APPENDIX C -

ADVISORY GROUP WRITTEN COMMENTS ON CCRC DRAFT DOCUMENTS

(2-19-20)

Comments of U.S. Attorney's Office for the District of Columbia on D.C. Criminal Code Commission Recommendations for Chapter 2 of the Revised Criminal Code: Basic Requirements of Offense Liability Submitted Feb. 22, 2017

The U.S. Attorney's Office for the District of Columbia maintains the positions it previously has articulated in its correspondence on December 18, 2014, to the former D.C. Sentencing and Criminal Code Revision Commission, and on June 16, 2016, to Kenyan McDuffie (then chairman of the Committee on the Judiciary & Public Safety of the District of Columbia Council). In response to the request of the District of Columbia Criminal Code Reform Commission, we provide the following preliminary comments on the Recommendations for Chapter 2 of the Revised Criminal Code (Basic Requirements of Offense Liability) provided for Advisory Group review:

- Temporal Aspect of Possession (pages 15-17)
  - Section 22A-202(d) requires that the government prove that the defendant exercised control over property for period of time sufficient to provide an opportunity to terminate the defendant's control over the property.
  - Commission staff authors acknowledge that this approach takes a component of the "innocent or momentary possession" affirmative defense (the momentary possession component) and makes it an element that the government must now prove (versus an affirmative defense that the defendant must prove).
  - The Advisory Group should discuss this change further inasmuch as it is a substantive to D.C. law.

- Causation Requirement: § 22A-204
  - Factual Cause
    - Page 29: The Advisory Group should consider the "factual cause" definition in light of gun-battle liability, which is predicated upon "substantial factor" causation.

- Page 31 re: § 22A-204(b) (Definition of Factual Cause)

    - Commission staff authors appropriately concede that the proposed definition for "factual cause" would be a substantive change from current D.C. law. Specifically, the proposed rule would eliminate the "substantial factor" test, and would thereby appear to eliminate the basis for urban gun-battle causation as a theory of factual causation.

    - However, in cases such as *Roy* and *Fleming*, factual cause includes situations where the defendant's actions were a "substantial factor" in bringing about the harm. The D.C. Court of Appeals has stated that "[i]n this jurisdiction[,] we have held findings of homicide liability permissible where: (1) a defendant's actions contribute substantially to or are a substantial factor in a fatal injury . . . and (2) the death is a reasonably foreseeable consequence of the defendant's actions." *Fleming v. United States*, 148 A.3d 1175, 1180 (D.C. 2016) (quoting *Roy v. United States, 871 A.2d 498* (D.C. 2005) **(petition for rehearing *en banc* pending**))

    - Concerns regarding an "unnecessarily complex analysis" required by a "substantial factor" test in all cases can be addressed easily by a jury instruction (*e.g.*, if the jury finds "but for" causation, the analysis ends; where there is no "but for" causation, the jury would consider whether defendant's conduct was a "substantial factor" – and this would be unnecessary in most cases, where causation is not meaningfully at issue).

    - Of course, as noted above, the *Roy* petition for rehearing is pending and the decision of the D.C. Court of Appeals *en banc* would be decisive on this point.

o Legal Cause

- Page 29: Delete the "or otherwise dependent upon an intervening force or act" language. An intervening force or act does not negate legal causation if that intervening force or act is reasonably foreseeable.

- Similar/conforming revisions should be made at page 35 (to the text that immediately precedes footnote 31) and at page 38 (to the text that immediately precedes footnote 49).

- Culpable Mental State Requirement: § 22A-205

    - Regarding mens rea as to results and circumstances (the last sentence of page 42), USAO-DC notes that, more recently, the D.C. Court of Appeals has held in *Vines* that "it is clear that a conviction for ADW can be sustained by proof of reckless conduct alone. If reckless conduct is sufficient to establish the requisite intent to convict a defendant of ADW, it necessarily follows that it is enough to establish the intent to convict him of simple assault." *Vines v. United States*, 70 A.3d 1170, 1180 (D.C. 2013), as amended (Sept. 19, 2013). By "reckless conduct," the D.C. Court of Appeals meant that the defendant was reckless as to the possibility of causing injury*, i.e.*, the defendant was reckless as to the result.

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 22, 2017

SUBJECT: Comments to D.C. Criminal Code Reform Commission First Draft of Report No. 2, Recommendations for Chapter 2 of the Revised Criminal Code - Basic Requirements of Offense Liability

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 Commission's First Draft of Report No. 2, Recommendations for Chapter 2 of the Revised Criminal Code - Basic Requirements of Offense Liability (the Report). OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

§ 22A-201, Proof of Offense Elements Beyond a Reasonable Doubt

On page 1, the Report begins with § 22A-201, Proof of Offense Elements Beyond a Reasonable Doubt. Subparagraph (c)(2) defines a result element. It states that a "Result element" means any consequence that must have been caused by a person's conduct in order to establish liability for an offense." The problem is that while "Conduct element" is defined on page 1 in 22A-201

[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.

(c)(1)[2] and "Conduct Requirement" is defined on page 9 in 22A-202 (a), the word "conduct," itself, is not defined. It appears that the interpreter is left to assume that the word takes on the meanings associated with their usage in those separate definitions (or at least the one in 22A-201 (c)(1)). The need for the word "conduct" to be replaced, or defined, is highlighted by the Report's observations on page 6. There it recognizes that conduct includes an action or omission. To make § 22A-201 (c) (2) clearer, we propose incorporating the concepts from pages 6 and substituting them for the word "conduct" in 22A-201(c)(2) The definition would then read "Result element" means any consequence that must have been caused by a person's act or omission in order to establish liability for an offense." The advantage of this definition is that the terms "act" and "omission" are defined in 22A-202.

§ 22A-202, Conduct Requirement

On page 9, in paragraph (c) the term "Omission" is defined. It states ""Omission" means a failure to act when (i) a person is under a legal duty to act and (ii) the person is either aware that the legal duty to act exists or, if the person lacks such awareness, the person is culpably unaware that the legal duty to act exists…" Neither the text of the proposed Code nor the Commentary explains what is meant by the term "culpably unaware." The Code should define this term, or at least, the Commentary should focus on this term and give examples of when a person is "culpably unaware" that a legal duty to act exists as opposed to merely being unaware that there is a legal duty to act.

In § 22A-202 (d) the term "Possession" is defined. Included in that definition is a requirement that the person exercise control over the property "for a period of time sufficient to allow the actor to terminate his or her control of the property." As noted in the Report, this is a departure from current District law. On page 15 of the Report it states "The latter temporal limitation dictates that a person who picks up a small plastic bag on the floor in a public space, notices that it contains drug residue, and then immediately disposes of it in a nearby trash can has not "possessed" the bag for purposes of the Revised Criminal Code…." What this definition of possession misses, or at least what the Commentary does not address, is that there are times when a person may be culpable for possession even in less time than it would take to "immediately dispose[] of it in a nearby trash." Consider the following hypothetical. Two people walk over to a person who is selling heroin. One of them hands the seller money in exchange for the drug. As soon as the transaction is completed, the other person, who is an undercover police officer, arrests both the buyer and the seller. In that case, though the buyer literally had possession of the heroin for a fraction of a second, there is no question that the buyer knew that he or she possessed illegal drugs and intended to do so. In this situation, there is

[2] Subparagraph (1) states that a "Conduct element" means any act or omission, as defined in § 22A-202, that is required to establish liability for an offense."

no reason why there should be a temporal limitation on how long the heroin must have been in the buyer's possession before a law violation would have occurred.

§ 22A-203, Voluntariness Requirement

On page 20, the Report defines the scope of the voluntariness requirement. Subsection (b)(1) states that an act is voluntary if the "act was the product of conscious effort or determination" or was "otherwise subject to the person's control." Based on the associated Commentary, it seems to be designed to capture circumstances, such as intoxication or epilepsy, when someone with a condition that can cause dangerous involuntary acts knowingly enters circumstances in which that condition may endanger others. The theory seems to be that, for example, driving while intoxicated is "subject to [a] person's control" because the person can prevent it by not drinking and driving in the first instance. The same analysis applies to an accident that could arise due to an epileptic seizure. This makes sense; a person cannot willfully expose others to a risk at point X, and when the actual act that would constitute the offense takes place, insist that the act was not voluntary so that they cannot be held responsible for it. The question is whether there is some threshold of risk to trigger voluntariness here; otherwise, any involuntary act that was brought about in circumstances that were voluntarily chosen would be considered to be voluntary. Is this what was intended? If not, what is the threshold of risk that would "trigger" voluntariness here – and how would a court make that determination? Take the epilepsy example. Suppose a person knows that there is a .05% (or .005%) chance that he or she will experience an epileptic seizure if they don't take their medication, but drives that way anyway. If a crash occurs, will driving the vehicle have been enough to trigger the "otherwise subject to the person's control" prong of voluntariness or is it too remote? The Commentary should address this issue.

§ 22A-204, Causation Requirement

On page 29, the Report defines the "Causation Requirement." In paragraph (a) it states "No person may be convicted of an offense that contains a result element unless the person's conduct was the factual cause and legal cause of the result." Paragraphs (b) and (c) then define the terms "Factual cause" and "Legal cause." Section 22A-204 (b) states ""Factual cause" means:

> (1) The result would not have occurred but for the person's conduct; or
>
> (2) In a situation where the conduct of two or more persons contributes to a result, the conduct of each alone would have been sufficient to produce that result."

On pages 30 and 31, the Commentary addresses "Factual cause." It states:

> In the vast majority of cases, factual causation will be proven under § 22A-204(b)(1) by showing that the defendant was the logical, but-for cause of a result. The inquiry required by subsection 22A-204(b)(1) is essentially empirical, though also

> hypothetical: it asks what the world would have been like if the accused had not performed his or her conduct. In rare cases, however, where the defendant is one of multiple actors that independently contribute to producing a particular result, factual causation may also be proven under § 22A-204(b)(2) by showing that the defendant's conduct was sufficient—even if not necessary—to produce the prohibited result. Although in this situation it cannot be said that but for the defendant's conduct the result in question would not have occurred, the fact that the defendant's conduct was by itself sufficient to cause the result provides a sufficient basis for treating the defendant's conduct as a factual cause.

