of D.C. Code § 25-1002, or a comparable offense in another jurisdiction." This subparagraph was previously limited to encouraging the commission of a "District offense or a comparable offense in another jurisdiction," with only a footnote in the RCC commentary explaining that D.C. Code § 25-1002, prohibiting the purchase, possession, of consumption of alcohol by persons under 21 years of age, was an "offense" for the purposes of the revised CDM statute despite the civil penalties for a person under the age of 21 years. OAG states that it could be "argued that the language in D.C. Code § 25-1002(a) that provides for civil penalties means that it is no longer an 'offense' for a person under the age of 21 to possess or drink alcohol."

- The RCC incorporates this recommendation by codifying "for a District offense, including a violation of D.C. Code § 25-1002, or a comparable offense in another jurisdiction" in subparagraphs (a)(3)(A) and (a)(3)(B), pertaining to both accomplice liability and solicitation liability. This change improves the clarity of the revised statutes.

OAG would note that by classifying something subject to civil penalties as an "offense," it implies that every other use of the word "offense" in this provision sweeps in offenses punishable only by civil penalties. Instead, this language should say something like: "a District offense, a violation of D.C. Official Code § 25-1002, or a comparable offense or violation in another jurisdiction."[46]

On page 296, comment 7, the CCRC states:

USAO, App. C at 632, recommends clarifying that the RCC developmental incapacity defense (RCC § 22E-505) does not preclude liability for an adult defendant under the revised CDM statute. USAO states that at the October 7, 2020 Advisory Group meeting, "the CCRC clarified that, even if a child defendant legally could not be prosecuted for the underlying conduct due to their age or other developmental incapacity, liability should still attach under this provision for an adult who contributes to that child's delinquency." USAO does not recommend specific language.

- The RCC incorporates this recommendation by clarifying in the commentary to the RCC developmental incapacity defense that the defense does not preclude liability for an adult defendant under the revised CDM statute. In addition, paragraph (c)(1) of the revised CDM statute states that an actor may be convicted of CDM even if the minor complainant "has not been prosecuted [or], subject to delinquency proceedings." This change improves the clarity of the commentary.

OAG does not believe that the new comment language described above is accurate. The statutory provision governing accomplice liability does say a person can be convicted as an accomplice even if the other person has not been convicted of the related offense. But it does not say that the person can be convicted even if the other person could not be convicted. In that case, OAG believes that the provisions involving an innocent or irresponsible person, not the accomplice provisions, would apply.

[46] This same point applies everywhere this new language is added.

On page 297, comment 7, the CCRC states:

> *USAO, App. C at 633, recommends removing what was previously subsection (c): "An actor does not commit an offense under this section when, in fact, the conduct constituting a District offense or a comparable offense in another jurisdiction, constitutes an act of civil disobedience." USAO states that "[a]lthough [this provision] tracks current law . . . it is unclear what would constitute 'civil disobedience.'" USAO states it "is not aware of any legislative history or case law that would elucidate the definition of 'civil disobedience' in" the current D.C. Code contributing to the delinquency of a minor statute.*
>
> - The RCC partially incorporates this recommendation by narrowing the exclusion to liability for civil disobedience to conduct that, in fact, constitutes a trespass under RCC § 22E-2601, a public nuisance under RCC § 22E-4202, blocking a public way under RCC § 22E-4203, an unlawful demonstration under RCC § 22E-4204, or a comparable offense in another jurisdiction, by the complainant during a demonstration. The provision makes explicit that a parent or other person cannot be held liable for encouraging such activities protected by the First Amendment. The commentary to the revised CDM statute reflects that this is a possible change in law. This change improves the clarity of the revised statutes.

The text of subsection (b), previously subsection (c) now states, "*Exclusion~~s~~ from liability.* An actor does not commit an offense under this section when, in fact, the complainant's conduct constitut~~es~~ing, or, if carried out, would constitute, a trespass under RCC § 22E-2601, a public nuisance under RCC § 22E-4202, blocking a public way under RCC § 22E-4203, an unlawful demonstration under RCC § 22E-4204, an attempt to commit such an offense, ~~a District offense~~ or a comparable offense in another jurisdiction~~, constitutes an act of civil disobedience~~ during a demonstration. While OAG believes that this amendment is an improvement on what was previously drafted, we do not believe that it reaches the concerns raised by USAO. The offenses of trespass under RCC § 22E-2601, public nuisance under RCC § 22E-4202, blocking a public way under RCC § 22E-4203, and unlawful demonstration under RCC § 22E-4204 are not activities protected by the First Amendment. Though implicating federal, as well as local law, the demonstrations at the Capitol on January 6 provide a good example. Just because someone was demonstrating at the Capitol does not excuse the trespass that that person would have committed by entering the Capitol building. OAG believes that a person who encouraged a minor to enter the Capitol should likewise be guilty of contributing to the delinquency of a minor.

Should the Commission not adopt OAG's recommendation, OAG has one further recommendation pertaining to subsection(b), above. The phrase "during a demonstration" now needs to be moved so that it modifies everything that precedes it. Under these circumstances OAG recommends that subsection (b) be amended to say, "*Exclusion from liability.* An actor does not commit an offense under this section when, in fact, during a demonstration the complainant's conduct constitutes, or, if carried out, would constitute, a trespass under RCC § 22E-2601, a public nuisance under RCC § 22E-4202, blocking a public way under RCC § 22E-4203, an unlawful demonstration under RCC § 22E-4204, an attempt to commit such an offense, or a comparable offense in another jurisdiction."

M E M O R A N D U M

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	January 29, 2021
Re:	Comments on First Draft of Report No. 68, Cumulative Update to the Revised Criminal Code

The Public Defender Service submits the following comments on Report No. 68 for consideration.

1. §22E-215, De Minimis Defense. The commentary to de minimis defense, RCC § 22E-215, at footnote 23 provides that "a *de minimis* defense would be unavailable under subsection (d) where, in the absence of mitigating circumstances … a person charged with fare evasion intentionally jumps over a turnstile for the purpose of evading payment of his or her metro fare." Since, following the initial draft of the RCC's commentary, the D.C. Council decriminalized fare evasion,[1] PDS suggests referencing a different code provision that criminalizes a minimal harm.

