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: February 16, 2021

SUBJECT: First Draft of Report #69 - Cumulative Update to Class Imprisonment Terms and Classification of RCC Offenses

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #69 - Cumulative Update to Class Imprisonment Terms and Classification of RCC Offenses.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22E-602. Authorized Dispositions[2]

For the reasons stated below, OAG objects to the proposal that judges be authorized to grant unlimited "probations before judgements" (PBJ)[3] to the same defendant, over government opposition, notwithstanding that neither the judge nor the prosecutor, because of the expungement provision, know how many times the defendant has received this benefit for committing the instant offense or for committing any number of other covered misdemeanor

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.
[2] Found at Appendix D3 – Disposition of Advisory Group Comments & Other Changes to Draft Documents (App. D3) page 1 and page 47 of the First Draft of Report #69 - Cumulative Update to Class Imprisonment Terms and Classification of RCC Offenses.
[3] Throughout this memo, OAG will refer to the CCRC proposal as a "probation before judgment" or "PBJ" as that is familiar phrase for when the court places a defendant on probation without entering the conviction.

offenses. Instead, OAG recommends that the judge's authority to grant a PBJ, for the designated offenses - over the government's objection[4]- should be limited to one PBJ in any 10 year period and that if the defendant successfully completes the PBJ, that the law enforcement and court records associated with the PBJ be sealed – not expunged.

Paragraph (c) states:

> *Dismissal of proceedings.*
>
> (1) When a person is found guilty of violation of any Class C, D, or E offense[5], the court may, without entering a judgment of guilty and with the consent of the person, defer further proceedings and place the person on probation upon such reasonable conditions as it may require and for such period, not to exceed one year, as the court may prescribe. Upon violation of a condition of the probation, the court may enter an adjudication of guilt and proceed as otherwise provided. The court may, in its discretion, dismiss the proceedings against such person and discharge the person from probation before the expiration of the maximum period prescribed for such person's probation. If during the period of probation the person does not violate any of the conditions of the probation, then upon expiration of such period the court shall discharge such person and dismiss the proceedings against the person. Discharge and dismissal under this subsection shall be without court adjudication of guilt. Such discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime (including the penalties prescribed under RCC § 22E-606 for second or subsequent convictions) or for any other purpose.
>
> (2) Upon the dismissal of the person and discharge of the proceedings against the person under paragraph (1) of this subsection, the person may apply to the court for an order to expunge from all official records all recordation relating to the person's arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this subsection. If the court determines, after hearing, that the person was dismissed and the proceedings against the person discharged, it shall enter such order. The effect of such order shall be to restore the person, in the contemplation of this law, to the status the person occupied before such arrest or indictment or information. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of failure to recite or acknowledge such arrest, or indictment, or trial in response to any inquiry made of the person for any purpose. [emphasis added]

On page 1 app D3, it states "Under current District law and prior versions of the RCC, deferred disposition was only available for possession of a controlled substance (a Class C or Class D

[4] OAG does not object to the court entering a PBJ more often than once every 10 years if the government concurs. See discussion below concerning deferred sentencing agreements.

[5] In prior Reports Class C, D, or E offenses were 90 day, 30 day, and no jail time offenses, but in Report 69 they were reduced to 60 day, 10 day, and no jail time. See RCC § 22E-603.

offense under the RCC), and prostitution and patronizing prostitution (both Class D offenses under the RCC). This change makes deferred disposition available to all other Class C, D, and E offenses." This note understates both the availability of a PBJ and the scope of the expansion.

In appropriate cases, OAG and a defendant enter into an agreement that if the defendant pleads guilty and agrees to go on probation, that if the defendant successfully completes the term of the probation, that OAG agrees not to oppose the defendant withdrawing their guilty plea and, after the plea is withdrawn, OAG dismisses the case under Superior Court Criminal Rule 48 (a). Thus, PBJs are actually granted across the range of offenses that OAG prosecutes (not merely for the USAO charges of controlled substances, prostitution, and patronizing prostitution). This plea bargain arrangement is referred to as a deferred sentencing agreement or DSA. DSAs are not the only mechanism that OAG uses to dispose of appropriate cases in a way that allows a defendant not have a conviction on their record. OAG also offers defendants deferred prosecution agreements or DPAs. A DPA is like a DDA, except that in a DPA the defendant does not have to plead guilty or otherwise admit guilt in any way. DPAs and DSAs make up a portion of a continuum whereby OAG offers a defendant a mechanism not to have their criminal behavior lead to a conviction. This continuum includes OAG allowing law enforcement to offer post and forfeits as a way of resolving the offense; OAG exercising its discretion not to bring charges, including when we offer diversion opportunities; offering post charging post and forfeits; DPAs; and DSAs. This continuum, however, is based on the fact that OAG and law enforcement know the defendant's criminal history because, even if prior arrests, charges, and convictions have been sealed from public view, pursuant to D.C. Code § 16-803, OAG knows the defendant's criminal record and can authorize the appropriate level of intervention necessary to try and rehabilitate or sanction the defendant. If OAG is deprived of the person's criminal record, then we will not know the level of intervention that is necessary and just. Which is the same position under RCC § 22E-602, that a judge would be in when trying to decide if the defendant's plea or finding of guilt at trial should be expunged under this provision. The judge will not know the person's true criminal history.

As noted above, both a DSA and a DDA may be sealed under D.C. Code 16-803. Law enforcement and court records sealed under this provision, like the CCRC expungement proposal, provide that the person cannot be found guilty of perjury or giving a false statement for failing to disclose the facts of their criminal history. See RCC § 22E-602 (c)(2) and D.C. Code § 16-803 (m).[6] However, there is a major difference between a record being sealed and it being

[6] RCC § 22E-602 (c)(2) provides that "(2) Upon the dismissal of the person and discharge of the proceedings against the person under paragraph (1) of this subsection, the person may apply to the court for an order to expunge from all official records all recordation relating to the person's arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this subsection. If the court determines, after hearing, that the person was dismissed and the proceedings against the person discharged, it shall enter such order. The effect of such order shall be to restore the person, in the contemplation of this law, to the status the person occupied before such arrest or indictment or information. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of failure to recite or acknowledge such arrest, or indictment, or trial in response to any inquiry made of the person for any purpose. [emphasis

expunged. Under the CCRC proposal, neither the judge nor the prosecutor in any case will know whether the defendant was a first offender or someone who has had their records expunged numerous times pursuant to RCC § 22E-602 (c)(2). Under current law, only when individuals who have their records sealed for actual innocence will the records generally not be available to judges, prosecutors, and law enforcement. As the Council Court Excellence stated in the Committee Report for B16-0746, the Criminal Record Sealing Act of 2006:

> The calculus is quite different, however, when the records to be sealed relate to an individual who may be or is guilty of a criminal offense. In such instances, there are strong reasons for preserving the ability of law enforcement agencies to access those records for legitimate law enforcement purposes. As the D.C. Circuit Court of Appeals has noted:
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> > The government does … have a legitimate need for maintaining criminal records to efficiently conduct future criminal investigations. Law enforcement authorities have an interest in knowing, for example, that a definite suspect in a crime under investigation had previously been arrested or convicted, especially if for a similar offense. Likewise, police investigators will be greatly assisted if they are able to check whether persons residing or having been observed at the situs of an offense involving a particular modus operandi had previously been arrested or convicted of an offense involving the same modus operandi.
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> *Doe v. Webster,* 606 F. 2d 1226, 1243 (D.C. Cir. 1979). Similarly, courts often consider criminal records in making a wide variety of decisions, ranging from pre-trial detention to sentencing decisions.[7]

See page 17 of Council for Court Excellence's report contained in the Committee Report for B16-0746, the Criminal Record Sealing Act of 2006. In the same year that the Circuit Court decided *Webster*, the D.C. Court of Appeals issued an opinion in lock step with the Circuit Court. The Court of Appeals stated:

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added]. Though OAG disagrees with the proposal, as explained in the text above, we do note that the quoted language of (c)(2) above appears to be inconsistent. While the court can expunge an information; a finding of guilt, which would include a plea of guilty; and a dismissal, the defendant could *still* be prosecuted for perjury or giving a false statement for failing to mention those to events because the last sentence of RCC § 22E-602 (c)(2) is limited to indictments and trials.