While much of this explanation is intuitive, what may be more difficult for people to understand is how factual causation works when the result element is satisfied by a person's omission to act. Consider the following hypothetical. A father takes his toddler to the pool. He sees the child crawl to the deep end of the pool and fall in. The father sits there, doesn't move, and watches the child drown. In this situation it is awkward to think about the father's lack of movement as "performing" conduct, as opposed to doing nothing. The Commission should review whether there needs to be a third definition of "factual cause" that addresses acts of omission or whether merely an explanation and example in the Commentary about how to apply factual causation in cases of omission is sufficient. Clearly in this example, the father had a duty to perform the omitted act of saving his child. See § 22A-202 (c)(2).

§ 22A-206, Hierarchy of Culpable Mental States

On page 49, the Report defines the Hierarchy of Culpable Mental States. In paragraph (c) Recklessness is defined. It states

> RECKLESSNESS DEFINED. "Recklessly" or "recklessness" means:
>
> (1) With respect to a result, being aware of a substantial risk that one's conduct will cause the result.
>
> (2) With respect to a circumstance, being aware of a substantial risk that the circumstance exists.
>
> (3) In order to act recklessly as to a result or circumstance, the person's conduct must grossly deviate from the standard of care that a reasonable person would observe in the person's situation.
>
> (4) In order to act recklessly as to a result or circumstance "under circumstances manifesting extreme indifference" to the interests protected by an offense, the

person's conduct must constitute an extreme deviation from the standard of care that a reasonable person would observe in the person's situation.[3]

While it is meaningful to say that recklessly means … "With respect to a result, being aware of a substantial risk that one's conduct will cause a result, it is not meaningful to say that recklessly means "In order to act recklessly as to a result or circumstance, the person's conduct must grossly deviate from the standard of care that a reasonable person would observe in the person's situation." The formulation of paragraphs (3) and (4) do not flow from the lead in language. It lacks symmetry. While it appears that paragraph (3) relates in a meaningful way to paragraph (1), as paragraph (4) relates in a meaningful way to paragraph (2), the text does not explain how each of these sets of definitions relate to each other internally. A tenant of a well written definition for use in a Code provision is that, niceties of grammar aside, the definition should be able to be substituted for the defined term in the substantive offense and the sentence should retain its meaning. One cannot do that with the definition of recklessness.[4] We propose that the definition of recklessness be redrafted so that the terms have more exacting meanings within the context of an offense. [5] One way to accomplish this is to redraft the definition as follows:

RECKLESSNESS DEFINED. "Recklessly" or "recklessness" means:

(1) With respect to a result, being aware of a substantial risk that one's conduct will cause the result and that either the person's conduct *viewed as a whole* grossly deviates from the standard of care that a reasonable person would observe in the person's situation or under circumstances manifesting extreme indifference to the interests protected by an offense, the person's conduct must constitute an extreme deviation from the standard of care that a reasonable person would observe in the person's situation.[6]

[3] It is unclear why the term" under circumstances manifesting extreme indifference" is in quotes in paragraph 4.

[4] Similarly, it is unclear at this time whether the definition of "Factual Cause" in § 22A-204 suffers from the same infirmity. After seeing how this term is actually used in the revised Code it may need to be amended. At this time, the definition appears not to define "factual cause" as such, rather it appears to operate more like an if-then ("A person's is a factual cause of a result if the result would not have occurred without the conduct"). We will be able to evaluate this definition when we are able to take the phrase "the result would not have occurred but for the person's conduct" and substitute it for the term "factual cause" in the text of the Code. If the sentence has meaning than the definition works.

[5] The same issues concerning the definition of Recklessness exists in the definition of Negligence.

[6] In the proposed text we added, in italics the phrase "viewed as a whole." Italics was used to show that the phrase was not in the original Code text. This language is taken from the explanation of the gross deviation analysis on page 68 of the Report. Given the importance of this statement, we propose that it be added to the actual definition of Recklessness.

> (2) With respect to a circumstance, being aware of a substantial risk that the circumstance exists and that either the person's conduct *viewed as a whole* must grossly deviate from the standard of care that a reasonable person would observe in the person's situation or under circumstances manifesting extreme indifference to the interests protected by an offense, the person's conduct must constitute an extreme deviation from the standard of care that a reasonable person would observe in the person's situation.

On page 58, in regard to § 22A-206(c)(3) it states "In many cases where a person consciously disregarded a substantial risk of prohibited harm, it is likely to be obvious whether the person's conduct constituted a "gross deviation" from a reasonable standard of care under § (c)(3). In these situations, further elucidation of this broad phrase to the factfinder is unnecessary. Where, however, it is a closer call, the discretionary determination reflected in § 22A-206(c)(3) is intended to be guided by the following framework."[7] If this definition is to remain, the comment should be expanded to explain which part of (c)(3) the Commission believes is discretionary or otherwise explain this point. Paragraph (c)(3) does not contain the word "discretionary" nor does it use a term that would lead the reader to believe that any part of it could be discretionary.

Of perhaps greater concern is that the Commentary elucidates a precise three-factor test to determine whether something is a "gross deviation" but does not actually incorporate that test into the codified text. The Commission should consider whether a legal standard of that nature should be codified.

The definition of recklessness states that in order for someone to act recklessly, his or her conduct must "grossly deviate from the standard of care that a reasonable person would observe in the person's situation," and in order for that conduct to take place "under circumstances manifesting extreme indifference" to the interests protected by a particular offense, the conduct must be an "extreme deviation from the standard of care that a reasonable person would observe in the person's situation." The difference between "grossly deviating" and an "extreme deviation" is not clear, and the Report does not clarify it. On page 58 the Report states that "[t]he difference between enhanced recklessness [requiring extreme deviation] and normal recklessness [requiring gross deviation] is . . . one of degree." This does not sufficiently illuminate the distinction. Whether through additional explanations, examples, or a combination of the two, the Commentary should make clear the distinction between a gross deviation and an extreme deviation.

There is another aspect of the recklessness definition: being "aware of a substantial risk" which should be further explained. The Report maintains that "recklessness entails awareness of a

[7] While we suspect the word "discretionary" means not that a court can choose whether to apply it, but rather that its application in any particular case requires significant case-specific judgment, the Report does not actually say that.

risk's substantiality, but not its unjustifiability." The language, however, is not altogether clear in that respect. Being aware of a substantial risk doesn't necessarily mean being aware that the risk is substantial – the very same kind of ambiguity that inspired element analysis to begin with. Take the following hypothetical. Suppose a person drives down a little used street at 150 miles an hour at 3:00 am. In order to be considered reckless, does the person have to be aware that there is a substantial risk that he will hit and kill someone or that if he hits someone they will be killed.

§ 22A-207 Rules of Interpretation Applicable to Culpable Mental State Requirement

On page 73, in § 22A-207 (b)(2), the proposed text states one of two ways that the Council can indicate that an element is subject to strict liability. It states that a person is strictly liable for any result or circumstance in an offense "[t]o which legislative intent explicitly indicates strict liability applies." This language is subject to multiple interpretations. If the phrase "legislative intent " is meant to include indicia from legislative history, it's not clear what it means for the legislative history to "explicitly indicate" something (leaving aside the tension in the phrase "explicitly indicate"). Does this provision mean that if a committee report explicitly says "strict liability should apply to X," that's good enough? What if there are contrary statements at the hearing, by a witness or a councilmember? If, alternatively, the phrase was meant to simply mean "when another statutory provision can fairly be read to indicate that strict liability should apply" the language should be modified to refer to other statutory provisions explicitly indicating that strict liability applies, rather than the "legislative intent explicitly" so indicated.

In the Commentary following the Rules of Interpretation Applicable to Culpable Mental State Requirement there are a few examples that demonstrate how the "rule of distribution" works. We believe that two additional examples are needed to fully explain how it works in situations of strict liability.

The first example in the Commentary explains how to interpret "knowingly causing bodily injury to a child" and the second, in the footnote, contrasts that explanation with the explanation for how to interpret "knowingly causing injury to a person, negligent as to whether the person is a child. Given the rule that strict liability only applies to the element specified (and does not follow through to subsequent elements), we suggest that the Commentary add two additional examples. The first would be where there is a mental state provided for the first element, the second element is modified by the phrase "in fact", and where there is no mental state associated with the third element. The purpose of that example would be to show that the mental state associated with the first element would also apply to the third element. The second example would contrast the previous examples with one where there is a mental state stated for the first element, the second element is modified by the phrase "in fact", and the third element is also modified with the phrase "in fact."

The following examples could be used, "Knowingly causing injury to a person, who is, in fact, a child, with a knife. Under the rules of interpretation the mental state of "knowingly" would apply not only to the causing injury to a person, but would also apply to the circumstance of the knife. This illustration could be contrasted with "Knowingly causing injury to a person, who is, in fact, a child, with what is, in fact, a knife." We leave it to the Commission to decide where in the presentation of the Commentary it would be most informative to place these additional examples.

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: April 24, 2017

SUBJECT: Comments to D.C. Criminal Code Reform Commission First Draft of Report No. 3, Recommendations for Chapter 2 of the Revised Criminal Mistake, Deliberate Ignorance, and Intoxication

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 Commission's First Draft of Report No. 3, Recommendations for Chapter 2 of the Revised Criminal Code Chapter 2 of the Revised Criminal Code: Mistake, Deliberate Ignorance, and Intoxication (the Report). OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

§ 22A-208, Principles of Liability Governing Accident, Mistake, and Ignorance.