2. §22E-401, Lesser Harm, and §22E-402, Execution of Public Duty. Both of these defenses include provisions that disallow the respective defenses if the conduct constituting the offense is expressly addressed by another available defense, affirmative defense, or exclusion defense. See RCC § 22E-401(b)(3) and §22E-402(b)(1). PDS objects to these provisions and recommends eliminating them. The CCRC made this change to the duress defense in Report No. 68; the same policy reasons support also removing the provision from both §22E-401 and §22E-402. A defendant, consistent with their Sixth Amendment rights, should be able to present evidence of all applicable defenses and to have all available defenses go to the jury. There is no fair basis for depriving a defendant of the right to have a jury consider the entire circumstances of their case. Further, this limitation is particularly unjust given that the government is allowed to present various theories of liability, such as conspiracy and aiding and abetting in the same trial. The government is not limited in its presentation of evidence and the defense should not be either.

3. §22E-604, Authorized Fines. RCC § 22E-604 would allow fines of up to a million dollars to be imposed for class one felonies and up to $10,000 fines for class nine felonies. Almost across the board, this represents a steep increase from the fines imposed under the Fine Proportionality Act.[2] The RCC commentary for § 22E-604[3] seems to justify this difference by arguing that the

[1] D.C. Act 22-592, the Fare Evasion Decriminalization Amendment Act of 2018.

[2] *See* Fines for Criminal Offenses, D.C. Code § 22–3571.01.

[3] Commentary to RCC § 22E-604, at 71.

RCC provision would allow for even greater fines for corporations while "low-income and indigent persons would not be subject to the higher crimes under RCC § 22E-604(c)."

PDS believes that RCC § 22E-604(c) is insufficient to achieve the stated goal of protecting poor people from higher fines. RCC § 22E-604(c) provides only that "a court may not impose a fine that would impair the ability of the person to make restitution or deprive the person of sufficient means for reasonable living expenses and family obligations." Under this exception, a court could still impose fines that burden the District's poorest residents. Reasonable living expenses and family obligations are subject to interpretation and a judge may believe that imposing a $2,000 fine and allowing payment in monthly increments allows a defendant to contribute to family obligations and living expenses, even if it prevents the defendant from saving money to create more financial security for their family. The RCC provision lacks a robust evidentiary process through which the government must prove an ability to pay. The RCC provision also does not include a reconsideration provision for circumstances where a fine becomes a greater burden as a result of job or housing loss or illness. If the CCRC truly intends not to subject poor individuals to burdensome fines, it should begin to do so by precluding the imposition of fines on all defendants with court-appointed counsel.

Across the country, criminal fines have perpetuated poverty by imposing financial obligations on individuals who are already struggling to make ends meet. Criminal fines have also led to incarceration of defendants for failure to pay fines.[4] Those fines have been driven in part by a need to fund state criminal legal systems. As the District moves toward statehood, it should have a system in place that does not create a budgetary incentive for saddling residents with fines.

In the commentary, the CCRC appears to justify the much higher fine structure on the basis that it provides a way of increasing fines for corporate defendants, by allowing the fines to be doubled for corporations[5]. The CCRC could more directly achieve the goal of holding corporations financially accountable for their criminal conduct by creating a separate table for corporate defendants or decreasing the base amount and allowing the statutory maximum for corporate defendants to be multiplied by a greater number.

4. Multiple penalty enhancements. RCC § 22E-606(e) and subsequent provisions which address penalty enhancements allow limitless stacking of penalty enhancements. *See e.g.*, §22E-606(e); §22E-607(d); §22E-608(c); §22E-610(c). Without a limitation on the stacking, offense grades and statutory maxima can become grossly disproportionate to the penalties imposed for other more serious offenses. For instance, an actor who commits third-degree robbery reckless as to the fact that the complainant is a protected person (one class level penalty enhancement) and with the purpose of causing a pecuniary loss to the person because of prejudice against the person's perceived religion (hate crime – one class level enhancement) while the actor is on pretrial release (+180 days to 1 year enhancement) and who is subject to the repeat offender

[4] Matthew Menendez, Michael F. Crowley, Lauren-Brooke Eisen, and Noah Atchison, *The Steep Costs of Criminal Justice Fees and Fines*, Brennan Center, 2019. Available at: https://www.brennancenter.org/sites/default/files/2020-07/2019_10_Fees%26Fines_Final.pdf

[5] *See* note 3.

enhancement (+180 days to 1 year enhancement)[6] will face up to 10 years of imprisonment rather than the base offense penalty of 2 years. Purely as a result of rampant enhancements, that statutory maxima is more comparable to much more serious crimes of violence. In order to prevent unmooring the punishment from the classification of the offense by the RCC, PDS recommends that the RCC limit the government to two enhancements for each case.

5. § 22E-606, Repeat Offender Penalty Enhancement, and §22E-607, Pretrial Release Penalty Enhancement. PDS continues to object to the inclusion of RCC § 22E-606, the repeat offender penalty enhancement.[7] If the RCC does not remove the prior offense enhancement and the offense committed while on release enhancement, the RCC should clarify that these enhancements are applied based on the class of the unenhanced base offense, not in relation to a class of the offense increased by the application of other enhancements.

6. §22E-701, Generally Applicable Definitions, definition of "Dwelling." PDS recommends eliminating the most recent changes to the definition of "dwelling" and returning to the previous definition. The definition should read: "'Dwelling' means a structure that is either designed for lodging or residing overnight at the time of the offense or that is actually used for lodging or residing overnight, including in multi-unit buildings, communal areas secured from the general public." According to the CCRC notes in Appendix D2, the most recent changes, most notably eliminating the phrase "at the time of the offense" were done to make the definition easier to read. The phrase "at the time of the offense" was critical to ensuring that a structure that was originally designed as a dwelling and that might even retain a number of design-elements common to dwellings - e.g., a bathtub in the bathroom - but that no longer serves the actual function of a dwelling would not be included in the definition of "dwelling." A structure that was originally a residential rowhouse but that now functions only to "house" a restaurant or a charitable foundation should not be considered a "dwelling" for purposes of the RCC.

7. 22E-701, Generally Applicable Definitions, definition of "Position of trust and authority." The RCC defines "position of trust and authority" to include a child of a parent's sibling, whether related by blood, adoption, or marriage, domestic partnership either while the legal status exists or after such marriage or domestic partnership exists or an individual with whom such individual is in a romantic, dating, or sexual relationship. "Position of trust" also includes any individual with whom a biological half-sibling is in a romantic, dating, or sexual relationship. PDS believes

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[6] It is unclear whether §22E-606 and §22E-607, which both add days or years depending on the class level of the offense being enhanced, are calculated based on the class level of the base offense or on the class level after other enhancements have been applied. PDS recommends the CCRC clarify that both enhancements are calculated based on the unenhanced class for the base offense.