[7] There are other uses of criminal records that the Court in *Doe* did not mention that the government would be deprived of if records were expunged rather than sealed. These include how many times – and under what circumstances -a defendant made a knowing waiver of their right to remain silent, prior to claiming in the instant case that they do not understand their rights. Also, if records are expunged, the government will not have access to potential *Brady* information that the government would have had to turn over to another defendant which could help exculpate that second person. See *Brady v. Maryland*, 373 U.S. 83 (1963),

> [it] has been said that law enforcement officials use records of arrests in the following ways: Police officers will use an arrest record "in subjecting the individual to rearrest on the basis of past arrests and in deciding whether to bring formal charges"; the prosecutor, in deciding the category of the offense to charge a defendant and whether to plea bargain with him, could consider the defendant's past arrests; parole boards, in determining whether to release a defendant under sentence, could consider the arrest records of the potential parolee; and finally, courts might well give some weight to a particular defendant's past arrests in determining the conditions for his release pending trial of a current charge. *District of Columbia v. Hudson,* 404 A.2d 175, 179 (D.C. 1979), *citing* Retention and Dissemination of Arrest Records: Judicial Response at 855.

All of the sound reasons cited by the two appellate courts for permitting nonpublic retention of records would be lost under the CCRC proposal to expunge these records.

Very few jurisdictions have adopted the CCRC recommendation permitting judges to grant PBJs without the prosecutor's consent. And, of those that permit this practice, it does not appear that any allow it for all offenses within multiple misdemeanor classes. As noted on pages 60 and 61 of the 2017 proposed Final Draft of the Model Penal Code: Sentencing (entry on judicial deferral):

> d. *Process*. Deferred-adjudication provisions that do not require the consent of the prosecutor are relatively rare, but not unknown. See N.Y. Crim. Proc. Law § 170.56 ("Adjournment in contemplation of dismissal in cases involving marihuana"); Vt. Stat., title 13, § 7041 (trial court has authority to defer adjudication without agreement of prosecutor in specified circumstances). See also Ohio Rev. Code § 2935.36 (prosecutor must initiate pretrial diversion process based on prosecutor's belief that the defendant "probably will not offend again," although case law grants judges nonstatutory authority to devise their own similar programs; see Lane v. Phillabaum, 912 N.E.2d 35 113 (Ohio Ct. App. 2008)).
>
> There is no general deferred-adjudication statute in New York, but courts have created a deferred-adjudication process under their own rules, allowing guilty pleas to be withdrawn with the consent of the prosecutor following successful completion of a period of probation. See N.Y. City Bar, The Immigration Consequences of Deferred 4 Adjudication Programs in New York City (2007), at 2-3, available at 5 http://www.nycbar.org/pdf/report/Immigration.pdf; N.Y. Crim. Proc. Law §§ 160.5, 160.55. [emphasis added]

The recommendation made by the American Law Institute Model Penal Code Sentencing (recommendations) is even more limiting in its approach.[8] On page 58 it states:

[8]See mpcs_proposed_final_draft.pdf

> d. Process. The main significance… is that a deferred adjudication does not require the approval of the prosecutor, though it always requires the consent of the defendant. The majority of existing state provisions interpose prosecutors as gatekeepers to deferred adjudications, and the revised Code would disapprove of this arrangement in all cases… [emphasis added]

While OAG disagrees with the proposal to allow judges to grant unlimited PBJs for this class of misdemeanors over the government's objection, we do not oppose a more limited grant of authority. OAG proposes that RCC § 22E-602 be amended to permit a judge to grant a PBJ over the government's objection only once every 10 years. OAG's proposal is modeled on provisions in the Maryland Code. See Maryland Code § 6-220 (d).[9] This limitation ensures that defendants who receive this benefit deserve it. A defendant should not be able to commit crime after crime and escape having a criminal record. By limiting the judge's ability to require a PBJ to once every 10 years, the provision targets defendants whose criminal offenses represent aberrant behavior for them. Few jurisdictions grant this authority to judges and those appear to be for a very limited number of offenses. It is one thing for a judge to grant a PBJ when it is part of a plea bargain which was agreed to by the parties and another for a judge to be able to do it over the objection of the prosecutor. The broad scope of CCRC's recommendation, like RCC § 22E-215, De Minimis Defense, improperly impedes on prosecutorial discretion in seeking justice. When the CCRC's proposed amendments to D.C. Code § 16-705, eventually granting jury trials to any person who has any jail exposure,[10] is considered, we end up with a system where a defendant charged with a Class C, D, or E offense will first be able to argue that the offense is De Minimus (basically a jury nullification argument), if they lose they get a jury trial, and when they lose, they will not end up with a conviction because a judge grants a PBJ, even though neither the judge nor the prosecutor was aware of the number of times that the person has previously received a PBJ. For the foregoing reasons, OAG objects to the recommendation as drafted in RCC § 22E-602 and recommends, instead, that the judge's grant of authority to order a PBJ over the government's objection be limited to once every 10 years.

Whether or not the CCRC adopts OAG's proposal, OAG recommends an amendment to subparagraph (c)(2) above. The proposed language, echoing some sealing language in existing law, states, "The effect of such order shall be to restore the person, in the contemplation of this law, to the status the person occupied before such arrest or indictment or information. No person

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[9] For example, Maryland Code § 6-220 (d)(1) states that a court may not stay the entering of judgment and place a defendant on probation for [] "a violation of § 21-902 of the Transportation Article or § 2-503, § 2-504, § 2-505, § 2-506, or § 3-211 of the Criminal Law Article, if within the preceding 10 years the defendant has been convicted under § 21-902 of the Transportation Article or § 2-503, § 2-504, § 2-505, § 2-506, or § 3-211 of the Criminal Law Article, or has been placed on probation in accordance with this section, after being charged with a violation of § 21-902 of the Transportation Article or § 2-503, § 2-504, § 2-505, § 2-506, or § 3-211 of the Criminal Law Article." [emphasis added]

[10] See proposed amendments to D.C. Code § 16-705 (b), on page 51 of First Draft of Report 69, which states in relevant part "After [midnight on a date three years after enactment of the RCC], in a criminal case tried in the Superior Court … The defendant is charged with an offense that is punishable by a fine or penalty of more than $250, or by imprisonment…"

as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of failure to recite or acknowledge such arrest, or indictment, or trial in response to any inquiry made of the person for any purpose." In other sealing contexts, OAG has recommended that "law" read "District law," in light of the fact that the District lacks the authority to control the operation of federal law.

RCC § 22E-1201. Robbery[11]

Subparagraph (e)(5) establishes a class of penalty enhancements. As to firearms, it states:

> The penalty classification of second and third degree robbery is increased by:
>
> (A) One class when the actor commits the offense…
>
> (II) Under sub-paragraphs (b)(3)(B), (c)(1)(B), (c)(1)(C), or (c)(1)(D) by using or displaying what is, in fact, a dangerous weapon or imitation dangerous weapon; or
>
> (B) Two classes when the actor commits the offense under sub-paragraph (b)(3)(A) or sub-paragraph (c)(1)(A) by recklessly displaying or using what, in fact, is a dangerous weapon.