On page 3, the Report discusses § 22A-208, Principles of Liability Governing Accident, Mistake, and Ignorance. We believe that the Commentary, if not the provision itself, should clarify the types of mistakes or ignorance of law, if any, to which this applies.[2] For example, it is our

[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] While the Commentary, at the top of page 5 of the Report does have a brief discussion concerning mistake of fact or non-penal law, we do not believe that that explanation is sufficient to address the issues raised here. Similarly while, footnote 20, on page 8, quotes LaFave that

understanding from the meetings that this provision does not mean that the government would have to prove that the defendant was aware that the act itself was illegal or the exact parameters of the prohibition. Two examples may be helpful. First, a person would be guilty of distribution of a controlled substance even if what the government proved was that the defendant thought that she was selling heroin, but she was really selling cocaine. Second, the government would not need to prove that a person knew that he was a mandatory reporter and that mandatory reporters must report child abuse in order to secure a conviction for failing to report child abuse.[3]

Section 22A-208 (b) is entitled "Correspondence between mistake and culpable mental state requirements. Subparagraph (3) states, "Recklessness. Any reasonable mistake as to a circumstance negates the recklessness applicable to that element. An unreasonable mistake as to a circumstance only negates the existence of the recklessness applicable to that element if the person did not recklessly make that mistake." [Emphasis added] Subparagraph (4) states, "Negligence. Any reasonable mistake as to a circumstance negates the existence of the negligence applicable to that element. An unreasonable mistake as to a circumstance only negates the existence of the negligence applicable to that element if the person did not recklessly or negligently make that mistake. " [Emphasis added] At the meeting the Commission staff explained why these two subparagraphs are not parallel and why the inclusion of the word "recklessly" logically follows from the rules of construction already agreed upon. To be parallel, subparagraph (b)(4) on "Negligence" would not include the phrase "recklessly or." If the Commission is going to keep this nonparallel structure then the Commentary should explain the reason why a reference to "recklessness' is included in the statement on "negligence." This is not a concept that may be intuitive to persons who will be called upon to litigate this matter.

§ 22A-209, Principles of Liability Governing Intoxication

On page 25, the Report discusses § 22A-209, Principles of Liability Governing Intoxication. Paragraph (b) is entitled "Correspondence between intoxication and culpable mental state requirements." The subparagraphs explain the relationship between a person's intoxication and the culpable mental states of purpose, knowledge, and recklessness. However, there is a forth mental state. Section 22A-205, Culpable mental state definitions, in addition to defining purpose, knowledge, and recklessness, also defines the culpable mental state of "negligently." [4] To avoid needless arguments in litigation over the relationship between intoxication and the culpable mental state of negligently, § 22A-209 should include a statement that explicitly states

"mistakes or ignorance as to a matter of penal law typically was not, nor is currently, recognized as a viable defense since such issues rarely negate the mens rea of an offense…" this provision is speaking in terms of the current law and not what the law would be if § 22A-208 were enacted. The Commentary should make it clear that no change in the law is intended.

[3] See D.C. Code §§ 4-1321.01 through 4-1321.07.

[4] On page 26 of the Report there is a statement that says, "Notably absent from these rules, however, is any reference to negligence, the existence of which generally cannot be negated by intoxication."

that a person's intoxication does not negate the culpable mental state of negligence. A litigator should not have to go to the Commentary to find the applicable law.
On page 28 of the report it states, "Subsections (a) and (b) collectively establish that evidence of self-induced (or any other form of) intoxication may be adduced to disprove purpose or knowledge, while § (c) precludes exculpation based on self-induced intoxication for recklessness or negligence." However, § (c) is entitled "Imputation of recklessness for self-Induced intoxication." While referring to a person being "negligent" as a factor in determining if there should be imputation of recklessness for self-induced intoxication, that paragraph does not, as written, appear to actually preclude exculpation of negligence (probably because it is not needed for the reasons stated above). This portion of the Commentary should be rephrased.

Section 22A-209 was clearly drafted to explain the relationship between intoxication and culpable mental states in general and not when the offense itself includes the requirement that the government prove – as an element of the offense - that the person was intoxicated at the time that the offense was committed.[5] The Commentary should note this.

[5] For example, it would be an ineffectual offense statute that permitted a person's self-induced intoxication to negate the mental state necessary to prove driving while impaired (intoxicated).

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: April 24, 2017

SUBJECT: Comments to D.C. Criminal Code Reform Commission First Draft of Report No. 4, Recommendations for Chapter 1 of the Revised Criminal Code: Preliminary Provisions

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 Commission's First Draft of Report No. 4, Recommendations for Chapter 1 of the Revised Criminal Code: Preliminary Provisions [1]

COMMENTS ON THE DRAFT REPORT

§ 22A-102, Rules of Interpretation

On page 3, the Report discusses § 22A-102, Rules of Interpretation. Paragraph (a) states, "(a) GENERALLY. To interpret a statutory provision of this title, the plain meaning of that provision shall be examined first. If necessary, the structure, purpose, and history of the provision also may be examined." [Emphasis added]. The provision does not state "necessary for what." The Commentary, does include the statement that "However, in addition to its plain meaning, a provision also may be interpreted based on its structure, purpose, and history when necessary to determine the legislative intent." To make the Code clearer, we suggest that the phrase "to determine the legislative intent" be added to the text of § 22A-102 (a). The amended provision would read "(a) GENERALLY. To interpret a statutory provision of this title, the

[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.

plain meaning of that provision shall be examined first. If necessary to determine legislative intent, the structure, purpose, and history of the provision also may be examined."

§ 22A-102, Interaction of Title 22A with other District Laws

On page 7, the Report discusses § 22A-103, Interaction of Title 22A with civil provisions in other laws. Paragraph (b) states, "The provisions of this title do not bar, suspend, or otherwise affect any right or liability to damages, penalty, forfeiture, or other remedy authorized by law to be recovered or enforced in a civil action.". The Commentary says that this is intended to mean, for instance, that "the conviction or acquittal of a defendant for a crime will not affect subsequent civil litigation arising from the same incident, unless otherwise specified by law." [Emphasis added] We have two concerns about that statement, both of which suggest that the language needs to be clarified or changed. First, it is unclear if paragraph (b) means what the Commentary says that it does. Paragraph (b) says simply that the "provisions of this title" – i.e., the existence and interpretation of the criminal offenses listed in this title – does not alter any right or liability to damages. However, that statement is different from saying that being convicted of any one of those crimes will not alter someone's right or liability to damages. Despite the statement in the Commentary that "Relation to Current District Law. None," saying that conviction of a crime will not "affect" any civil action for the same conduct seems to be a significant change to existing law. Being convicted of a crime for certain conduct can collaterally estop someone, or otherwise prevent them from relitigating the issue of liability based on that same conduct. For example see *Ross v. Lawson*, 395 A.2d 54 (DC 1978) where the Court of Appeals held that having been convicted by a jury of assault with a dangerous weapon and that conviction having been affirmed on appeal, appellee, when sued in a civil action for damages resulting from that assault, could not relitigate the issue of liability for the assault. [2] So the Commentary is not correct when it says that "the conviction… will not affect subsequent litigation…" Unfortunately, the phrase in the Commentary that "unless otherwise specified by law" actually compounds the issue. The question then becomes whether the example, of *Ross,* falls under the "unless otherwise specified by law" statement in the Commentary. It is not clear whether the caveat is a reference to statutory law or common-law. An argument could be made that for common-law purposes, there is no impact because this is the result that the common-law actually requires.

[2] It is true, however, that an "acquittal" is less likely to have an impact on civil cases because the acquittal simply allows the conduct at issue to be re- litigated in a subsequent civil proceeding. But note that an "acquittal" or "dismissal for want of prosecution" is one key requirement for a malicious tort claim (plaintiff must show that he or she prevailed on the underlying claim – in this case a criminal matter—that was instituted in bad faith or for malicious purposes).

MEMORANDUM

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

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

From: Laura E. Hankins, General Counsel

Date: April 24, 2017

Re: Comments on First Draft of Report No. 3: Recommendations for Chapter 2 of the Revised Criminal Code: Mistake, Deliberate Ignorance, and Intoxication

In general, the Public Defender Service approves the recommendations in the First Draft of Report No. 3. However, PDS has the following concerns and makes the following suggestions:

1. With respect to the Principles of Liability Governing Accident, Mistake, and Ignorance -- Although the Report explains that mistake and accident are not defenses but are "conditions that preclude the government from meeting its burden of proof" with respect to a mental state,[1] the proposed statutory language at §22A-208 does not make that point clear. This is particularly important because, in the view of PDS, judges and practitioners too often incorrectly (whether mistakenly or accidentally) view "accident" or "mistake" as "defenses," creating a serious risk of burden shifting, a risk, as the Report notes, the DCCA has warned against.

   PDS proposes adding language to subsection (a) of § 22A-208 that states plainly that accident and mistake are not defenses and that is explicit with regard to how accident and mistake relate to the *government's* burden of proof. Specifically, PDS proposes changing §22A-208(a) to read as follows:

[1] "Viewing claims of mistake or accident through the lens of offense analysis has, on occasion, led Superior Court judges to treat issues of mistake and accident as true defenses, when, in fact, they are simply conditions that preclude the government from meeting its burden of proof with respect to an offense's culpability requirement. In practical effect, this risks improperly shifting the burden of proof concerning an element of an offense onto the accused—something the DCCA has cautioned against in the context of both accident and mistake claims." First Draft of Report No. 3, March 13, 2017, at page 7. (footnotes omitted)

> Effect of Accident, Mistake, and Ignorance on Liability. A person is not liable for an offense when that person's accident, mistake, or ignorance as to a matter of fact or law negates the existence of a culpable mental state applicable to a result or circumstance in that offense. Accident, mistake and ignorance are not defenses. Rather, accident, mistake, and ignorance are conditions that may preclude the government from establishing liability.