[7] Enhancements for prior convictions tend to target older individuals who may have longer criminal records and therefore impose lengthy sentences on individuals who statistically are close to aging out of crime. Prior sentence enhancements also disproportionately impact Black defendants who have been targeted by the criminal legal system and "undercut the goal of making sentence severity proportional to offense severity." Robina Institute, Criminal History Enhancements Sourcebook. Available at: https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/criminal_history_enhancement_web2_0.pdf.

that this definition, which serves as the basis for numerous sex offenses, stretches too far in prohibiting what would be consensual sexual contact between individuals who are legally capable of consent. The RCC justifies the expansion of this definition to first cousins by adoption, marriage, or domestic partnership as improving consistency, proportionality, and removing a possible gap.[8] Rather than removing a gap, the revision extends liability without clear evidence that relationships between first cousins, including cousins who are not biologically related and who may have little family-based contact with one another, for example a cousin who is the biological child of an uncle who is divorced from the would-be complainant's aunt, carry a heightened risk of coercion. In fact, there is nothing inherently coercive in that relationship. A would-be complainant is just as likely to have an independent non-family-based relationship with the child of an aunt or uncle's ex-spouse such that criminalizing that consensual relationship serves to protect no one and merely adds additional crimes that prosecutors can charge at their discretion. Similarly, there is no evidence-based reason for prohibiting all consensual sexual conduct between one half-sibling and someone with whom another half-sibling is in a romantic, dating or sexual relationship. It's not clear why the law should presume that there is a position of trust and authority between one half-sibling's ex-boyfriend who still occasionally has sex with the half-sibling, and another half-sibling who may choose to also engage in occasional sexual contact with the same person. If the RCC employs this expansive definition, it should also import into the definition of "position of trust and authority" a requirement like that in RCC § 22E-1308, incest, that one party obtains the consent of the other by undue influence.

8. §22E-1101, Murder. PDS strongly objects to the current RCC provision for felony murder and to the application of this law to accomplices who do not commit the lethal act. PDS continues to object to the inclusion of felony murder in the RCC but if the RCC maintains a felony murder provision, it is essential that it apply only to the individual who committed the lethal act. As currently formulated, the RCC will exacerbate the injustice of the felony murder doctrine. This is the case because the RCC will abrogate the protections for accomplices to felony murder created in *Wilson-Bey v. United States*, 903 A.2d 818 (D.C. 2004), and *Robinson v. United States*, 100 A.3d 95 (D.C. 2014). Under *Robinson*, in the prosecution of a non-death-causing accomplice for felony murder while armed with a predicate while armed felony, the government must prove beyond a reasonable doubt that the aider and abettor had actual knowledge that the principal would be armed with or have readily available a dangerous weapon. The actual knowledge is critical in providing some measure of protection for an aider and abettor who does not intend to cause the homicide; it requires the jury to find something more than that the death was caused in the course of and in furtherance of the underlying felony. The predicate offenses for felony murder under the RCC do not require the use of a firearm or a dangerous weapon. Therefore, if the government charges a codefendant with felony murder for their role as a lookout in a first degree robbery, the government will never have to prove beyond a reasonable doubt that the lookout knew that the principal who committed the lethal act was armed. The only procedural protection afforded to the unarmed lookout will be a requirement that the jury find that the death was in the course of and in furtherance of the felony. The predicate felony of first-degree robbery already includes the element of substantial injury, so the injury caused during the robbery could

[8] RCC Commentary to Offenses Against Persons at 270.

be used to bolster the conclusion that the death was caused in the course of and in furtherance of the felony.

In a California case that is indicative of the problem of felony murder, a 15-year old was convicted of felony murder and is serving a sentence of 25 to life for his role in standing by the door as a lookout during a home burglary.[9] The 15-year old entered the home and stole candy but had no part in causing the death of the homeowner. Nonetheless this 15-year old was held responsible for that death-causing action of his codefendant. The injustice of applying felony murder to accomplices often ensnares very young defendants because they are more susceptible to peer pressure and often commit criminal acts with others. Keeping this version of felony murder in the RCC will mean that the United States Attorney's Office can direct file the cases of youth as young as 16 in adult criminal court where they could be sentenced to decades in prison despite not committing the lethal act and without a jury finding that the 16-year-old knew that the codefendant was armed. PDS explained in its June 19, 2020, memo why the RCC's use of a defense in felony murder would not be protective for defendants who must in nearly all instances testify to assert the defense and would encounter all of the barriers created by potential educational deficits or mental illness, and would have to provide testimony against codefendants, which may come with a host of safety issues and other concerns. There is overwhelming evidence of injustice in the application of felony murder to accomplices who do not intend that any fatal act be committed, and there is now growing momentum demonstrated by states such as Hawaii, Massachusetts, Michigan, Kentucky, Vermont, New Hampshire, New Mexico, Arkansas, and California to abolish or limit it.[10] The RCC should embrace this reform.

9. §22E-1102, Manslaughter. PDS makes the same objection to "felony manslaughter" as it does above to felony murder.

10. §22E-1301, Sexual Assault. PDS recommends making it a defense, rather than an affirmative defense, that in fact the actor reasonably believes that the complainant gives effective consent to the actor to engage in the conduct constituting the offense. This change would be identical to the change to the consent law made by D.C. Law 18-88. The law was changed because of the difficulty of instructing the jury when consent can be an aspect of the government's failure to prove force beyond a reasonable doubt at the same time that consent is an affirmative defense. To resolve that inherent tension, D.C. Law 18-88, in a section proposed by the U.S. Attorney's Office, effectively changed consent from an affirmative defense to a defense such that the government must disprove consent once it is raised by the defense. To prevent the same conundrum before juries and to properly allocate the burden on the government for this serious offense that carries lengthy periods of incarceration and the potential for lifetime sex offender registration, PDS recommends changing §22E-1301(e).