OAG believes that the Commentary overstates the necessary linkage in the proposed statutory text between the displaying of the weapon and any bodily injury that the victim may have suffered. For example, subparagraph (c)(1)(A), a triggering offense under (e)(5)(B) above, includes the element that the perpetrator must "Caus[e] bodily injury to the complainant or another person present, when the perpetrator "Knowingly takes or exercises control over the property of another that the complainant possesses within the complainant's immediate physical control."

The Commentary states, in relevant part:

> Paragraph (e)(5) provides two penalty enhancements for second and third degree robbery that are the same as under paragraph (e)(4), except that there are more severe penalties for committing the robbery by inflicting a bodily injury or significant bodily injury by recklessly displaying or using what, in fact, is a dangerous weapon. To receive the higher (two penalty class) enhancement the dangerous weapon must directly or indirectly cause the bodily injury or significant bodily injury to the complainant.[12] [emphasis added]

[11] In this memo, OAG is addressing a narrow aspect of the RCC robbery offense. For OAG's comments, generally, see OAG's Memorandum on the First Draft of Report 68 - Red-Ink Comparison and Attachments, dated January 29, 2021.

[12] Following the quoted text, the Commentary continues If the government proves the presence of at least one element listed under paragraph (e)(5)(A), the penalty classification for second and third degree robbery may be increased in severity by one penalty class. If the government proves the presence of the element listed under paragraph (e)(5)(B), the penalty classification for second and third degree robbery may be increased in severity by two penalty classes. The increased penalty reflects the greater risk of more serious injury when actually using a dangerous weapon

The Commentary includes footnote 4 here. It states, "For example, if a defendant displays a gun during a robbery and the gun's display causes a complainant to step back, trip, fall, and suffer an injury from the fall, the weapon penalty enhancement would be satisfied even though there was no gunshot."

The disconnect between the proposed statutory text and the Commentary, is that when the penalty enhancement in subparagraph (e)(5)(B) is applied to the offense in (c)(1)(A), it appears that there will be an enhancement when the perpetrator commits the robbery and causes bodily injury to someone. The text does not appear to require the causation element that the display of the dangerous weapon directly or indirectly causes the bodily injury. If it does, it is because of the CCRC's belief that the word "by," in the quote above, by itself, requires this connection. To ensure that it is clear that the text of this enhancement matches the intent of the CCRC as expressed in the Commentary, OAG recommends amending subparagraph (e)(5)(B) to read:

> Two classes when the actor commits the offense under sub-paragraph (b)(3)(A) or sub-paragraph (c)(1)(A) by recklessly displaying or using what, in fact, is a dangerous weapon and that the display or use of the dangerous weapon directly or indirectly causes the injury to the complainant.

RCC § 22E-2701. Burglary

On page 22 of Appendix E are the proposed penalties for the different gradations of the burglary offense. They are as follows:

• Enhanced 1st Degree Burglary	Class 7 felony	8 years (96 months)
• 1st Degree Burglary	Class 8 felony	4 years (48 months)
• Enhanced 2nd Degree Burglary	Class 8 felony	4 years (48 months)
• 2nd Degree Burglary	Class 9 felony	2 years (24 months)
• Enhanced 3rd Degree Burglary	Class 9 felony	2 years (24 months)
• 3rd Degree Burglary	Class A misdemeanor	1 year (12 months)

RCC § 22E-2701 (a) states the elements for first degree burglary. It says:

> (a) *First degree*. An actor commits first degree burglary when that actor:
> (1) 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;
> (2) Knowingly and fully enters or surreptitiously remains in a dwelling, or part thereof;
> (3) Without a privilege or license to do so under civil law;
> (4) With intent to commit inside one or more District offenses that is, in fact, an offense under Subtitle II of this title or a predicate property offense.[13]

against another person. These penalty enhancements may apply in addition to any penalty enhancements authorized by RCC Chapter 6.

[13] See pages 149 and 150 of the First Draft of Report 68 – Red-Ink Comparison.

Subtitle II, mentioned in subparagraph (a) (4) above, is the subtitle that contains "Offenses Against Persons.[14] Predicate property offenses are defined in paragraph (e)(2) as:

(A) Theft under RCC § 22E-2101;
(B) Unauthorized Use of Property under RCC § 22E-2102;
(C) Unauthorized Use of a Motor Vehicle under RCC § 22E-2103;
(D) Extortion under RCC § 22E-2301;
(E) Arson under RCC § 22E-2501;
(F) Reckless Burning under RCC § 22E-2502; or
(G) Criminal Damage to Property under RCC § 22E-2503.

The current burglary statute is found in D.C. Code § 22-801. Paragraph (a), like RCC § 22E-2701 (a), establishes the offense for a burglary of an occupied residence. It states:

> (a) Whoever shall, either in the nighttime or in the daytime, break and enter, or enter without breaking, any dwelling, or room used as a sleeping apartment in any building, with intent to break and carry away any part thereof, or any fixture or other thing attached to or connected thereto or to commit any criminal offense, shall, if any person is in any part of such dwelling or sleeping apartment at the time of such breaking and entering, or entering without breaking, be guilty of burglary in the first degree. Burglary in the first degree shall be punished by imprisonment for not less than 5 years nor more than 30 years.

Therefore, while the current law provides a range of 5 years to 30 years for burglarizing an occupied residence, the CCRC recommends that the offense carry a maximum penalty of just 4 years. In addition, whereas committing an armed burglary of a residence, under current law carries a maximum penalty of 60 years and a 5 year mandatory minimum for a first offense[15], the CCRC recommendation is that this offense, designated as enhanced 1st degree burglary, carry a maximum penalty of only 8 years. To recognize the seriousness of a burglary of an occupied residence, including the trauma and potential harm to a victim, OAG recommends that the CCRC amend the burglary penalty provision to increase, by one class the penalty for first degree burglary and enhanced first degree burglary.[16]

D.C. Code § 24-403.01. Sentencing, supervised release, and good time credit for felonies committed on or after August 5, 2000

[14] See pages 47 through 124 of the First Draft of Report 68 – Red-Ink Comparison.
[15] See D.C. Code § 22-4502, additional penalty for committing crime when armed.
[16] OAG's recommendation is consistent with the recommendation previously made by USAO. It varies in that OAG is making a specific recommendation as to which penalty class should be assigned by to first degree and enhanced first degree burglary. See page 240 of Appendix D2: Disposition of Advisory Group Comments & Other Changes to Draft Documents.

For the reasons stated below, OAG recommends deleting the reference to August 5, 2000 from this provision. Paragraph (a) of the CCRC draft, on page 38, retains verbatim the existing language of D.C. Code § 24-403.01 (a). That paragraph states:

> For any felony committed on or after August 5, 2000, the court shall impose a sentence that:
> (1) Reflects the seriousness of the offense and the criminal history of the offender;
> (2) Provides for just punishment and affords adequate deterrence to potential criminal conduct of the offender and others; and
> (3) Provides the offender with needed educational or vocational training, medical care, and other correctional treatment.