This proposal exposes another problem however. While the above proposal refers to the government establishing liability, the Revised Criminal Code General Provisions are silent with respect to the government having such burden. Indeed, all of the proposed General Provisions are written in the passive voice. There is no clear statement that the government bears the burden of proving each element beyond a reasonable doubt. Certainly the constitutional principle is itself beyond any doubt and therefore including it in the Code might seem superfluous. The problem is that a statute explaining the effect of mistake or accident on liability, without a statement about who bears the burden of proving liability, allows confusion about whether it is the government or the defense that has the burden of proof with the (mistakenly termed) "mistake and accident *defenses*."

PDS further notes that the General Provisions frequently speak in terms of a person's "liability." For example -- § 22A-201(b): "'Offense element' includes the objective elements and culpability requirement necessary to establish *liability*;" §22A-203(b)(1): "Where a person's act provides the basis for *liability*, a person voluntarily commits the conduct element of an offense when that act was the product of conscious effort…;" §22A-204(c): "'Legal cause' means the result was a reasonably foreseeable consequence of the person's conduct. A consequence is reasonably foreseeable if its occurrence is not too remote, accidental, or otherwise dependent upon an intervening force or act to have a just bearing on the person's *liability*." However, the most important subsection in the General Provision Chapter, §22A-201(a), Proof of Offense Elements Beyond a Reasonable Doubt, speaks only in terms of *convicting* a person and not at all in terms of the person's *liability*. Thus, PDS strongly believes the General Provisions generally should make more explicit the connection between the proof beyond a reasonable doubt requirement and a person's liability for an offense. Therefore, PDS proposes the following change to §22A-201(a):

> Proof of Offense Elements Beyond a Reasonable Doubt. No person may be convicted of an offense unless the government establishes the person's liability by proving each offense element ~~is proven~~ beyond a reasonable doubt.

The above proposed statement that the government bears the burden of establishing the person's liability now provides an express link for PDS's proposed language that accident, mistake and ignorance may preclude the government from establishing that liability. Together, these proposals should correct the too common misconception that mistake and accident are "defenses" and will prevent the unconstitutional burden shifting that can result from such misconception.

2. With respect to the Imputation of Knowledge for Deliberate Ignorance, at §22A-208(c) – PDS proposes a higher threshold before knowledge can be imputed to a person. Specifically, PDS proposes the following change to §22A-208(c):

> When a culpable mental state of knowledge applies to a circumstance in an offense, the required culpable mental state is established if: …
>
> (1) The person was reckless as to whether the circumstance existed; and
>
> (2) The person avoided confirming or failed to investigate whether the circumstance existed with the primary purpose of avoiding criminal liability.

The central problem, and PDS's main concern, with the willful indifference doctrine is that it permits culpability under a diluted *mens rea* standard. The willful indifference doctrine will allow convictions for offenses where knowledge of a circumstance is required when the person, in fact, did not have knowledge of the particular circumstance or when the government fails to prove that the person had the required knowledge. If the Revised Criminal Code is going to allow a backdoor for the government to use to convict someone for a crime serious enough that its *mens rea* is knowledge, then the backdoor should be difficult to open. Or more formally phrased, the Revised Criminal Code should distinguish between willfully blind actors who are more like knowing actors from those who are merely negligent or reckless. *See* Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not an Element of Willful Blindness, 121 Harv. L. Rev. 1245, 1248-49 (2008).

It is PDS's position that the language in First Draft of Report No. 3 for §22A-208(c) creates a backdoor that is too easy for the government to open; it so dilutes the knowledge requirement that it is barely a shade more onerous than requiring proof of mere recklessness. The lock on the backdoor, as it were, has two parts that work together – sub-subsections (1) and (2) of §22A-208(c). Focusing on the first part, the required level of circumstance-awareness the person must have, PDS proposed for discussion at the April 5, 2017 meeting of the Advisory Group that the appropriate standard, instead of the reckless standard, should be the "high probability" standard used in the Model Penal Code at § 2.02(7); that is, our Code would read "the person was aware of a high probability that the circumstance existed." As was noted at that meeting and more fully explained in the Commission's Report No. 2: Basic Requirements of Offense Liability, the

difference between awareness to a practical certainty (the Revised Criminal Code proposed language) and awareness of a high probability (MPC's willful blindness language) might be so narrow that the distinction is not worth recognizing.[2] PDS acknowledges that if the Revised Criminal Code is to have a deliberate ignorance provision at all, then it cannot be worded so as to require the same level of awareness as that required for knowledge.

If PDS is agreeing not to create a new level of awareness that would be less than knowledge but more than recklessness, then the strength of the "lock on the backdoor" must come from the second part. That is, if to satisfy the knowledge requirement, the government need only prove the reckless-level of awareness of the circumstance, then the purpose the person had for avoiding confirming the existence of the circumstance has to be a stringent enough test that it significantly distinguishes the deliberate avoider from the merely reckless person. Therefore, PDS proposes that to hold the person liable, the person must have avoided confirming the circumstance or failed to investigate whether the circumstance existed with the *primary* purpose of avoiding criminal liability. A primary purpose test embeds a *mens rea* element in that in order to have a primary purpose of avoiding criminal liability, a person must have had something approaching knowledge that the circumstance existed. Adding the requirement that avoiding liability was the person's primary purpose sufficiently separates the more culpable from those who were merely negligent or reckless.

3. With respect to § 22A-209, Principles of Liability Governing Intoxication – PDS recommends stating the correspondence between intoxication and negligence. The correspondence for this culpable mental state may be obvious or self-evident, but explaining the correspondence between three of the culpable mental state requirements and failing to explain the last comes across as a negligent (or even reckless) omission. PDS recommends the following language:

> (4) *Negligence*. A person's intoxication negates the existence of the culpable mental state of negligence applicable to a result or circumstance when, due to the person's intoxicated state, that person failed to perceive a substantial risk that the person's conduct will cause that result or that the circumstance exists, and the person's intoxication was not self-induced.

4. With respect to §22A-209(c), Imputation of Recklessness for Self-Induced Intoxication, PDS strongly recommends defining the term "self-induced intoxication." The imputation of recklessness for self-induced intoxication turns on whether the intoxication is self-induced. The outcome of some cases, perhaps of many cases, will depend entirely on whether the defendant's intoxication was "self-induced." The term will have to be defined; the only question is who should define it. While perhaps only a few of the modern recodifications have codified such

[2] First Draft of Report No. 2, dated December 21, 2016 at page 57.

general definitions and those that have codified intoxication definitions have drafted flawed ones,[3] the Commission cannot duck its responsibility to recommend the District's legislature proscribe criminal laws and define the terms used. The purpose of modernizing the District's Code is to reduce significantly the need for courts to create law by interpretation.

PDS recommends a definition that is based on the Model Penal Code definition at § 2.08. PDS's proposed definition differs from that of the Model Penal Code in how it treats substances that are introduced into the body pursuant to medical advice. PDS would agree to differentiate between individuals who abuse prescription drugs in order to induce intoxication and individuals who suffer unforeseen intoxicating consequences from prescribed medication. PDS does not disagree with treating the former as "self-induced intoxication," even if the substance was originally prescribed for a legitimate medical purpose. The latter, however, is <u>not</u> self-induced.

Specifically, PDS recommends the following definition:

> <u>"Self-induced intoxication" means intoxication caused by substances the person knowingly introduces into the body, the tendency of which to cause intoxication the person knows or ought to know, unless the person introduces the substances under such circumstances as would afford a defense to a charge of crime. Intoxication is not "self-induced" if it occurs as an unforeseen result of medication taken pursuant to medical advice.</u>

[3] First Draft of Report No. 3, March 13, 2017, at page 40.

Comments of U.S. Attorney's Office for the District of Columbia on D.C. Criminal Code Commission Recommendations for Chapter 2 (Mistake, Deliberate Ignorance, and Intoxication) (1st Draft of Report No. 3) and for Chapter 1 (Preliminary Provisions) (1st Draft of Report No. 4) Submitted April 24, 2017

The U.S. Attorney's Office for the District of Columbia maintains the positions it previously has articulated in its correspondence on December 18, 2014, to the former D.C. Sentencing and Criminal Code Revision Commission, and on June 16, 2016, to Kenyan McDuffie (then chairman of the Committee on the Judiciary & Public Safety of the District of Columbia Council). In response to the request of the District of Columbia Criminal Code Reform Commission, we provide the following preliminary comments on these materials provided for Advisory Group review:

COMMENTS ON RECOMMENDATIONS FOR CHAPTER 2 (MISTAKE, DELIBERATE IGNORANCE, AND INTOXICATION) (First Draft of Report No. 3)

- Section 22A-208: PRINCIPLES OF LIABILITY GOVERNING ACCIDENT, MISTAKE, AND IGNORANCE

  - In discussing the imputation of knowledge for deliberate ignorance (at 3), the Report states that the required culpable mental state is established if, among other things, "[t]he person avoided confirming or failed to investigate whether the circumstance exited with **the purpose of avoiding criminal liability**" (emphasis added).

  - This phrase could be misinterpreted as to require proof that a defendant knew that his/her actions would be against the law. In fact, what is relevant is a defendant's awareness of the circumstances, not the legality of his/her actions in that circumstance.

  - This language should be revised so that "criminal liability" is replaced with "knowledge of whether the circumstance existed." Thus, prong (2) would read: The person avoided confirming or failed to investigate whether the circumstance exited with the purpose of avoiding knowledge of whether the circumstance existed."

  - This revised language also would avoid the problem identified in the Commentary (at 23); that is, for example, the incurious defendant.

- Section 22A-209: PRINCIPLES OF LIABILITY GOVERNING INTOXICATION (at 25-40)

    - As footnote 27 indicates (at 29), for certain non-conforming offenses (*i.e.*, "those offenses that the [D.C. Court of Appeals] has classified as "general intent" crimes, yet has also interpreted to require proof of one or more purpose of knowledge-like mental states"), the Commission, staff, and Advisory Group will need to re-visit this principle as substantive offenses are addressed.