11. Marriage and domestic partnership defense, for example in §22E-1302, Sexual Abuse of a Minor. RCC § 22E-1302 defines sixth degree sexual abuse as consensual sexual contact between

[9] Abbie VanSickle, If He Didn't Kill Anyone, Why Is It Murder?, New York Times, June 27, 2018. Available at: https://www.nytimes.com/2018/06/27/us/california-felony-murder.html

[10] Katie Rose Quandt, A Killer Who Didn't Kill, Slate, September 18, 2018. Available at: https://slate.com/news-and-politics/2018/09/felony-murder-rule-colorado-curtis-brooks.html

one actor who is under age 18 and another who is at least 4 years older than the other actor and in a position of trust or authority over the other actor. The RCC provides that marriage is an affirmative defense to the offense. Since the offense criminalizes otherwise consensual conduct but for the status of the individuals, marriage should be a preclusion to liability rather than an affirmative defense that the defendant must prove. The same change should be made in RCC § 22E-1303, sexual abuse by exploitation in the second degree, which criminalizes otherwise consensual conduct due to the status and age of the individuals, RCC § 22E-1304, sexually suggestive conduct with a minor, and RCC § 22E-1305, enticing a minor into sexual contact.

12. §22E-1308, Incest. The conjunction between the second and third elements of first- degree incest should be "and," not "or." This is consistent with the RCC commentary.[11]

13. §22E-1808, Possession of an Obscene Image of a Minor. PDS recommends adding an affirmative defense that the image is possessed with intent, exclusively and in good faith, to permanently dispose of the item, similar to the temporary possession affirmative defense at §22E-502(a)(1)(F).

14. The affirmative defenses in the distribution of sexual recording and obscene images offenses, specifically at §22E-1804(c), 22E-1805(c)(2), 22E-1806(c)(2), and 22E-1807, should be expanded to allow distribution with the intent to permanently dispose of the item, similar to the temporary possession defense at RCC §22E-502(a)(1)(F). Specifically, PDS proposes the affirmative defenses be rewritten as follows:

> It is an affirmative defense to liability under this section, that the actor:
> (A) With intent, exclusively and in good faith, to report possible illegal conduct, ~~or~~ seek legal counsel from any attorney, or permanently dispose of the image or audio recording;
> (B) Distributed the image or audio recording to a person whom the actor reasonably believes is:
> (i) A law enforcement officer, prosecutor, or attorney…

15. §22E-4103, Possession of a Dangerous Weapon with Intent to Commit Crime. PDS continues to object to attempt liability for this offense. While intending to commit a crime, there is a difference between coming dangerously close to committing the offense by actually possessing a weapon that the person believes is a dangerous weapon but, because of a mistake of fact, is not a dangerous weapon and coming dangerously close to possessing a dangerous weapon but not in fact possessing it. By allowing attempt liability without limitation, the statute would impose criminal liability on a person who has only come dangerously close to possessing the weapon while having an intent to commit a crime. If the underlying crime were committed or even attempted, the offense of possession of a dangerous weapon with an intent to commit a crime would ultimately merge with it. So we are necessarily focused on a situation where there is evidence (e.g., a text message) of an intent to commit a crime in the future and the person comes dangerously close to possessing a dangerous weapon. PDS is not suggesting that the person would not be liable for attempted possession of a prohibited weapon or accessory pursuant to 22E-4101. The problem is holding someone liable for not yet possessing a weapon while

[11] RCC Commentary to Offenses Against Persons at 266.

intending but not yet even attempting to commit a crime. Assume in January, X decides to buy a bomb to use to blow up a building on a particular date two months hence. X comes dangerously close to buying the bomb but is arrested before he is actually holds, carries on his person, or has the ability and desire to exercise control over the bomb. Arguably, X has committed attempt 1st degree possession of a prohibited weapon. But the intended crime isn't for another 2 months; X could change his mind. He could have changed his mind even absent the arrest. It is possible, even had the police not intervened, that X would have abandoned the plan to take possession of the bomb. Since X came dangerously close to possessing the dangerous weapon, however, PDS accepts the law holding X liable for attempted possession. It is too far to hold X liable for coming dangerously close to possessing a weapon but not actually possessing it while intending to commit a crime that X has not committed or even come dangerously close to committing. For that reason, PDS objects to allowing attempt liability for this offense without limitation.

16. §22E-4105, Possession of a Firearm by an Unauthorized Person. The commentary makes clear that the mental state of "knowingly" is to apply to the element "is a fugitive from justice" at §22E-4105(b)(2)(B). However, there is an intervening mental state of "in fact" buried in the preceding paragraph at (b)(2)(A); the rules of interpretation applicable to culpable mental states mean that the mental state for "is a fugitive from justice" then becomes "in fact," rather than "knowingly." PDS recommends switching the order so "is a fugitive from justice" is at (A) and the prior conviction paragraph is at (B).

17. §22E-4119, Limitation on Convictions for Multiple Related Weapon Offenses – Paragraph (3) of subsection (b) refers to "an element, of any gradation, that the person displayed or used a dangerous weapon." This seems to be an outdated reference to the structure of many offenses prior to Report No. 68, where "displays or uses a dangerous weapon" was an element of a higher gradation. Now it is often, if not always, a penalty enhancement rather than a gradation. See e.g., §22E-1201(e)(4) ("The penalty classification for first, second, or third degree robbery is increased in severity by one penalty class when a person commits the offense … by using or displaying what is, in fact, a dangerous or imitation dangerous weapon.")

    PDS notes that while the limitation on convictions at §22E-4119(b)(3) applies only to Subtitle II of Title 22E, the offense of possession of a dangerous weapon with intent to commit a crime at §22E-4103 allows for liability when the actor intends to commit an offense under Title III of Title 22E. This appears to be an oversight as there is no statement in the commentary to explain why offenses against persons would merge with possession of a dangerous weapon with intent to commit a crime but a property offense would not.

    In sum, PDS recommends rewriting paragraph (3) to read as follows: "Any offense ~~under Subtitle II of this title~~ that includes <u>either</u> as an element, of any gradation, <u>or as a penalty enhancement</u> that the person displayed or used a dangerous weapon."

Memorandum

Michael R. Sherwin
Acting United States Attorney
District of Columbia

Subject: Comments to D.C. Criminal Code Reform Commission for First Draft of Report #68	Date: January 29, 2021

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

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

The U.S. Attorney's Office for the District of Columbia (USAO) and other members of the Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the CCRC's First Draft of Report #68. USAO reviewed these documents and makes the recommendations noted below.[1]

First Draft of Report #68—RCC Compilation

A. RCC § 22E-504. Mental Disability Defense.

USAO recommends changing the name of this defense back to "Mental Disease or Defect Defense," rather than "Mental Disability Defense."