B13-0696 - Sentencing Reform Amendment Act of 2000 added the language that references August 5, 2000 in D.C. Code § 24-403.01 which was carried over into this provision. On page 2 of the Committee Report for this legislation, in the Purpose section, it states, "Congress established a determinate sentencing scheme for the District of Columbia that abolished parole for subsection (h) offenses committed on or after August 5, 2000 and requires offenders to serve at least 85% of the determinate sentence."[17]

OAG's recommendation to remove the date is based upon three premises. First, few, if any, people are likely to be sentenced for offenses committed at least 22 years before the RCC's enactment. Second, in hindsight, for those old offenses, there is no reason why the court should not impose an indeterminate sentence that:

> (1) Reflects the seriousness of the offense and the criminal history of the offender;
> (2) Provides for just punishment and affords adequate deterrence to potential criminal conduct of the offender and others; and
> (3) Provides the offender with needed educational or vocational training, medical care, and other correctional treatment.

This is especially true because, as the Council for Excellence noted as to the effects of indeterminate sentencing:

> It was our experience and expectation at the time we were involved in these cases that the minimum, or "bottom number," of an indeterminate sentence was the amount of time felt appropriate to serve as punishment for the offense. Absent specific circumstances, such as poor conduct while incarcerated, that led the Parole Board to decide that additional incarceration was appropriate, the offender was presumptively expected to be released upon serving the minimum sentence… The signatories to this letter who participated in sentencing -- prosecutors who recommended sentences, public defenders who advised their clients regarding plea offers, and judges who imposed the sentences -- acted based on the

[17] See https://lims.dccouncil.us/Legislation/B13-0696.

> presumption that people serving indeterminate sentences would be eligible for release upon serving their minimum sentence, and would be released absent specified aggravating conduct while incarcerated. While not commenting on any specific case, we would be surprised to learn that those whose cases we were involved in were not granted parole at the bottom number, despite having risk scores appropriate to being released and absent disqualifying institutional behavior..[18]

After the RCC is enacted, judges who must sentence a person for an offense that occurred when the District still had indeterminate sentencing should be guided by the redrafted D.C. Code § 24-403.01 (a) when determining the minimum and maximum sentence.[19]

Third, by removing the date, we avoid an issue concerning how people should be sentenced for offenses that where committed between August 2000 and the effective of the RCC.

In addition, the Commentary should make it clear that the removal of the date is not intended (nor understood) to require resentencing for someone who has already been sentenced under the then existing statutory provision.

[18] See http://www.courtexcellence.org/uploads/publications/Restoring_Local_Control_of_Parole_Sign_On_Letter.pdf

[19] This is not to say that the remainder of D.C. Code § 24-403.01 should apply to offenses that occurred before the RCC is enacted.

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:	February 9, 2021
Re:	Comments on First Draft of Report No. 69, Cumulative Update to Class Imprisonment Terms and Classification of RCC Offenses

The Public Defender Service submits the following comments on Report No. 69 for consideration.

1. **Reduce sentence length**. PDS acknowledges that the Commission reduced many maximum sentences from 60 years or life without release to 45 years or less. However, as conceded in the RCC commentary, 45 years still amounts to a life sentence and is more than the 39.2 years that the Bureau of Prisons considers to be a life sentence.[1] PDS understands the CCRC's point that maximum penalties of 45 and 40 years, though seemingly lower than the D.C. Code's maximum allowable prison sentences, are in fact comparable to life without possibility of release because the life expectancy for non-Hispanic Black men in the District is just under 69 years.[2] However, the notion that we would create a system that sets penalties based on ensuring the possibility that the punishment can be longer than the life of the person being punished is extremely troubling. PDS has repeatedly advocated[3] against creating life sentences in the Revised Criminal Code and joins scholars and researchers who argue for setting the absolute maximum sentence for an offense at no more than 20 years of incarceration.[4] In the District, long prison sentences are imposed almost exclusively on Black residents.[5] This long-term incarceration traumatizes families and perpetuates poverty by depriving families of the support and wages of incarcerated

[1] RCC Commentary First Draft of Report #69 page 5.

[2] PDS notes with sadness and alarm the fact that a discussion of life expectancies in the context of the District's criminal legal system could quote only one statistic to have relevance for the overwhelming vast majority of the defendants in the system.

[3] See PDS comments to Comments on First Draft of Report No. 51, Jury Demandable Offenses and First Draft of Report No. 52, Cumulative Update to RCC Chapter 6 Offense Classes, Penalties, & Enhancements, May 15, 2020.

[4] See e.g. Marc Mauer, *A 20-Year Maximum for Prison Sentences.* Available at: https://www.sentencingproject.org/news/a-20-year-maximum-for-prison-sentences/.

[5] For example, the 2019 Annual Report of the DC Sentencing Commission states that 93% of the individuals sentenced for felonies that year were Black. Available at: https://scdc.dc.gov/sites/default/files/dc/sites/scdc/service_content/attachments/Annual_Report_Final%2004-10-2020.pdf.

family members. While inflicting deep harm, there is no evidence that sentences beyond 20 years further community safety. Numerous studies have shown that criminal behavior correlates strongly with age and that individuals "age out of crime." Researchers have concluded that "age is one of the most robust predictors of criminal behavior." The age-crime curve "shows that most criminal offending declines substantially beginning in the mid-20s and has tapered off substantially by one's late 30s."[6]

There is also no evidence that increasing sentences from 20 years to 45 years deters criminal conduct. The study of deterrence has led to the conclusion that it is the certainty of punishment that serves as a deterrent rather than the length of punishment.[7] It is also unrealistic to think that an individual weighing whether to commit a crime would be deterred by 45 years but would not be deterred by 20 years.[8] The life-expectancy statistic is important. Rather than use it to justify penalties that are effectively death sentences, the statistic should justify lowering the sentences to 20 years maximum imprisonment.

While incarcerating older individuals offers diminishing returns from a public safety standpoint, it comes with significant financial costs. Given the District's movement toward statehood, the District can no longer ignore the financial costs of incarceration which have for decades been paid for by the federal government. According to Vera Institute, the average cost of incarceration is $45,000 per year per individual.[9] The cost for care increases for all people as they age, but since health declines more rapidly for incarcerated individuals as a result of poor health care and environmental stress, the costs associated with incarceration will increase sharply as a result of aging.[10] By allowing sentences over 20 years in length, the District will be forced to allocate funds that could go to education, housing, drug treatment and conflict resolution training – the lack or insufficiency of which are all root causes of entry into the criminal legal system – to warehousing older individuals when they pose no threat to public safety.

2. **Reduce time on probation.** While the current version of the RCC does not address reform of probation, PDS urges the Commission to address this aspect of sentencing as well. Probation, just like supervised release, should have much shorter periods of supervision, set at a maximum of two years. Further, to increase any positive impacts of probation and to minimize intrusive,

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[6] Ashley Nellis, *Still Life: America's Increasing Use of Life and Long-Term Sentences*, May 3, 2017. Available at: https://www.sentencingproject.org/publications/still-life-americas-increasing-use-life-long-term-sentences/.

[7] Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, at 10. Available at: https://www.sentencingproject.org/publications/long-term-sentences-time-reconsider-scale-punishment/.

[8] *Id.*

[9] Vera Institute, *The Price of Jails*, May 2015. Available at: https://www.vera.org/publications/the-price-of-jails-measuring-the-taxpayer-cost-of-local-incarceration#:~:text=The%20annual%20cost%2C%20per%20incarcerated,the%20total%20cost%20of%20jails.