COMMENTS ON RECOMMENDATIONS FOR CHAPTER 1 OF THE REVISED CRIMINAL CODE: PRELIMINARY PROVISIONS (First Draft of Report No. 4)

- § 22A-102: RULES OF INTERPRETATION

  - Rule of Lenity

    The current language proposed (at 3) allows for an arguably broader application of the rule of lenity than under current D.C. Court of Appeals case law. USAO-DC proposes rephrasing as follows: "If ~~two or more reasonable interpretations~~ the meaning of a statutory provision remains genuinely in doubt after examination of that provision's plain meaning, structure, purpose, and history, then the interpretation that is most favorable to the defendant applies." *See United States Parole Comm'n v. Noble*, 693 A.2d 1084, 1104 (D.C. 1997).

  - Effect of Headings and Captions

    - The draft commentary regarding Section 102(c) is incorrect in saying (at 7) that "There appears to be no case law in in the District assessing the significance of headings and captions for interpreting criminal statutes." In fact, the proposed language reflects the current practice of the D.C. Court of Appeals, , i.e., the D.C. Court of Appeals is willing to look at titles, captions, and headings, but the Court of Appeals recognizes that they may not always be illuminating. S*ee In re: J.W.*, 100 A.3d 1091, 1095 (D.C. 2014) (interpreting the offense captioned "possession of implements of crime").

    - Also, the commentary text that precedes footnote 36 is misleading in suggesting that the proposed language is consistent with national trends. Specifically, the commentary is imprecise in saying that several jurisdictions have provisions "describing the relevance" of captions and headings. In fact, all of the jurisdictions cited in footnote 36 (Illinois, New Jersey, and Washington) expressly prohibit reliance on headings, as does South Carolina. *See* S.C. Stat. § 2-13-175 ("Catch line heading or caption not part of Code section."). And although the commentary notes that "two recent code reform efforts have adopted a similar provision," those reform efforts were not adopted, and instead both jurisdictions at issue expressly prohibit reliance upon captions or headings (*i.e.,* Illinois, (discussed *supra*) and Delaware (*see* 1 Del. C. § 306 ("titles, parts, chapters, subchapters and sections of this Code, and the descriptive headings or catchlines . . . do not constitute part of the law. All derivation and other notes set out in this Code are given for the purpose of

convenient reference, and do not constitute part of the law"). Thus, it appears that no jurisdiction has enacted a provision authorizing reliance on titles, captions, and headings.

- If the goal is to be consistent with current case law, USAO-DC proposes that Section 102(c) be revised as follows: EFFECT OF HEADINGS AND CAPTIONS. Headings and captions that appear at the beginning of chapters, subchapters, sections, and subsections of this title, may aid the interpretation of otherwise ambiguous statutory language. *See Mitchell v. United States*, 64 A.3d 154, 156 (D.C. 2013) ("The significance of the title of the statute should not be exaggerated. The Supreme Court has stated that the title is of use in interpreting a statute only if it "shed[s] light on some ambiguous word or phrase in the statute itself." *Carter v. United States*, 530 U.S. 255, 267, 120 S. Ct. 2159, 147 L.Ed.2d 203 (2000). It "cannot limit the plain meaning of the text," *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212, 118 S. Ct. 1952, 141 L.Ed.2d 215 (1998), although it may be a "useful aid in resolving an ambiguity" in the statutory language. 359 U.S. 385, 388–89, 79 S. Ct. 818, 3 L.Ed.2d 893 (1959). We agree with the Supreme Court of Arizona that in determining the extent and reach of an act of the legislature, the court should consider not only the statutory language, but also the title, *Maricopa County v. Douglas*, 69 Ariz. 35, 208 P.2d 646, 648 (1949), and we shall do so here.").

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: June 15, 2017

SUBJECT: Comments to D.C. Criminal Code Reform Commission Second Draft of Report No. 2, Recommendations for Chapter 2 of the Revised Criminal Code - Basic Requirements of Offense Liability

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 Commission's Second Draft of Report No. 2, Recommendations for Chapter 2 of the Revised Criminal Code - Basic Requirements of Offense Liability (the Report). OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

§ 22A-206, Hierarchy of Culpable Mental States

On page 3, the Report defines the Hierarchy of Culpable Mental States. It states:

(a) PURPOSE DEFINED.

(1) A person acts purposely with respect to a result when that person consciously desires that one's conduct cause the result.

[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) A person acts purposely with respect to a circumstance when that person consciously desires that the circumstance exists.

(b) KNOWLEDGE & INTENT DEFINED.

(1) A person acts knowingly with respect to a result when that person is aware that one's conduct is practically certain to cause the result.

(2) A person acts knowingly with respect to a circumstance when that person is practically certain that the circumstance exists.

(3) A person acts intentionally with respect to a result when that person believes that one's conduct is practically certain to cause the result.

(4) A person acts intentionally with respect to a circumstance when that person believes it is practically certain that the circumstance exists.

Paragraphs (a)(1), (b)(1), and (b)(3) use the same sentence construction and word choice. We believe that a slight non-substantive change to each would make these sentences clearer. They each start with "A person" then refer to "that person" and then discuss "one's" conduct. By changing the word "one's" to "his or her" there would be no question that it is the same person whose mental state and conduct is being considered.[2]

To be consistent with paragraph (a) of the proposed code, and the rest of the first paragraph of the commentary, the last sentence of the first paragraph of the commentary should also be changed. The sentence currently reads,, "However, the conscious desire required by § 206(a) must be accompanied by a belief on behalf of the actor that it is at least possible that the person's conduct will cause the requisite result or that the circumstance exists." The rest of that paragraph refers to the "person" and not the "actor." To make the commentary more clear and consistent this sentence should be modified to say, "However, the conscious desire required by § 206(a) must be accompanied by a belief on behalf of the person that it is at least possible that his or her conduct will cause the requisite result or that the circumstance exists."

On page 4, of the Report the commentary discusses inchoate liability. While footnote 2 appropriately gives examples of hypothetical offenses, there is no footnote that shows the difference in proof if these offenses used the phrase "with intent" rather than "with knowledge." To better explain these concepts the commentary should have another footnote. That footnote

[2] For example, Section 22A-206 (a)(1) would read, "A person acts purposely with respect to a result when that person consciously desires that his or her conduct causes the result."

should contain the same hypothetical offenses as footnote 2, but with the substitution of "with intent" for "with knowledge."[3]

[3] For example, "A hypothetical receipt of stolen property offense phrased in terms of possessing property "with intent that it is stolen" suggests that the property need not have actually been stolen."

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: June 15, 2017

SUBJECT: Comments to D.C. Criminal Code Reform Commission First Draft of Report No. 5, Recommendations for Chapter 8 of the Revised Criminal Code – Offense Classes & Penalties.

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 Commission's First Draft of Report No. 5, Recommendations for Chapter 8 of the Revised Criminal Code – Offense Classes & Penalties. (the Report). OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

§ 22A-801, Offense Classifications

On pages 3 and 4, the Report proposes offense classifications and defines the terms "felony" and "misdemeanor."

Paragraph (b) (1) states "'Felony' means an offense with an authorized term of imprisonment that is more than one (1) year or, in other jurisdictions, death ." We assume that by the inclusion of the phrase "or, in other jurisdictions, death" that the term "felony" will be used to define both

[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.

in jurisdiction and out of state conduct. To avoid any confusion, we suggest that the language be redrafted as follows:

> "Felony" means any offense punishable:
> (A) By an authorized term of imprisonment that is more than one (1) year; or
> (B) By death, in the case of a felony from a jurisdiction that permits capital punishment.

In addition, under current District law, there is one use of the word "felony" that does not comply with the definition in the proposal and which must be retained in the Revised Criminal Code. D.C. Official Code § 16-1022 establishes the offence of parental kidnapping. Section 22A-801 must be amended to account for offense.

Under certain circumstances the penalty for parental kidnapping is defined as a felony even though the maximum penalty is one year or less. D.C. Code § 16-1024 (b) states:

> **(b)** A person who violates any provision of § 16-1022 and who takes the child to a place outside the District or detains or conceals the child outside the District shall be punished as follows:
>
> **(1)** If the child is out of the custody of the lawful custodian for not more than 30 days, the person is guilty of a felony and on conviction is subject to a fine not more than the amount set forth in [§ 22-3571.01] or imprisonment for 6 months, or both…
>
> **(2)** If the child is out of the custody of the lawful custodian for more than 30 days, the person is guilty of a felony and on conviction is subject to a fine of not more than the amount set forth in [§ 22-3571.01] or imprisonment for 1 year, or both …

The reason why these penalties are defined as "felonies" is so that persons who are charged with parental kidnapping may be extradited. See D.C. Code 23-563.[2] To allow for parental kidnapping to be designated a felony, and for any other situations where the Council may want to create a felony offense that has a penalty of one year or less or a misdemeanor offense of more than a year, 22A-801 (a) should be amended to say "Unless otherwise provided by statute."