The CCRC originally proposed that this offense be called the "Mental Disease or Defect Defense," and subsequently changed it to the "Mental Disability Defense." USAO recommends that it be changed back to the "Mental Disease or Defect Defense" to reduce confusion. The words "mental disability" are very similar to "intellectual disability," which are used in other contexts. For example, the Citizens with Intellectual Disabilities Act (CIDA) defines "intellectual disability" as "a substantial limitation in capacity that manifests before 18 years of age and is characterized by significantly below-average intellectual functioning, existing concurrently with 2 or more significant limitations in adaptive functioning." D.C. Code § 7-1301.03(15A). This is different from the RCC's proposed definition of "mental disability" in this defense. CIDA provides a basis for civil commitment for those with intellectual disabilities, which is different from commitment for those found not guilty on the basis of a mental disability under this defense. Further, the words "mental disease or defect" are used elsewhere in the D.C. Code, *see* D.C. Code § 24-531.01(5) (definition of "incompetent" for purposes of competency evaluations and proceedings), and it is unclear what the relationship would be between the RCC's defined terms and terms used elsewhere in the D.C. Code.

[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.

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

USAO opposes limiting the felony repeat offender penalty enhancement to felony offenses under Subtitle II.

The CCRC proposes modifying subsection (a) so that only felony offenses under Subtitle II can be enhanced. In support of creating this limitation, the CCRC states: "This change makes the enhancement for felonies similar in approach to that for misdemeanors and focuses the enhancement on crimes against persons and omits the possibility of the enhancement being applied to drug or other offenses outside Subtitle II." (App. D2 at 36–37.) USAO recommends that this enhancement apply to felony offenses outside of Subtitle II, particularly to the offenses of Burglary and Arson. A defendant who has committed multiple burglaries or arsons should be subject to a repeat offender penalty enhancement, as those are offenses that are, in many ways, as serious as some felony offenses under Subtitle II. The previous CCRC proposal required that, if the prior conviction(s) were felony offenses under Subtitle II, only one prior conviction would be required for the enhancement to apply. By contrast, if the prior conviction(s) were felony offenses outside Subtitle II, two or more prior convictions would be required for the enhancement to apply, also requiring that both convictions have been committed within 10 years. Thus, a defendant convicted of felony-level assault would only need one prior felony-level assault conviction for the enhancement to apply, but a defendant convicted of burglary would need two prior convictions for burglary for the enhancement to apply. This is a sufficient limitation on the enhancement. Accordingly, USAO recommends removing the words "under Subtitle II" from subsection (a) of this enhancement.

C. RCC § 22E-701. Definitions.

USAO recommends the following changes to the definition of "Consent."

"Consent" means a word or act that:

(A) Indicates, explicitly or implicitly, agreement to particular conduct or a particular result; and

(B) Is not given by a person who:

(i) In fact, ~~I~~is legally incompetent to authorize the conduct charged to constitute the offense or to the result thereof; or

(ii) Because of youth, mental illness or disorder, or intoxication, ~~is believed by the actor to be~~ the actor knew or should have known is unable to make a reasonable judgment as to the nature or harmfulness of the conduct to constitute the offense or to the result thereof; and

(C) Has not been withdrawn, explicitly or implicitly, by a subsequent word or act.

USAO recommends adding the word "in fact" to subsection (B)(i) to clarify that the relevant inquiry, for purposes of subsection (B)(i), is whether the person "in fact" is legally incompetent to authorize the conduct, and does not require a higher mental state by the actor. USAO recommends, in subsection (B)(ii), replacing the words "is believed by the actor to be" with the words "the actor knew or should have known is." The objective reasonableness of the

actor's belief is important. For example, if an actor claims that the actor believed that a young child consented to an activity, the actor's subjective belief should be balanced with the objective reasonableness of such a belief. Under USAO's proposed standard, the actor should have known that the young child would be unable to make a reasonable judgment as to the nature of the conduct, as that belief was not objectively reasonable.

USAO recommends the following change to the definition of "Prior conviction."

"Prior conviction" means a final order, by any court of the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, that enters judgment of guilt for a criminal offense. The term "prior conviction" does not include:

(A) An adjudication of juvenile delinquency;
(B) ~~A conviction that is subject to successful completion of a diversion program or~~ probation under D.C. Code § 48-904.01(e);
(C) A conviction that has been reversed, vacated, sealed, or expunged; or
(D) A conviction for which a person has been granted ~~clemency or~~ a pardon.

USAO recommends, in subsection (B), removing the words "a conviction that is subject to successful completion of a diversion program." There could be certain diversion programs whereby, as a result of successful completion of a diversion program, a charge is reduced to a lesser charge, such as a felony charge being reduced to a misdemeanor conviction. This misdemeanor conviction would and should still qualify as a "prior conviction." Further, in many cases, successful completion of a diversion program would not result in a conviction at all. For example, if a defendant successfully completes a deferred prosecution agreement (DPA), the defendant never has to plead guilty, so never has a conviction. If a defendant successfully completes a deferred sentencing agreement (DSA), the defendant's guilty plea is withdrawn, and no conviction results.

USAO also recommends, in subsection (D), removing the words "clemency or." Clemency may consist of either a pardon or a commutation of a sentence. A commutation of a sentence would reduce the amount of time that a person serves, but would not impact the fact of a conviction. Rather, a pardon should be the only type of clemency exempted from a "prior conviction."

D. RCC § 22E-1101. Murder.

USAO opposes the elimination of First and Second Degree Criminal Abuse of a Minor as enumerated predicate offenses for Felony Murder, and recommends inclusion of First and Second Degree Criminal Neglect of a Minor as predicate offenses for Felony Murder.

USAO opposes removing first and second degree criminal abuse of a minor as enumerated predicates to felony murder. The CCRC originally recommended including these offenses as predicates to felony murder, and removed them in the latest draft. Eliminating these offenses as predicates does not adequately account for the heinous nature of child abuse resulting in death and creates a gap in liability for felony murder. In certain circumstances, this change could result in a defendant improperly escaping liability for murder, despite engaging in a prolonged period of torture and/or abuse of a child that ultimately leads to a child's death.