[10] Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, at 10. Available at: https://www.sentencingproject.org/publications/long-term-sentences-time-reconsider-scale-punishment/.

unproductive, and lengthy supervision, the RCC should consider tying the length of probation to completion of a goal rather than an arbitrary amount of time. The RCC should also establish a one-year review of probation at which time there should be a presumption that probation will be terminated unless the government can show a compelling reason for continuing probation. According to research analyzed by the Pew Institutes, "studies show that after the first year, many supervision provisions, such as reporting requirements and community-based services, have little effect on the likelihood of re-arrest, so keeping probation terms short and prioritizing resources for the early stages of supervision can help improve success rates among people on probation, reduce officer caseloads, and protect public safety."[11]

3. **Reduce supervised release terms**. PDS urges the Commission to reduce the time that individuals are required to spend on supervised release and to set two years as the maximum period of supervision. Long periods of supervision are not only demeaning to individuals, they feed a system of mass incarceration through which supervision officers use minor violations to send individuals to prison for infractions that could be better addressed through community programs or a problem-solving approach. As of 2016, as many as 4.5 million people were on probation or parole, amounting to one out of every 55 individuals.[12] "Across the United States, in 20 states, more than half of all state prison admissions in 2017 stemmed from supervision violations. In six states—Utah, Montana, Wisconsin, Idaho, Kansas, and South Dakota—violations made up more than two-thirds of state prison admissions."[13] In February 2021, when arguably fewer people were detained by the United States Parole Commission, nearly 13 percent of non-federal detentions at the DC Department of Corrections were for alleged parole and supervised release violations.[14] Much of this incarceration stems from technical violations, which reflect the over-policing of Black communities and exacerbate the disparities in a system that already incarcerates African Americans at disproportionate rates.[15]

   Further, the District should be exceedingly cautious about imposing supervision requirements. As currently structured, supervised release is supervised by the Court Services Offender Supervision Agency (CSOSA), over which the District has no control. For example, the District is powerless to stop CSOSA's practice of requesting warrants and the arrest of individuals for minor infractions of supervision requirements. Similarly, the District cannot order CSOSA to stop onerous check-in requirements and electronic monitoring for individuals who pose little risk of recidivism. Rather than responding to District initiatives, this federal agency will respond to federal prerogatives that have often run afoul of local interests. Once CSOSA requests a warrant or informs the United States Parole Commission (USPC) of a supervision infraction, the warrant

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[11] Pew, States Can Shorten Probation and Protect Public Safety, December 3, 2020. Available at: https://www.pewtrusts.org/en/research-and-analysis/reports/2020/12/states-can-shorten-probation-and-protect-public-safety.

[12] Human Rights Watch, *Revoked: How Probation and Parole Feed Mass Incarceration in the United States*, July 31, 2020. Available at: https://www.hrw.org/report/2020/07/31/revoked/how-probation-and-parole-feed-mass-incarceration-united-states.

[13] *Id.*

[14] Data provided through the Criminal Justice Coordinating Council.

[15] See supra note 3.

is almost always issued by the USPC, another federal entity over which the District has no control and can exercise no oversight. If the power to rescind supervision rested with judges, then the Council and the Mayor would at least be in a position to legislate surrounding the circumstances that would trigger a revocation and decide the length of incarceration to be served for an infraction. As the District prioritizes achieving statehood, it should not add to the federal control of its residents by relegating them to long periods of federal supervision without meaningful local checks. Until there is a restructuring of the authority of CSOSA and the United States Parole Commission, the clearest way to ensure that the District plays the largest role in the fate of District residents is by limiting the time spent on supervised release and instead proactively working to make programming, housing, education, and employment available to returning citizens in a voluntary fashion that respects their dignity.

4. **Expand misdemeanor dismissal provision.** RCC § 22E-602(c) Authorized Dispositions, allows a judge to place an individual found guilty of any Class C, D, or E offense on probation and then dismiss the proceedings against the person at the end of the period of probation, or earlier. PDS strongly supports this provision but believes that it should be expanded beyond Class C, D, and E offenses. As written, this option is available to judges for offenses that carry a maximum term of 60 days of incarceration. Under the current D.C. Code, an analogous provision exists only for first time drug offenses that would otherwise carry 180 days of incarceration.[16] The RCC should build and expand on that provision by including all misdemeanors and low-level felonies.

   RCC § 22E-602(e) is not a mandatory dismissal procedure, but instead grants discretion to judges to fashion appropriate remedies for District residents. Until the District becomes a state and has a locally elected prosecutor and local input on what cases should be brought to court in the first instance and what should be resolved through diversion, community programs, and restorative justice, the CCRC should give broad discretion to judges to fashion justice. Without a broad provision that allows for judicial dismissal, the decision about what happens to District residents and how they are treated in the criminal legal system will in most cases fall to a United States Attorney that the District had no vote in confirming. The RCC should recognize the need to give lawyers the opportunity to argue for a complete set of remedies to Superior Court judges and allow those decision-makers, in addition to the United States Attorney's Office, to have a role in deciding the fair outcome of prosecutions.

   The dismissal procedure is also necessary to bring a measure of racial equity to the District's criminal legal system. As shown by the Sentencing Commission's felony sentencing data, more than 90 percent of the individuals sentenced on felonies are Black[17], and any time spent in misdemeanor and traffic courtrooms in Superior Court shows that the same racial dynamics exist for misdemeanors. It is not that white residents do not commit offenses, rather they are diverted out of the system before they ever get to a courtroom. White defendants are not arrested, are given warnings, dismissal opportunities, and second chances. The non-arrests do not register in any database, are not counted against them and do not create barriers for employment, education, or housing. RCC § 22E-602(e) provides a way for Black defendants to have an opportunity to

[16] D.C. Code § 48–904.01(e)(1).

[17] See supra note 5.

have a small measure of the compassion enjoyed by white residents, although RCC § 22E-602(e) will still require criminal prosecution and probation.

Finally, a dismissal procedure in not an extraordinary remedy that would be unique to the District. New York allows for dismissal of all misdemeanors in the interests of justice.[18] Twelve states recognize the judicial capacity to dismiss cases in the interest of justice.[19] If the District aims to undue its role in the mass incarceration of Black residents, it needs to open multiple avenues to allow individuals to exit the criminal legal system.

5. **Limit Enhancements**. PDS maintains its objection to enhancements based on prior convictions (RCC §22E-606) and on pre-trial release status (RCC §22E-607) and incorporates its previous arguments explaining why these enhancements are overly punitive and amplify the racial disparities and inequities of our criminal legal system.[20] Compounding the problems with those enhancements is the policy choice to allow stacking of enhancements. PDS continues to argue that allowing the stacking of enhancements undermines the commendable work of the CCRC to eliminate as much as possible sentences that are disproportionate to the person's conduct and harm caused.[21] For Report No. 69 in particular, PDS reiterates its recommendation that the repeat offender enhancement and the pre-trial release status enhancement, which both increase the statutory maximum for an offense add a certain number of years to increase the statutory maximum of an offense based on the class of the offense, add years based on the class of the unenhanced offense (e.g., 2nd Robbery) rather than on an already enhanced offense (e.g., enhanced 2nd Robbery (significant bodily injury by dangerous weapon)). If CRCC persists in the policy choice of increasing punishment based on the status of the offender rather than based only on the offender's conduct, PDS strongly recommends that the status-punishment be minimal. In many cases, the enhanced offense and the unenhanced offense would receive the same status-punishment. For example, 1st Robbery is in class 6 and enhanced 1st Robbery is in class 5. The status-punishment based on prior convictions (RCC §22E-606) adds 2 years to the statutory maximum for an offense that is in either class 5 or class 6. In other cases, allowing the status-punishment on the enhanced offense would make a difference. For example, 2nd Robbery is in class 8. The significant bodily injury, dangerous weapon enhancement at RCC § 22E-606(e)(5)(B) adds two classes, class 6. The status-punishment based on prior convictions adds 1 year for a class 8 offense but adds 2 years for a class 6 offense. The punishment for the offense is already untethered from the conduct committed, allowing punishment that is disproportionate, the CCRC should not add to the disparity by increasing the punishment that is based only on status. For clarity, PDS recommends that the addition to the explanatory note for robbery[22] include a footnote following the sentence that reads: "These penalty enhancements may apply in addition to any penalty enhancements authorized by RCC Chapter 6." That footnote should

[18] New York Criminal Procedure § 170.40.