[2]D.C. Official Code § 23-563 states:

> **(a)** A warrant or summons for a felony under sections 16-1022 and 16-1024 or an offense punishable by imprisonment for more than one year issued by the Superior Court of the District of Columbia may be served at any place within the jurisdiction of the United States.
>
> **(b)** A warrant or summons issued by the Superior Court of the District of Columbia for an offense punishable by imprisonment for not more than one year, or by a fine only, or by such imprisonment and a fine, may be served in any place in the District of Columbia but may not be executed more than one year after the date of issuance…. [emphasis added]

Similar language should be added to the definitions of "Felony" and "Misdemeanor" found in 22A-801 (a) and (b).[3]

§ 22A-803, Authorized Terms of Imprisonment

Section 22A-803 (a) establishes the definitions for the various classes of felonies and misdemeanors. Paragraph (a) begins by saying that "… the maximum term of imprisonment authorized for an offense is ..." Except for a Class A felony, the definitions for all of the felony and misdemeanor offenses include the phrase "not more than..." The use of the term "not more than" appears redundant following that introductory language. For example, compare "the maximum term of imprisonment authorize for an offense is... for a Class 2 felony forty-five (45) years" with "the maximum term of imprisonment authorize for an offense is... for a Class 2 felony, not more than forty-five (45) years".[4]

In the commentary, in the last paragraph on page 8 of the Report, it states "Under Supreme Court precedent, offenses involving penalties of six months or more are subject to a Sixth Amendment right to jury trial…" We believe that this is a typo and that the phrase should say "Under Supreme Court precedent, offenses involving penalties of more than six months are subject to a Sixth Amendment right to jury trial…" [emphasis added][5]

RCC § 22A-804. AUTHORIZED FINES.

Section 22A-804 (c) establishes an alternative maximum fine based on pecuniary loss to the victim or gain to the defendant. This provision states:

> (c) ALTERNATIVE MAXIMUM FINE BASED ON PECUNIARY LOSS OR GAIN. Subject to the limits on maximum fine penalties in subsection (b) of this section, if the offense of conviction results in pecuniary loss to a person other than the defendant, or if the offense of conviction results in pecuniary gain to any person, a court may fine the defendant:
>
> (1) not more than twice the pecuniary loss,
>
> (2) not more than twice the pecuniary gain, or

[3] Additionally, for the sake of clarity, the language "except as otherwise provided by statute" should also be added to the beginning of the paragraph that lists the penalty for "attempts." See § 22A-803 (b).

[4] The repeated use of term "not more than" pertaining to fines in § 22A-804 appears also to be redundant.

[5] See *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 543 (1989) and Lewis v. *United States*, 518 U.S. 322 (1996).

(3) not more than the economic sanction in subsection (a) that the defendant is otherwise subject to, whichever is greater. The pecuniary loss or pecuniary gain must be alleged in the indictment and proved beyond a reasonable doubt.

OAG recommends that the sentence "The pecuniary loss or pecuniary gain must be alleged in the indictment and proved beyond a reasonable doubt" be modified and made into its own paragraph. In addition, OAG suggests changing the paragraph structure and language in the subparagraphs from "not more than" to "Up to" to make the paragraph clearer. Paragraph (c) should be amended to read:

(c) (1) ALTERNATIVE MAXIMUM FINE BASED ON PECUNIARY LOSS OR GAIN. Subject to the limits on maximum fine penalties in subsection (b) of this section, if the offense of conviction results in pecuniary loss to a person other than the defendant, or if the offense of conviction results in pecuniary gain to any person, a court may fine the defendant:

(A) Up to twice the pecuniary loss;

(B) Up to twice the pecuniary gain; or

(C) Up to the economic sanction in subsection (a) that the defendant is otherwise subject to.[6]

(2) If the pecuniary loss or pecuniary gain exceeds the amount of fine authorized by subsection (a), the amount of gain or loss must be alleged in the indictment and proved beyond a reasonable doubt.

By rewording and breaking out new paragraph (c)(2) from former paragraph (c)(3) it is clear that the government only has to allege gain or loss in an indictment and prove the amount beyond a reasonable amount when it seeks an alternative maximum fine and not merely when the government wants to justify the court's imposition of a fine based on pecuniary loss or gain which is less than or equal to the statutory amount in subsection (a). This rewording makes it clear that it is only when the alternative maximum fine is sought that the government should have to allege and prove the amount of gain or loss.

OAG recommends that the Commission consider two substantive changes to § 22A-804 (d). This paragraph addresses the alternative maximum fine for organizational defendants. Paragraph (d) states, "Subject to the limits on maximum fine penalties in subsection (b) of this section, if an

[6] As there are three choices, we recommend that the word "greater" be replaced with the word "greatest." This would clarify what the court's options are if both the pecuniary loss and pecuniary gain are greater than the sanction in subsection (a), but are of unequal amounts. Under our proposed change it would be clear that the court could impose the largest sanction (not merely the greater of one of the sanctions and subsection (a)).

organizational defendant is convicted of a Class A misdemeanor or any felony, a court may fine the organizational defendant not more than double the applicable amount under subsection (a) of this section."[7] First, there is no reason why the misdemeanor portion of this paragraph should be limited to Class A misdemeanors. Organizational defendants are frequently motivated by financial gain when committing offenses and a court should be able to set a fine that acts as a deterrent to such conduct. As the Council wrote in the Report on Bill 19-214, Criminal Fine Proportionality Amendment Act of 2012,

> The reason for imposing an unusually high fine is appropriate for certain offenses in the interest of deterring violations. Of the listed offenses many were designed to deter corporate entities from engaging in prohibited conduct… While the penalty provisions may have low imprisonment terms, the larger fine currently associated with the provision is deemed important to deterring the specified conduct. In addition, organizational defendants are subject to section 1002(b) of the legislation – which effectively doubles any fine amount authorized under the law.[8]

The court should be authorized, in appropriate circumstance, to double the fine when an organizational defendant is convicted of any misdemeanor offense – not just a Class A misdemeanor.

Second, § 22A-804 (d) limits the court's ability to "double the applicable amount under subsection (a) of this section." This paragraph does not address the courts authority to double fines for organizational defendants when the underlining fine is established in the individual offense, as an exception to the standard fine.[9] Section 22A-804 (d) should be amended to add that "… a court may fine the organizational defendant not more than double the applicable amount under subsection(a) of this section or twice the maximum specified in the law setting forth the penalty for the offense." [Proposed language underlined]

[7] OAG recognizes that this paragraph is substantially based on D.C. Official Code § 22-3571.01(c).
[8] See Section 1102 on page 15 of the Report on Bill 19-214, Criminal Fine Proportionality Amendment Act of 2012. Section 22A-804 (d) is based upon §1002(b) of Bill 19-214
[9] The Criminal Fine Proportionality Amendment Act of 2012 exempts numerous offenses that carry higher fines than those established in the Act.

MEMORANDUM

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

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

From: Laura E. Hankins, General Counsel

Date: June 16, 2017

Re: Comments on First Draft of Report No. 5: Recommendations for Chapter 8 of the Revised Criminal Code: Offense Classes & Penalties

PDS understands that the proposed classification system and the corresponding penalties are preliminary and subject to significant revision during the final phrase of the Commission's work. Despite the preliminary nature of the proposals in Report No. 5, PDS has two grave concerns it requests the Commission consider at this time.

1. With respect to RCC § 22A-803, Authorized Terms of Imprisonment, specifically regarding the felony classes – PDS disagrees with the Commission's approach of aligning its proposed felony classes and corresponding maximum imprisonment terms with current District sentencing norms. PDS believes that criminal code reform is an opportunity to rationally recalibrate our criminal justice system to reflect evidence-based research about public safety and crime. To start, PDS recommends the Commission eliminate the excessive sentence of life without release and all sentences above 20 years of incarceration. Sentences of life without release, particularly where there is no "second look" provision or parole eligibility, are not supported by evidence about dangerousness of the offender and are inhumane. The association between age and general criminal behavior is well established: most crimes are committed by young people and older adults have low rates of recidivism.[1] For instance, the Justice Policy Institute reported on the release of a large number of people, mostly age 60 and up who had been convicted of homicides in Maryland but released due to an appellate ruling. As of March 2016, of the more than 100

[1] See Alfred Blumstein, Jacqueline Cohen, and P. Hsieh, *The Duration of Adult Criminal Careers*, (1982).

people who had been released, none had been convicted of a new felony offense.[2] Over the past decade, New Jersey, New York, and Michigan reduced their prison populations by a range of 20 percent through front end reforms such as decreasing sentence length and through back end reforms in their parole systems. No adverse impacts on public safety were observed in these states.[3]

The Commission, and ultimately the Council, should also consider the fiscal impact of constructing such an expensive sentencing system. Because persons convicted of felony offenses and sentenced to prison are in the legal custody of the Bureau of Prisons,[4] the fiscal impact statements that accompany legislation creating felonies or changing felony penalties have not had to assess the costs of incarceration. When the Council promulgates new felony offenses, sets mandatory minimum prison sentences or increases the maximum term of imprisonment possible for a felony offense, it need never ask itself what the additional prison time will cost the District taxpayer. Many states are considering sentence reform because of budget deficits and the cost of prison overcrowding due to long sentences.[5] The National Conference of State Legislatures estimated that the taxpayers paid approximately $24 billion dollars to incarcerate persons convicted of something other than a non-violent offense; that estimate excludes spending on county and city jails and the federal corrections budget.[6] Given the tremendous support in the District for statehood,[7] and repeated calls for more local control over prosecutions and of the District's criminal justice system, the Commission, and ultimately the Council, should be mindful about building a sentencing system it would never be able to afford. Criminal code reform presents an ideal opportunity to weigh the high cost of long prison sentences against the little to no benefit in terms of increased public safety and propose the general reduction of

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[2] *Defining Violence: Reducing Incarceration by Rethinking America's Approach to Violence*, ("Defining Violence") Justice Policy Institute, August 2016. http://www.justicepolicy.org/uploads/justicepolicy/documents/jpi_definingviolence_final_report_9.7.2016.pdf.

[3] Judith Greene & Marc Mauer, *Downscaling Prisons: Lessons from Four States*, The Sentencing Project (2010).

[4] D.C. Code § 24-101.

[5] See e.g., "Skyrocketing prison costs have states targeting recidivism, sentencing practices." https://www.washingtonpost.com/blogs/govbeat/wp/2015/05/19/skyrocketing-prison-costs-have-states-targeting-recidivism-sentencing-practices/?utm_term=.a13e38050348; "Fiscal and prison overcrowding crises could lead to Three-Strikes reform." http://www.mercurynews.com/2011/07/22/fiscal-and-prison-overcrowding-crises-could-lead-to-three-strikes-reform/.