Under current law, first degree cruelty to children is a predicate felony for felony murder. *See* D.C. Code § 22-1101. The District of Columbia is not alone in making child abuse offenses predicate felonies for felony murder. Alabama,[2] Alaska,[3] Arizona,[4] Arkansas,[5] Florida,[6] Georgia,[7] Idaho,[8] Iowa,[9] Kansas,[10] Louisiana,[11] Michigan,[12] Minnesota,[13] Mississippi,[14] Nevada,[15] North Dakota,[16] Oklahoma,[17] Oregon,[18] Tennessee,[19] Utah,[20] Wyoming,[21] and the United States Congress,[22] have all categorized child abuse as a predicate felony. In addition, Delaware, New Mexico, Pennsylvania, and Texas more broadly make any felony a predicate felony. South Carolina also has a special offense entitled "Homicide by Child Abuse."[23]

Ensuring that child abuse remains a predicate felony fills what would otherwise be a gap in criminal liability for defendants who engage in horrendous patterns of physical abuse of children, but where no single act of abuse can be pointed to as the cause of death. "A conviction for intentional homicide [in the child abuse context] is difficult to obtain." Barry Bendetowies, *Felony Murder and Child Abuse: A Proposal for the New York Legislature*, 18 Fordham Urb. L.J. 383, 384 (1991). "First, the government must prove intent to cause death, a factor often absent in child abuse cases." *Id.* "Second, frequently the sole witness is the abuser, since such crimes usually occur in private." *Id*. "Moreover, it is difficult to convince a jury that a parent intentionally killed his child." *Id.* at 384–85. Rather, "in a case of child abuse of long duration the jury could well infer that the perpetrator comes not to expect death of the child from his action, but rather that the child will live so that the abuse may be administered again and again." *Midgett v. State*, 729 S.W.2d 410, 413 (Ark. 1987).[24] Courts have "held that child abuse may have several independent purposes: to punish, to chastise, to force the child's conformity with the father's idea of propriety, and to impress upon the child the virtues of obedience and

[2] Ala. Code 1975 13A-6-2(a)(3).
[3] AS § 11.41.100(a)(2).
[4] A.R.S. § 13–1105(A)(2).
[5] A.C.A. § 5–10–102(a)(3).
[6] West's F.S.A. § 782.04(1)(a)(2)(h)
[7] Ga. Code Ann., § 16-5-1(d).
[8] I.C. § 18-4003(d).
[9] I.C.A. § 707.2(1)(e).
[10] K.S.A. 21-5402(c)(1)(G).
[11] LSA-R.S. 14:30(A)(1).
[12] M.C.L.A. 750.316(1)(B).
[13] M.S.A. § 609.185(a)(5).
[14] Miss. Code Ann. § 97-3-19
[15] N.R.S. 200.030(1)(b).
[16] NDCC, 12.1–16–01(1)(c).
[17] 21 Okl. St. Ann. § 701.7(C).
[18] O.R.S. § 163.115(1)(b)(J), (c).
[19] T. C. A. § 39–13–202(a)(2).
[20] U.C.A. 1953 § 76-5-203(1)(b).
[21] W.S.1977 § 6-2-101(a).
[22] 18 U.S.C. § 1111(a).
[23] Code 1976 § 16-3-85.
[24] Following this decision, the Arkansas legislature amended the statute to define knowingly taking the life of a child under the age of 14 as first degree murder. A.C.A. § 5–10–102(a)(3).

discipline." Bendetowies, 18 Fordham Urb. L.J. at 401 (citing *People v. Jackson*, 172 Cal. App. 3d 1005, 218 Cal. Rptr. 637, 641 (1st Dist. 1985)).

In a pattern of abuse case, the abuser often does not intend to kill the child. The abuser acts recklessly and repeatedly over a course of time with disregard for the fact that their conduct may kill a child. For example, some children can survive being shaken once or twice, but they may have internal injuries that are not diagnosed. Subsequently, when the child is shaken, the child may die. As a further example, if a child is beaten and has broken ribs or a lacerated liver, the child may not immediately die, but following a subsequent beating, the same conduct may cause the child's death. In certain situations, the abuser's conduct may constitute circumstances manifesting extreme indifference to human life, which would constitute second degree murder under the RCC. But there may also be situations where the government is unable to prove that a defendant's reckless conduct manifested extreme indifferent to human life, but where murder liability should still attach. In those situations, where the government could prove that the defendant negligently caused the death of the child in the course of committing the offense of criminal abuse of a minor—which is the RCC's proposed standard for felony murder—a defendant should be liable for felony murder, with criminal abuse of a minor as the predicate offense.

Moreover, USAO recommends that first and second degree criminal neglect of a minor also be predicate felonies for felony murder. The RCC divides the current offense of cruelty to children under D.C. Code § 22-1101 into two offenses of criminal abuse and criminal neglect. Death can foreseeably result, however, from both types of harms. Indeed, first degree criminal neglect of a minor requires that the defendant "[c]reated, or failed to mitigate or remedy, a substantial risk that the complainant would experience serious bodily injury or death." RCC § 22E-1502(a)(2).

Where a child actually dies due to the defendant's repeated neglect in a manner that would constitute first or second degree criminal neglect of a minor, liability should also attach for felony murder. USAO, for example, has prosecuted cases where both parents have refused to feed a newborn child over a prolonged period, resulting in its death. Similarly, USAO has prosecuted cases where parents know their child has suffered severe injury, including multiple rib and bone fractures and severe diaper rash, and yet have not sought medical care for that child. In these types of cases, it is the defendant's failure to act that causes the death of the child. To the extent such conduct does not otherwise meet the causation and intent elements for murder under the RCC, first and second degree criminal neglect of a minor should be incorporated as predicate felonies to hold defendants liable for the deaths of their children in such cases.