[19] Valena E. Beety, Judicial Dismissal in the Interest of Justice, Missouri Law Review, 2015. Available at: https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=4147&context=mlr

[20] See Appendix C, Cumulative Advisory Group Written Comments on CCRC Draft Documents (1-29-21) at C42 - C45 and C533 - C536.

[21] See Appendix C at C678 – C679.

[22] See Report #69 at 36.

clarify the enhancements authorized by RCC §22E-606 and §22E-607 enhance the unenhanced robbery gradation.

In addition, PDS recommends changing Appendix E so that the main charts only show the class rankings of the offense gradations and not any enhanced rankings. For example, instead of showing that Enhanced 1st Robbery is in class 5; 1st Robbery is in class 6; Enhanced 2nd Robbery (significant bodily injury by dang weapon), Class 6; etc., the chart should just show 1st Robbery (class 6), 2nd Robbery (class 8), and 3rd Robbery (class 9). The problem with ranking unenhanced offenses and enhanced offenses in the same chart is that it is confusing and could allow a practitioner to apply an enhancement based on the classification of an enhanced offense. If CCRC likes the idea of a chart that shows the ranking of enhanced offenses, it could create a separate chart, also in Appendix E, only for enhanced offenses.

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 #69	Date: February 16, 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 #69. USAO reviewed these documents and makes the recommendations noted below.[1]

First Draft of Report #69—Cumulative Update to Class Imprisonment Terms and Classification of RCC Offenses

In addition to the recommendations below, USAO incorporates our previous recommendations regarding imprisonment terms and classification of RCC offenses.

A. RCC § 22E-602. Authorized Dispositions.

USAO recommends that the CCRC clarify that subsection (c) is only available for a deferred disposition where a Class C, D, or E offense is the most serious offense of which a defendant has been found guilty.

As currently drafted, RCC § 22E-602(c)(1) provides, "When a person is found guilty of violation of any Class C, D, or E offense, the court may, without entering a judgment of guilty and with the consent of the person, defer further proceedings and place the person on probation upon such reasonable conditions as it may require and for such period, not to exceed one year, as the court may prescribe. . . ." As currently drafted, for example, a defendant found guilty of both a felony and a Class C misdemeanor in the same case could theoretically benefit from this deferred disposition in the misdemeanor. This result would not be justified by the rationale and likely was not intended by the drafters. The Commentary provides: "This discretionary authority is warranted given that Class C, D, and E offenses are the least serious offenses in the RCC . . . ." (First Draft of Report 69 at 49.) Thus, the deferred disposition should only be available if a defendant were found guilty *only* of one of the least serious offenses in the RCC—that is, a Class

[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.

C, D, or E misdemeanor—and should not be available if the defendant were found guilty of a more serious offense in addition to that offense.

USAO recommends increasing the penalties for Class C and Class D misdemeanors.

The CCRC originally proposed that Class C misdemeanors be punishable by a maximum of 90 days imprisonment, and that Class D misdemeanors be punishable by a maximum of 30 days imprisonment. The CCRC modified its initial proposal to recommend that Class C misdemeanors be punishable by a maximum of 60 days imprisonment, and that Class D misdemeanors be punishable by a maximum of 10 days imprisonment. The CCRC recognizes that this would have the effect of lowering the penalty for many of these offenses under current law. (*See* Report 69 at 4 n.3.) USAO recommends that the CCRC return to its initial proposal of 90 days for Class C misdemeanors and 30 days for Class C misdemeanors. Notably, even under this framework, the penalties for many offenses would be lower than they are under current law.

B. RCC § 22E-1101. Murder.

USAO continues to oppose lowering the penalty for Murder, particularly for First Degree Murder.

Premeditated first degree murder is the most serious criminal offense that can be committed. The penalty for this offense should be commensurate with the seriousness of this offense, and USAO opposes the CCRC lowering that penalty.

Although social science has long shown that the risk an individual will commit a violent offense declines as the individual ages, "an emerging theme in the literature is that offenders that are convicted of homicide offenses, including 1st degree murder, are more likely than other offenders to subsequently perpetrate lethal violence relative to offenders that have never committed a homicide." Matt DeLisi, *et al*., *Who will kill again? The forensic value of 1st degree murder convictions,* Forensic Science International: Synergy 1 (2019) at 12.

Professor DeLisi, an influential criminologist, conducted a study of 682 male offenders in Florida and found that a prior first degree murder conviction "was significantly associated with current homicide offending." *Id*. at 13. This remained true when the data was adjusted to account for age and race. *Id*. "Forensically, prior 1st degree murder convictions appear to be a marker for an offender who not only poses elevated risk of killing again, but also elevated risk of killing multiple victims." *Id*. at 15.

> Prior convictions for 1st degree murder and subsequent homicide offending are also likely manifest indicators of a latent homicidal propensity. To illustrate, a recent study of a population of federal correctional clients found that about 12% of the population experience some degree of homicidal ideation. Moreover, correctional clients with homicidal ideation were significantly more likely to perpetrate a host of crimes including completed and attempted homicides, kidnapping, armed robbery, and aggravated assault, and these offenders also evinced more severe and extensive psychopathology.

Id. at 15. Given these findings, the penalty for first degree murder under current law is essential to protect the community from offenders who are significantly more likely to commit additional murders and other violent offenses. Accordingly, USAO urges the CCRC not to lower the penalty for First Degree Murder and Enhanced First Degree Murder.

C. RCC § 22E-1201. Robbery.

USAO recommends that the penalty enhancement in subsection (c)(5)(A)(II) increase the penalty classification by two classes, rather than one class.

The CCRC has proposed increasing the penalty classification for Second and Third Degree Robbery by one class when the actor commits the offense under sub-paragraphs (b)(3)(B), (c)(1)(B), (c)(1)(C), or (c)(1)(D) by using or displaying what is, in fact, a dangerous weapon or imitation dangerous weapon; and by two classes when the actor commits the offense under sub-paragraph (b)(3)(A) or sub-paragraph (c)(1)(A) by recklessly displaying or using what, in fact, is a dangerous weapon. Under this proposal, there would be a two-class increase for Third Degree Robbery where, for example, the defendant hit the victim with the gun to accomplish the robbery, but only a one-class increase for Third Degree Robbery where, for example, the defendant held a gun to the victim's head and threatened to kill the victim to accomplish the robbery, or where the defendant moved the victim by pushing the victim with the gun without causing any level of bodily injury. These offenses, however, are equally serious, and do not merit a distinction in offense level. Rather, there should be a single enhancement that increases the penalty classification by two classes where the defendant used or displayed what, in fact, is a dangerous weapon or imitation dangerous weapon. At a minimum,[2] a maximum penalty of 8 years imprisonment (rather than 4 years) is appropriate for all armed robberies.