[6] *Defining Violence* at page 20.

[7] "District voters overwhelmingly approve referendum to make D.C. the 51st state." https://www.washingtonpost.com/local/dc-politics/district-voters-overwhelmingly-approve-referendum-to-make-dc-the-51st-state/2016/11/08/ff2ca5fe-a213-11e6-8d63-3e0a660f1f04_story.html?utm_term=.5234e8fc29f3.

maximum terms of imprisonment for felonies and the elimination of the life without possibility of release penalty.

In further support of reducing the prison terms proposed for the felony classes in Report No. 5, PDS focuses on and strongly objects to the proposed 45-year term of imprisonment for the Class 2 felony. A 45-year term penultimate penalty is significantly more severe than the 20-year maximum recommended by the American Law Institute and than the 30-year maximum recommended in the Proposed Federal Criminal Code. Further, the 45-year penalty is not justified by the data included in Memorandum #9, which supplements Report No. 5.

According to Figure 1, there are nine criminal offenses in Title 22 that have a maximum penalty of 30 years imprisonment. This grouping of offenses would correspond with the proposed Class 3 felony and its recommended 30-year maximum. There are six offenses that have a maximum penalty of life without possibility of release (LWOR). This grouping corresponds with the proposed Class 1 felony. Between the 30-year maximum grouping of offenses and the LWOR maximum grouping in the D.C. Code, Figure 1 shows that there is one offense with a maximum penalty of 40 years (which I assume is armed carjacking) and one offense with a maximum penalty of 60 years (which I assume is first-degree murder).

Figure 3 is a little more complicated in that it compares the Sentencing Guidelines groups and the proposed felony classifications; the correspondence between the two is a little tricky. Category 3 on Figure 3 compares the maximum proposed penalty for Class 3 (30 years or 360 months) and the top of the box for the Master Grid Group 3 for column A and for column D. Figure 3 indicates that a maximum of 360 months for Class 3 felony offenses would more than adequately accommodates the top of the box for Column A, 180 months, and Column D, 216 months. PDS recommends lowering the penalty proposed for Class 3 to significantly less than 30 years. Category 2 in Figure 3 compares the 45-year (540 months) penalty proposed for Class 2 felony to the Master Grid Group 2 for column A and column D. Again, Figure 3 indicates that a maximum of 45 years for Class 2 felony offenses is significantly higher than top of the box for Column A, 288 months (24 years), and Column D, 324 months (27 years). PDS acknowledges that the maximum prison term for the class should be higher than the top of the box in Column D, for example to allow for aggravating circumstances of the particular incident. A maximum penalty of 45 years, however, allows for an excessive 18 years “cushion” above the top of the box for Master Grid group 2, column D. Category 1 in Figure 3 corresponds to Master Group 1, the group into which first-degree murder is ranked. Thus the one offense with a statutory maximum of 60 years (720 months), as shown on Figure 1, is the main offense (and variations of it) in Master Group 1 and the maximum penalty is 720 months for column A and column D.

Figure 4 is perhaps more helpful for recognizing the proposed penalty for Class 2 felony should be much lower than 45 years, even if that class were reserved for the most serious offense in the

Code. Figure 4 in Memo #9 shows that the average sentence and the mean sentence for Category 1 (meaning the average sentence for murder I) are both 30 years, both well below the 45-year penalty proposed for Class 2 felony. Category 2 on Figure 4 compares the 45-year (540 months) proposed for Class 2 felony to the average and mean sentences for Master Grid Group 2 offenses and also demonstrates that the 45-year penalty proposed for Class 2 could be greatly reduced and still well accommodate current sentencing practice for those offenses. The average sentence for that category is 225 months (18 years, 9 months) and the mean sentence is 228 months (19 years), lower than the proposed 45-year maximum by 26 years, 3 months and 26 years respectively.

While PDS focuses here on the maximum imprisonment terms proposed for the three most serious classes for RCC §22A-803, all of the penalties should be examined in light of the sentencing practices but also in light of evidence-based research on public safety and of the potential fiscal impact of incarceration.

2. With respect to RCC § 22A-803, Authorized Terms of Imprisonment, specifically regarding the Class B misdemeanor penalty – The Commission proposes in Report No. 5 to eliminate the 6-month prison term as the penultimate penalty for misdemeanor offenses and instead to have the 180-day prison term as the penultimate misdemeanor penalty.[8] The 180-day/6-month distinction is important because, as the Report notes, D.C. Code §16-705 requires a jury trial as compelled by the Constitution[9] or if the offense is punishable by imprisonment for *more than 180 days*.[10] Six months is longer than 180 days;[11] therefore offenses with a penalty of 6 months imprisonment are jury demandable; those with a penalty of 180 days are not. PDS would prefer that the maximum penalty for Class B be set at 6 months. PDS acknowledges that, under current law, a 6-month penalty would make every offense assigned to that class jury-demandable and that flexibility around this misdemeanor mid-point might have merit. Thus, to provide for such flexibility, PDS would not object to Class B having a maximum penalty of 180 days **IF** there were also a statutory provision that stated offenses categorized in Class B were jury demandable unless otherwise provided by law. Report No. 5 proposes the opposite default rule – that Class B misdemeanors would be non-jury demandable unless there were a plain statement in the offense definition that the offense was to be jury demandable. Because "trial by jury in criminal cases is fundamental to the American scheme of justice,"[12] the default should be that Class B misdemeanors are jury demandable unless there is a plain statement in the offense definition that the offense is not jury demandable.

[8] The ultimate term of imprisonment penalty for a misdemeanor is one year.

[9] D.C. Code § 16-705(a).

[10] D.C. Code § 16-705(b)(1).

[11] *Turner v. Bayly*, 673 A.2d 596, 602 (D.C. 1996).

[12] *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

Trial by jury is critical to fair trials for defendants. "The history of trial by jury in criminal cases has been frequently told. It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta…. The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government." [13]

Requiring jury trials is not only a acknowledgement of the core principle of American justice that a defendant should be tried by a jury of his or her peers, it also recognizes the importance to the community of serving as jurors. As the Supreme Court noted in *Batson v. Kentucky*, "Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try…. [B]y denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror."[14] Constructing a system that by default precludes jury trials harms not only the defendant but the community as a whole. The ability of District residents to participate in civic life is already curtailed compared to residents of States; the Commission should not restrict that participation further by default.

When the Commission engages in the work of adjusting penalties and gradation of offenses to provide for proportionate penalties[15] and when the D.C. Council promulgates new misdemeanors, they should have to explicitly decide to deprive the defendant and the community of a jury trial and they should have to publicly declare they made that decision, not hide behind a default rule buried in a penalty classification system.

[13] *Id*. at 151, 156.

[14] *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).

[15] D.C. Code § 3-152(a)(6).

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: July 17, 2017

SUBJECT: Comments to D.C. Criminal Code Reform Commission First Draft of Report No. 6, Recommendations for Chapter 8 of the Revised Criminal Code – Penalty Enhancements

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 Commission's First Draft of Report No. 6, Recommendations for Chapter 8 of the Revised Criminal Code – Penalty Enhancements (the Report). OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

§ 22A-805, Limitations on Penalty Enhancements

Section 22A-805 (a) uses the word "equivalent" but does not define it. Because it is defined in a later section the use of the word here is confusing, if not misleading.

Section 22A-805 (a) states:

> PENALTY ENHANCEMENTS NOT APPLICABLE TO OFFENSES WITH EQUIVALENT ELEMENTS. Notwithstanding any other provision of law, an offense is not subject to a

[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.

penalty enhancement in this Chapter when that offense contains an element in one of its gradations which is equivalent to the penalty enhancement.

In giving definitions to undefined Code terms the Court of Appeals has looked to definitions found in Code provisions that were enacted at a different time for a different purpose. See *Nixon v. United States*, 730 A.2d 145 (D.C. 1999), where the Court applied the definition of "serious bodily injury" found in a sex offense statute to the offense of aggravated assault. Because the very next section after § 22A-805 contains a definition for the word "equivalent" it is possible that, notwithstanding the limiting language in § 22A-806 (f)(2)[2], the Court of Appeals may look to that enacted definition when determining the meaning of the earlier use of the word "equivalent" in § 22A-805 (a). Clearly this is not what the Commission intends. To avoid any confusion about what the word means, to avoid making the Court of Appeals define the term, and to avoid unnecessary litigation, OAG suggests that the word "equivalent" be defined in § 22A-805 (a), a different word be used in § 22A-805 (a), or a definition be drafted that can be used in both sections.

Section 22A-805 (a) also uses the word "gradations." This word is also not defined. OAG suggests that the sentence be rewritten so that the word "gradations" is replaced by a term that includes "lesser included offenses."[3]

On page 4 of the Report there is a discussion of the holding in *Bigelow v. United States,* 498 A.2d 210 (D.C. 1985), and its application after the enactment of § 22A-805. The discussion initially leads the reader to believe that multiple repeat offender provisions would continue to apply when the dictates of *Lagon v. United Sta*tes, 442 A.2d 166, 169 (D.C. 1982), have been met. The paragraph then concludes with the statement "However, insofar as RCC § 22A-805 is intended to reduce unnecessary overlap in statutes, courts may construe the term "equivalent" in RCC § 22A-805 more broadly than under current law." It is OAG's position that this determination not be left to the courts to resolve. Rather, the Commission should unequivocally state that the holding in *Bigelow* would apply after enactment of these provisions.