The offenses of first degree cruelty to children and first degree child sexual abuse were made predicate felonies for felony murder by the D.C. Council in 1997, following the recommendation of then-U.S. Attorney Eric Holder. The change in law reflected a need to include circumstances where, despite the horrific nature of abuse suffered by children, the evidence was not sufficient to show the defendant's specific intent to kill the child. In his testimony before the D.C. Council, U.S. Attorney Holder focused on examples including *United States v. Aaron Morris*, where a three-year-old girl "was burned in scalding water, had cigarette burns on her body, suffered severe blunt force injuries to her head and abdomen, and was

strangled and smothered to death." Statement of Eric Holder to the D.C. Council Committee on the Judiciary, March 12, 1997. Despite the extent of these injuries, the jury appears to have found that the defendant (based on his own admission) punched the child in the stomach several times, but attempted to resuscitate the child and was sorry for what he had done. *Morris v. United States*, 728 A.2d 1210, 1214 (D.C. 1999). As a result, the jury acquitted the defendant of murder and convicted him of the lesser-included offense of involuntary manslaughter and cruelty to a child. *Id.* In response to this and similar situations, the amendment incorporated first degree cruelty to children as a predicate offense to felony murder, so that murder liability could attach where appropriate.

Maintaining first and second degree criminal abuse of a minor and adding first and second degree criminal neglect of a minor as predicate offenses for felony murder is essential to ensure that the seriousness of deaths to children and infants resulting from chronic abuse is adequately reflected within the RCC. In removing first and second degree criminal abuse of a minor as predicate felonies, the CCRC states: "First and second degree criminal abuse of a minor criminalize recklessly causing serious or significant bodily injury. In most cases, applying the felony murder rule to these offenses criminalizes recklessly causing the death of another as murder, without any intentional or purposeful wrongful conduct. All of the other predicate offenses require at least knowing or intentional conduct." (App. D2 at 67–68.) To the extent that the CCRC's concern is that first and second degree criminal abuse of a minor requires only reckless conduct, not knowing or intentional conduct as with the other predicate felonies, the CCRC may consider including first and second degree criminal abuse of a minor—along with first and second degree neglect of a minor—as predicates to felony murder where the defendant acted "intentionally" rather than "recklessly" in the relevant predicate offense.

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

USAO recommends that the RCC clarify that non-consensual sexual touching can qualify as Second Degree Offensive Physical Contact.

The Commentary to Offensive Physical Contact states: "The RCC offensive physical contact statute generally criminalizes offensive physical contacts that fall short of inflicting 'bodily injury.' However, the RCC abolishes common law non-violent sexual touching assault that is currently recognized in DCCA case law, and, depending on the facts of the case, there may be liability under RCC Chapter 12 offenses, RCC weapons offenses, or sex offenses under RCC Chapter 13." (Commentary to Subtitle II at 122.) Although we recognize that the CCRC intends to abolish liability under the Assault provisions for non-consensual sexual touching, the Commentary to this offense implies that the CCRC may abolish liability under the Offensive Physical Contact provisions for non-violent sexual touching as well. Second Degree Offensive Physical Contact, however, would provide liability for a non-violent sexual touching under certain circumstances. For example, where a defendant touches a complainant's stomach, outer thigh, or other sensitive area in a location that would not constitute a "sexual contact," but where the defendant intends such contact to be offensive, and where a reasonable person in the situation of the complainant would deem it offensive, liability should attach for Offensive Physical Contact. USAO accordingly recommends that the Commentary clarify that there could still be

liability for a non-violent sexual touching as Offensive Physical Contact, even if there could no longer be liability for a non-violent sexual touching as Assault.

In addition, USAO recommends that the CCRC include the following provision for offensive physical contacts that are based on a non-violent sexual touching: "Where the complainant is under 16 years of age, or where the complainant is under 18 years of age and the defendant is in a position of trust with or authority over the complainant, consent is not a defense." In *Augustin v. United States*, the DCCA held that, as a matter of statutory interpretation, 16 years is the age of consent for non-violent sexual touching prosecuted as simple assault, so consent is not a defense to non-violent sexual touching when the complainant is under 16 years of age. 240 A.3d 816, 828 (D.C. 2020). The DCCA further held that, as a matter of statutory interpretation, consent is a defense to non-violent sexual touching when the complainant is 16 years of age or older, regardless of whether the complainant and the defendant are in a significant relationship, as defined in D.C. Code § 22-3001(10). USAO recommends that the CCRC incorporate *Augustin*'s holding with respect to complainants under 16 years of age, recognizing that, consistent with other provisions under the RCC, a child under 16 years of age cannot consent to a sexual touching. USAO also recommends that the CCRC provide that, where the complainant is under 18 years of age and the defendant is in a position of trust or authority over the complainant, a minor under 18 years of age cannot consent to a sexual touching. *Augustin*'s holding to the contrary was a matter of interpretation, not a matter of policy, and USAO recommends that, consistent with other provisions under the RCC, a minor under 18 years of age cannot consent to a sexual touching where the defendant is in a position of trust or authority over the complainant.

F. RCC § 22E-1308. Incest.

USAO recommends removing subsections (a)(3) and (b)(3).

USAO recommends removing the requirement that the actor "obtains the consent of the other person by undue influence" from both subsections (a)(3) and (b)(3). "Undue influence" is defined in RCC § 22E-701 as "mental, emotional, or physical coercion that overcomes the free will or judgment of a person and causes the person to act in a manner that is inconsistent with his or her financial, emotional, mental, or physical well-being." This term is used in RCC § 22E-2208, Financial Exploitation of a Vulnerable Adult or Elderly Person, and has a similar definition under current law at D.C. Code § 22-933.01. It is inappropriate, however, to use it in the incest context. An example of incest is a father having sex with his minor biological daughter. The complainant may act of her own free will, in that no force is used and no threats are made. It is unclear at what point the complainant would no longer be deemed to be acting on their own free will. This sexual abuse is often the result of grooming behavior by the defendant, but it is unclear whether grooming behavior (for example, buying candy for a child, giving gifts to a child, normalizing certain sexual behavior, escalating in sexual behavior) would qualify as "mental, emotional, or physical coercion." Moreover, it is unclear who would decide if the sexual abuse is "inconsistent with his or her financial, emotional, mental, or physical well-being." By criminalizing child sexual abuse, society has essentially made a value judgment that certain sexual conduct is inconsistent with a child's financial, emotional, or physical well-being. But a victim often will not internalize such abuse as being detrimental to their well-being. Nor

would a parent or guardian necessarily always characterize the abuse as detrimental, particularly where the parent or guardian is the perpetrator. In sum, USAO recommends removing this provision from the Incest offense, as it is not appropriate for this offense.

G. RCC § 22E-3402. Tampering with a Detection Device.

USAO recommends removing subsection (b).