This is consistent with recent Superior Court practice. For robbery, between 2010 and 2019, the 0.5 quantile for imprisonment was 33 months, the 0.75 quantile for imprisonment was 54 months, the 0.9 quantile for imprisonment was 72 months, the 0.95 quantile for imprisonment was 84 months, and the 0.975 quantile for imprisonment was 108 months. (App. G, Line 157.) 27.7% of convictions were enhanced. (App. G, Line 157.) The bottom of the sentencing guideline range for robbery (a Group 6 offense) for a person with the lowest criminal history score is 18 months, and the bottom of the sentencing guideline range for a person with the highest criminal history score is 42 months. The bottom of the sentencing guideline range for armed robbery (a Group 5 offense) for a person with the lowest criminal history score is 36 months, and the bottom of the sentencing guideline range for a person with the highest criminal history score is 84 months. Moreover, for assault with intent to rob, between 2010 and 2019, the 0.5 quantile for imprisonment was 42 months, the 0.75 quantile for imprisonment was 60 months, the 0.9 quantile for imprisonment was 85.8 months, the 0.95 quantile for imprisonment was 120 months, and the 0.975 quantile for imprisonment was 169.5 months. (App. G, Line 45.) 45.6% of convictions were enhanced. (App. G, Line 45.) Most likely, many of these enhanced convictions for assault with intent to rob would be similar to Enhanced Third Degree Robbery (or Enhanced Second Degree Robbery) under the RCC.

[2] USAO previously recommended increasing the penalties for Robbery generally. (App. C. at 425–26.)

Under the CCRC's proposal, absent significant bodily injury, a maximum of 96 months (8 years) would be available for some forms of armed robbery, and a maximum of 48 months (4 years) would be available for other forms of armed robbery. To adequately reflect the seriousness of all forms of armed robbery, and to align with recent Superior Court practice, USAO recommends that all forms of armed robbery be categorized as a Class 7 felony.

USAO continues to oppose decreasing the penalty for carjacking.

The CCRC has proposed that unarmed carjacking be categorized as Second Degree Robbery, a Class 8 felony punishable by a maximum of 4 years imprisonment. The CCRC has proposed that armed carjacking be categorized as Enhanced Second Degree Robbery, a Class 7 felony punishable by a maximum of 8 years imprisonment. USAO opposes the significant decrease in penalty for carjacking proposed by the CCRC, particularly as the District is facing a troubling increase in carjacking. A carjacking is a significant intrusion into a person's personal space, and a carjacking is a violation of that sense of personal space. It also results in the loss of what is often a more significant asset than is lost in another form of robbery.

For armed carjacking, between 2010 and 2019, the 0.5 quantile for imprisonment was 180 months, the 0.75 quantile for imprisonment was 180 months, and the 0.9 quantile for imprisonment was 180 months. (App. G, Line 160.) The mandatory minimum for armed carjacking under D.C. Code § 22-2803(b)(2) is 15 years (180 months). The bottom of the sentencing guideline range for armed carjacking (a Group 3 offense) for a person with the lowest criminal history score is 90 months, and the bottom of the sentencing guideline range for a person with the highest criminal history score is 138 months. The 0.5 quantile, 0.75 quantile, and 0.9 quantile, therefore, all represent instances of the court imposing the mandatory minimum sentence.

For unarmed carjacking, by contrast, between 2010 and 2019, the 0.5 quantile for imprisonment was 84 months, the 0.75 quantile for imprisonment was 96 months, and the 0.9 quantile for imprisonment was 108 months. (App. G, Line 159.) The mandatory minimum for unarmed carjacking under D.C. Code § 22-2803(a)(2) is 7 years (84 months). The bottom of the sentencing guideline range for unarmed carjacking (a Group 5 offense) for a person with the lowest criminal history score is 36 months, and the bottom of the sentencing guideline range for a person with the highest criminal history score is 84 months. The 0.5 quantile for imprisonment represents the mandatory minimum for this offense. The 0.75 quantile and 0.9 quantile, however, reflect instances where the court thought the circumstances of the case merited a higher sentence than was required by the mandatory minimum or the bottom of the sentencing guidelines. The CCRC's proposal to make unarmed carjacking punishable by a maximum of 4 years imprisonment (48 months) would therefore have the effect of significantly lowering the maximum penalty available for this offense.

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

USAO recommends increasing the penalties for Offensive Physical Contact.

The CCRC has proposed categorizing 1st Degree Offensive Physical Contact as a Class C misdemeanor, and 2nd Degree Offensive Physical Contact as a Class D misdemeanor. The CCRC has proposed classifying the enhanced versions of these offenses as Class B and Class C misdemeanors, respectively. USAO recommends increasing all of these penalties by one class. The harm caused to a person by 1st Degree Offensive Physical Contact—which requires that the defendant cause the complainant to come into physical contact with bodily fluid or excrement—is similar to the harm caused by Fourth Degree Assault—which requires the infliction of some level of bodily injury. Likewise, the harm caused to a person by 2nd Degree Offensive Physical Contact—which requires that the defendant cause the complainant to come into physical contact with that person with the intent that the contact be offensive—is similar to the harm caused by Attempted Fourth Degree Assault, and should be punished proportionally.[3] Further, USAO previously recommended that the RCC clarify that non-consensual sexual touching can qualify as Second Degree Offensive Physical Contact. (App. C. at 689.) It would be more appropriate for non-consensual sexual touching to be a Class C misdemeanor than a Class D misdemeanor, and for it to be a Class B misdemeanor when committed against a protected person, including a child.

E. RCC § 22E-1301. Sexual Assault.

USAO continues to oppose decreasing the penalty for First Degree Sexual Assault and Enhanced First Degree Sexual Assault.

The CCRC has proposed a maximum penalty of 288 months for First Degree Sexual Assault, and a maximum penalty of 360 months for Enhanced First Degree Sexual Assault. With the repeat offender enhancement, there would be a maximum penalty of 336 months and 408 months, respectively. For first degree sexual abuse (force), between 2010 and 2019, the 0.5 quantile for imprisonment was 144 months, the 0.75 quantile for imprisonment was 198 months, the 0.9 quantile for imprisonment was 300 months, and the 0.975 quantile for imprisonment was 444 months. (App. G, Line 161.) 35.8% of those convictions were enhanced. (App. G, Line 161.) The bottom of the sentencing guideline range for first degree sexual abuse and first degree sexual abuse while armed (both Group 2 offenses) for a person with the lowest criminal history score is 144 months, and the bottom of the sentencing guideline range for a person with the highest criminal history score is 192 months. Although the RCC's proposal would encompass the vast majority of convictions for this offense, the RCC should have a high enough maximum for this offense that it would encompass all recent convictions for this offense. As USAO has noted previously, the maximum penalty for an offense should be sufficiently high to account for the worst possible version of an offense. To account for this, USAO recommends increasing the penalty for First Degree Sexual Assault and Enhanced First Degree Sexual Assault.

F. RCC § 22E-1401. Kidnapping.

USAO recommends, in subsections (a)(3)(D) and (a)(3)(F), that the CCRC clarify that liability would attach where the defendant intended to cause either serious bodily injury or death.

[3] As discussed above, USAO also recommends that a Class C misdemeanor be punishable by a maximum of 90 days imprisonment, which would be consistent with the penalty for Attempted Fourth Degree Assault.

As currently drafted, subsections (a)(3)(D) and (a)(3)(F) create liability where the defendant either intended to inflict serious bodily injury upon the complainant, or caused any person to believe that the complainant will not be released without suffering serious bodily injury. USAO recommends that the CCRC clarify that liability would also attach where the defendant intends to cause death, in addition to serious bodily injury. USAO recommends that subsection (a)(3)(D) provide: "Inflict death or serious bodily injury upon the complainant," and that subsection (a)(3)(F) provide: "Cause any person to believe that the complainant will not be released without suffering death or serious bodily injury, or a sex offense defined in Chapter 13 of this Title."

G. RCC § 22E-1804. Unauthorized Disclosure of a Sexual Recording.

USAO recommends that the CCRC update the language in subsection (d)(2) to conform with the penalty recommendations in Report #69.

In Report #69, the CCRC recommends that the unenhanced version of this offense be a Class B misdemeanor, and that the enhanced version of this offense be a Class 9 felony. The language in subsection (d)(2) provides that the penalty classification for this offense is increased by *one* class when an enhancement applies. USAO recommends that the CCRC modify the language in subsection (d)(2) to align with Report #69 and provide that the penalty classification for this offense is increased by *two* classes when an enhancement applies.

H. RCC Subtitle III. Property Offenses.

USAO continues to recommend decreasing the monetary thresholds for Theft, Fraud, and related offenses.

As USAO stated previously, the monetary thresholds for each gradation are so high that the top gradations will likely only be used very rarely, if ever. (App. C. at 427.) Thus, USAO continues to recommends decreasing the monetary threshold for Theft, Fraud, and related offenses to align with the CCRC's recommended penalties. In response to USAO's previous recommendation, the CCRC stated: "From 2009-2018, the 97.5th percentile sentence for first degree theft under current law was 3 years." (App. D1 at 315.) Under current law, first degree theft is a theft involving property $1000 or more. *See* D.C. Code § 22-3212(a). Under the CCRC's penalty recommendation, a theft that would constitute first degree theft under current law could be either 4th Degree Theft (if the property is $500 or more), 3rd Degree Theft (if the property is $5,000 or more), or a higher gradation if the property was over $50,000. The CCRC has proposed categorizing 4th Degree Theft as a Class A misdemeanor punishable by 1 year incarceration, and 3rd Degree Theft as a Class 9 felony punishable by 2 years incarceration. The CCRC states that its proposal is consistent with current practice, but then states that "[f]rom 2009-2018, the 97.5th percentile sentence for first degree theft under current law was 3 years." The proposed maximum penalties of 1 year and 2 years, accordingly, are lower than current practice. Although current practice could, theoretically, include property theft of $50,000 or more, theft of this value—particularly where the theft is prosecuted under the D.C. Code instead of under federal law—is likely very rare. Thus, the CCRC's recommendation would not necessarily be consistent with current practice, and would have the effect of lowering the

maximum penalty in many instances. Moreover, although these offenses do not involve physical violence, theft, fraud, and related offenses may cause far-reaching and irreparable harm to victims, and could result in them being unable to put food on the table, pay rent, or lose their homes. These are significant harms, and can result from losses even below $50,000. USAO recommends that the CCRC sufficiently account for these harms in its monetary thresholds and related penalty recommendations. Consistent with our previous recommendations, USAO recommends the following penalty gradations:

1st Degree—$50,000—Class 7 felony
2nd Degree—$5,000 or any motor vehicle—Class 8 felony
3rd Degree—$1,000—Class 9 felony
4th Degree—Any value—misdemeanor

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

USAO continues to recommend that the CCRC increase the penalty classifications for Escape.

USAO recommends that, at a minimum,[4] the CCRC increase the penalty classification for 3rd Degree Escape. The CCRC has proposed that 1st Degree Escape be a Class 8 felony, 2nd Degree Escape be a Class A misdemeanor, and 3rd Degree Escape be a Class C misdemeanor. The CCRC's recommendation—particularly with respect to 3rd Degree Escape—would be substantially lower than current sentencing practice in Superior Court. Appendix G reflects that, for D.C. Code § 22-2601, the 0.75 quantile for sentencing was 10 months; for D.C. Code § 22-2601(a)(1), the 0.75 quantile for sentencing was 10 months, for D.C. Code § 22-2601(a)(2), the 0.75 quantile for sentencing was 12 months; and for D.C. Code § 22-2601(a)(3), the 0.75 quantile for sentencing was 5 months. Most likely, many of the convictions categorized under D.C. Code § 22-2601 and D.C. Code § 22-2601(a)(1) would involve conduct similar to the conduct proscribed by the RCC's proposal for 3rd Degree Escape. Thus, the CCRC's recommendation would not be consistent with current practice and represents a substantial departure from current law.

J. RCC § 4120. Endangerment with a Firearm.

USAO continues to recommend increasing the penalty for Endangerment with a Firearm.

The CCRC has proposed categorizing this offense as a Class 9 felony. USAO previously recommended increasing the penalty for this offense. (App. C at 592.) The CCRC responded to USAO's recommendation as follows: "The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. For example, increasing the penalty class for this offense by one class would punish endangering a person with a firearm (which does not require inflicting any fear or injury) more severely than using a firearm to cause a significant bodily injury." (App. D2 at 271.) Under the RCC's proposed penalties, however, causing significant bodily injury (Third Degree Assault) would be a Class 9 felony, and using a firearm to cause a significant bodily injury (Enhanced Third Degree Assault) would be a Class 7 felony. Thus, USAO's proposal to increase the penalty for this offense (for example, to a Class 8 felony)

[4] USAO previously recommended that all gradations of escape be felonies. (App. C at 355, 428.)

would not punish endangering a person with a firearm more severely than using a firearm to cause a significant bodily injury, and would more adequately represent the substantial danger posed by a person who fires a gun.

K. D.C. Code § 24-403.01. Sentencing, supervised release, and good time credit for felonies committed on or after August 5, 2000.

USAO recommends removing subsection (b)(2)(C).

Among other recommendations, the CCRC proposes creating a new D.C. Code § 24-403.01(b)(2)(C) to provide that a judge shall impose a term of supervised release of not more than 1 year, if the maximum term of imprisonment authorized for the offense is less than 8 years. Offenses with a maximum term of imprisonment of less than 8 years would include 3rd Degree Assault (including domestic violence strangulation), certain sexual offenses (including 6th Degree Sexual Abuse of a Minor), and other offenses that can be relatively serious. For many offenses, a 1-year term of supervision may not be a sufficient period of supervised release.

Rather, the CCRC's proposal in this section to allow a judge discretion to impose a term of less than 3 years of supervision where the maximum term of imprisonment authorized is less than 24 years provides a judge with the option of imposing a term of 1 year of supervised release where appropriate. This discretion accounts for the situations where a 1-year term of supervised release could be appropriate. The fact that a 1-year period of supervision may not be sufficient in all cases was implicitly recognized by the DC Council in the recent passage of the "Intrafamily Offenses and Anti-Stalking Orders Amendment Act of 2020" (B23-181). In that act, which is pending congressional review, the DC Council modified the term of a civil protection order from an initial term of up to 1 year to an initial term of up to 2 years. In support of that change, the Committee Report cited to the testimony of the Legal Aid Society of the District of Columbia as follows: "There are many situations in which a one-year order simply is not enough. For example, the abuse may be egregious that a client will still be fearful in a year's time, or a survivor may need more than a year to secure a safety transfer to an apartment somewhere safe from their abuser." Report on Bill 23-0181, the "Intrafamily Offenses and Anti-Stalking Orders Amendment Act of 2020," Committee on the Judiciary & Public Safety, Council of the District of Columbia, at 11 (Nov. 23, 2020). This logic applies equally—if not more forcefully—to felony offenses. Moreover, it would not be consistent for a period of supervision in a civil protection order (that could stem from a misdemeanor offense) to last up to 2 years with the possibility of extension, and for a period of supervision in a felony case to last only up to 1 year.