USAO recommends removing subsection (b) in its entirety. USAO's previously submitted comments (App. C at 358) recommended adding a subsection to this offense to clarify that D.C. Code § 23-1303(d) has no impact on GPS-interference cases. The RCC incorporated this recommendation (App. D1 at 369), but made certain changes that could be confusing. The RCC proposes subsection (b) as follows: "The restriction on divulging detection device information from the Pretrial Services Agency for the District of Columbia under D.C. Code § 23-1303(d) shall not apply to this offense." This proposed language suggests that D.C. Code § 23-1303(d) precludes PSA from divulging detection device information in other contexts—a reading that has been rejected by at least one Superior Court judge and that USAO does not support. Given the confusion that may be created by this language—and, indeed, the confusion that could have been caused by USAO's originally proposed language—USAO believes that § 23-1303(d) is better left unaddressed in the misdemeanor tampering statute.

H. RCC § 22E-4105. Possession of a Firearm by an Unauthorized Person.

USAO recommends the following changes to subsection (b) of this offense.

(b) *Second degree.* An actor commits second degree possession of a firearm by an unauthorized person when that actor:
- (1) Knowingly possesses a firearm; and
- (2) In addition:
  - (A) Has a prior conviction for what is, in fact:
    - (i) A District offense that is currently punishable by imprisonment for a term exceeding one year, or a comparable offense, within 10 years;
    - (ii) An offense under Chapter 41 of this subtitle, or a comparable offense, within 5 years; or
    - (iii) An intrafamily offense, as defined in D.C. Code § 16-1001(8), that requires as an element confinement, ~~sexual conduct~~, a sexual act, a sexual contact, bodily injury, or threats, or a comparable offense, within 5 years.
  - (B) Is a fugitive from justice; or
  - (C) Is, in fact, subject to a ~~final civil protection order issued under D.C. Code § 16-1005.~~court order that:
    - (i) Requires the actor to relinquish possession of any firearms or ammunition, or to not own, possess, purchase, receive, or attempt to purchase or receive a firearm or ammunition while the order is in effect; and

(ii) Restrains the actor from assaulting, harassing, stalking, or threatening any person, or requires the actor to stay away from, or have no contact with, any person or a location; and
(I) Was issued after a hearing of which the actor received actual notice or for which the actor was personally served with notice, and at which the actor had an opportunity to participate; or
(II) Remained in effect after the actor failed to appear for a hearing of which the actor received actual notice or for which the actor was personally served with notice.

As to subsection (b)(2)(A)(iii), USAO recommends changing the words "sexual conduct" to "a sexual act, a sexual contact." "Sexual conduct" is not an element of RCC offenses, but a sexual act and a sexual contact are elements of RCC offenses.

As to subsection (b)(2)(C), the CCRC proposed modifying this provision to only include a final civil protection order. USAO had filed a comment recommending that this provision include a stay away/no contact order, in addition to a "no HATS" order. The CCRC states that it partially incorporates this recommendation by including any final civil protection order issued under D.C. Code § 16-1005. (App. D2 at 256.) However, this limitation excludes other important types of stay away orders, including stay away orders imposed as part of a criminal case, either as a condition of release pending trial or as a condition of probation. Moreover, under the Intrafamily Offenses and Anti-Stalking Orders Amendment Act of 2020 (B23-181), which has been passed by the DC Council and is currently pending congressional review, stay away orders could also be imposed as part of a newly created civil mechanism known as anti-stalking orders. USAO therefore recommends similar language to our previous proposal.

In subsection (b)(2)(C)(ii), USAO also recommends modifying the "actual notice" language to include situations in which the actor was personally served with notice. This language is consistent with the notice requirements in the Intrafamily Offenses and Anti-Stalking Orders Amendment Act of 2020, as clarified by Councilmember Charles Allen's amendment to the legislation. The rationale for this amendment was that "requiring *actual* notice could allow a respondent to avoid being found in violation of an order by remaining willfully ignorant of the order's contents and prohibitions. This amendment clarifies that *personal* service of a temporary protection order, civil protection order, valid foreign protection order, temporary anti-stalking order, or anti-stalking order also suffices for the purposes of finding a violation of the order." Amendment #1 to B23-0181, the "Intrafamily Offenses and Anti-Stalking Orders Amendment Act of 2020" (December 15, 2020).

I. D.C. Code § 16-705. Jury trial; trial by court.

USAO opposes the proposal that, three years following the enactment of the RCC, all offenses punishable by imprisonment be jury demandable.

USAO incorporates its arguments made in previous submissions regarding the significant expansion of jury trials proposed by the CCRC.

J. D.C. Code § 23-586. Failure to Appear After Release on Citation or Bench Warrant Bond.

USAO recommends eliminating the language that a defendant "fail to make reasonable efforts" to appear or remain for a hearing.

In response to PDS's comments, the RCC amended subsections (a)(2) and (b)(2) to require proof that the defendant "knowingly fails to make reasonable efforts to appear or remain for the hearing." It is unclear, however, how the government could prove that the defendant failed to make reasonable efforts to appear or remain for the hearing. PDS notes that there could be situations where a defendant desires to appear but fails to appear. (Appendix D2 at 319–20.) PDS provides examples where a person is stranded due to a bus cancellation, a person is unable to connect to a virtual hearing due to a technological problem, or a person is hospitalized. (App. C at 585.) Many of these situations, however, would be virtually impossible for the government to prove as an affirmative element. The government could not preemptively know what circumstance caused a defendant not to appear and investigate all those potential circumstances. Requiring the government to prove that the defendant failed to make reasonable efforts to appear would create a gap in liability for this offense. USAO therefore recommends that the CCRC remove this provision from the statute.

In the alternative, if the CCRC wishes to account for the possibility of these situations, the RCC could create an affirmative defense that allows a defendant to prove, by a preponderance of the evidence, that the defendant made all reasonable efforts to appear or remain for the hearing. That way, a defendant could offer proof—which could include the defendant's testimony or other evidence—of their bus breaking down, a serious injury, etc. This should be an affirmative defense, rather than a defense that the government must prove the absence of beyond a reasonable doubt, because the defendant will typically be the only party able to provide proof that they made all reasonable efforts to appear following a failure to appear.

K. D.C. Code § 23-1327. Failure to Appear in Violation of a Court Order.

USAO recommends eliminating the language that a defendant "fail to make reasonable efforts" to appear or remain for a hearing.

USAO repeats the above recommendations for RCC § 23-586 for this section as well.