§ 22A-806, Repeat Offender Penalty Enhancements

On page 8 of the Report the term "Prior Convictions" is defined. Section 22A-806 (f)(5)(i) states, "Convictions for two or more offenses committed on the same occasion or during the same course of conduct shall be counted as only one conviction…" However, the proposed language does not clarify what is meant by the word "occasion." Unfortunately, the addition of the phrase "during the same course of conduct" does not clarify it. Take, for example, the following scenario. An in-home worker who visits an elderly patient once a week is convicted for stealing from the victim. Afterwards, the government learns that the in-home worker actually started working for the patient at an earlier time and also stole from the patient during that

[2] Section 22A-806 (f)(2) states "For the purposes of this section, 'equivalent' means a criminal offense with elements that would necessarily prove the elements of the District criminal offense."

[3] For example, § 22A-805 (a) could be rewritten to say "Notwithstanding any other provision of law, an offense is not subject to a penalty enhancement in this Chapter when that offense ~~contains an~~ or any of its lesser included offenses contains an element ~~in one of its gradations~~ which is equivalent to the penalty enhancement. "

previous time period. Would a second conviction of the in-home worker be the subject of an enhancement under § 22A-806 (f)(5)(i) or would it be considered "the same course of conduct"? Either the proposed code provision or the Commentary should address this issue. To the extent that there is current case law on this issue, it should be fleshed out in the Commentary.

In § 22A-806 (f)(5)(iv) it states "A conviction for which a person has been pardoned shall not be counted as a conviction. OAG suggests that this exception be expanded to include convictions that have been sealed by a court on grounds of actual innocence.

§ 22A-807, Hate Crime Penalty Enhancement

On page 17 of the Report the Hate Crime Penalty Enhancement is explained. Section 22A-807 (a) states:

> A hate crime penalty enhancement applies to an offense when the offender commits the offense with intent to injure or intimidate another person because of prejudice against that person's perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibility, homelessness, physical disability, matriculation, or political affiliation. [Emphasis added]

Though not expounded upon in the Commentary, this penalty enhancement has narrower application than the current bias-related crime penalty. The definition of a "Designated act" in D.C. Code § 22-3701 includes not only injury to another person but property crimes as well. So long as the act is based upon prejudice, a bias-related crime penalty can currently be given when a defendant is guilty of injuring property, theft, and unlawful entry. See § 22-3701 (2). The Hate Crime Penalty Enhancement should be expanded to cover all of the offenses currently included under the law.

§ 22A-808, Pretrial Release Penalty Enhancement

On page 24 of the Report there are definitions for the misdemeanor, felony, and crime of violence pretrial release penalty enhancements. To be consistent with the wording of § 22A-806 (a), (b), and (c) two changes should be made to these provisions. First, the term "in fact" should be added to each of the pretrial release penalty enhancements. For example, § 22A-808 (a) should be redrafted to say "A misdemeanor pretrial release penalty enhancement applies to a misdemeanor when the offender*, in fact,* committed the misdemeanor while on release pursuant to D.C. Code § 23-1321 for another offense." [Additional term italicized] Second, penalty enhancements found in § 22A-806 refer to "the defendant" whereas the penalty enhancements found in § 22A-808 refer to "the offender." To avoid arguments about whether the difference in wording has legal significance, the same term should be used in both sections.

MEMORANDUM

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

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

From: Laura E. Hankins, General Counsel

Date: July 18, 2017

Re: Comments on First Draft of Report No. 6: Recommendations for Chapter 8 of the Revised Criminal Code: Penalty Enhancements

PDS has the following concerns and makes the following suggestions:

1. With respect to RCC § 22A-806, Repeat Offender Penalty Enhancements, PDS recommends the complete elimination of this section. Repeat offender penalty enhancements represent a triple counting of criminal conduct and work a grave miscarriage of justice for individuals who have already paid their debt to society in the form of a prior sentence. Repeat offender penalty enhancements exacerbate existing racial disparities in the criminal justice system and increase sentences that are already too long.

   The United States incarcerates more people than any other country in the world. The last forty years have seen relentless growth in incarceration.[1] The expansion in prison population is driven by greater numbers of people entering the system, less diversion, and longer sentences.[2] Enhancements create even longer sentences – beyond what the legislature originally envisioned for a particular offense committed by a broad range of potential culpable actors.

[1] The Sentencing Project, Ending Mass Incarceration: Charting a New Justice Investment, available at: http://www.sentencingproject.org/publications/ending-mass-incarceration-charting-a-new-justice-reinvestment.

[2] James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. Rev. 21, 48 (2012).

The commentary to the Revised Criminal Code ("RCC") justifies, in part, the continued use of prior convictions to enhance criminal sentences on the lack of evidence on how the operation of criminal history in sentencing may affect racial disparities.[3] But evidence of the criminal justice system's disparate impact on African-Americans abounds. The Black-white "disparity-ratio" in male imprisonment rates was nearly 6:1 in 2014.[4] Hispanic-white ratios for males were 2.3:1.[5] In the District, nearly fifty percent of black males between the ages of 18-35 were under criminal justice supervision according to a study by the National Center on Institutions and Alternatives.[6] The Sentencing Commission's statement that "the number of non-black, felony offenders present too small a sample size for meaningful statistical analysis" tells the picture of who in fact is being sentenced on felony offenses.[7] While enhancements may not necessarily cause disparity in sentencing, the use of penalty enhancements has the effect of amplifying racial disparities already present in the criminal justice system.

For instance, consider the evidence of disparate prosecution for drug offenses. Although blacks and whites use drugs at roughly the same rates, African Americans are significantly more likely to be arrested and imprisoned for drug offenses.[8] "Black arrest rates are so much higher than white rates because police choose as a strategic matter to invest more energy and effort in arresting blacks. So many more blacks than whites are in prison because police officials have adopted practices, and policy makers have enacted laws, that foreseeably treat black offenders much more harshly than white ones."[9] Sentencing enhancements for multiple prior misdemeanor or felony drug offenses create a feedback effect that amplifies the existing bias, or choices, already made by the criminal justice system.

PDS is not arguing that consideration of prior convictions should have no place in our criminal justice system, but rather that the place these prior convictions hold is already sufficient. As noted in the commentary, a defendant's criminal history is a dominant feature in the Sentencing

[3] Commentary for RCC§ 22A-806 at 12.

[4] *See* Bureau of Justice Statistics, Prisoners in 2014 (2015), available at: https://www.bjs.gov/content/pub/pdf/p14.pdf; *see also*, The Sentencing Project, Fact Sheet, available at: http://www.sentencingproject.org/publications/trends-in-u-s-corrections

[5] *Id*.

[6] Eric R. Lotke, "*Hobbling a Generation*," National Center on Institutions and Alternatives, August 1997.

[7] Commentary for RCC§ 22A-806 at 12.

[8] Tonry, M., & Melewski, M. (2008), *The Malign Effects of Drug and Crime Control Policy on Black Americans*. In M. Tonry (Ed.), Crime and justice: A review of research (pp. 1-44). Chicago, IL: University of Chicago Press; James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. Rev. 21, 48 (2012).

[9] *Id*.

Guidelines.[10] A prior felony conviction will often mean that probation is excluded as a guidelines-compliant sentencing option. Because it will move a defendant to a higher column on the guidelines grid, a prior felony conviction will also mean that the corresponding guidelines-compliant prison sentence the defendant will face is longer. This is important because judges overwhelmingly comply with the Sentencing Guidelines and thus already abide by a system that heavily weighs prior criminal history. [11] In addition to being determinative of which box a defendant will fall into on the Sentencing Guidelines, prior criminal history must be considered in sentencing the defendant within that box. This is the case because the D.C. Code explicitly requires judges to "impose a sentence that reflects the seriousness of the offense and the criminal history of the offender."[12] Enhancements therefore create a system that triple counts prior convictions for individuals who have already faced consequences as a direct result of the prior conviction.

While misdemeanors are not covered by the Sentencing Guidelines or by D.C. Code § 24-403.01, there is no doubt that judges consider criminal history in deciding whether to impose incarceration and in deciding the amount of incarceration to impose. Prosecutors routinely argue for a sentencing result based in substantial part on the defendant's criminal history. Penalty enhancements for misdemeanors create the same issue of over-counting criminal history for offenses where the defendant has already paid a debt to society. Further, as acknowledged in the commentary, misdemeanor enhancements exist in a tiny minority of jurisdictions. According to the commentary, only Maine, Missouri, and New Hampshire allow enhancements for prior misdemeanor convictions.[13]

There is no evidence that longer sentences for defendants who have committed multiple misdemeanors produce meaningful long-term improvements in community safety or better individual outcomes. To the contrary, many misdemeanor offenses can be addressed through comprehensive community based programming rather than ever longer periods of incarceration. For example, repeated drug possession offenses or offenses that stem from drug addiction such as theft may be successfully addressed through referrals to drug treatment. [14] Current Superior Court policies establishing specialized courts for individuals with mental illness or issues with

[10] Commentary for RCC§ 22A-806 at 12.

[11] Voluntary Sentencing Guidelines Manual (June 27, 2016) at 1. The 2015 annual report for the District of Columbia Sentencing and Criminal Code Revision Commission lists compliance as "very high" and "consistently above 90% since 2011" and 96% in 2015. Available at: https://scdc.dc.gov/sites/default/files/dc/sites/scdc/publication/attachments/Annual%20Report%202015%20Website%205-2-16.pdf .

[12] D.C. Code § 24-403.01(a)(1).

[13] Commentary for RCC§ 22A-806 at 13 fn. 43.

[14] Justice Policy Institute, Substance Abuse Treatment and Public Safety January 2008 available at: http://www.justicepolicy.org/uploads/justicepolicy/documents/08_01_rep_drugtx_ac-ps.pdf.

drug addiction reflect the community sentiment that there are better solutions to crime than more incarceration.

While the RCC does not propose specific mandatory minimums for enhancements, it contemplates a structure that would force a judge to sentence a defendant to a mandatory minimum once the prosecution proves the applicability of a repeat offender enhancement.[15] PDS opposes the use of mandatory minimums in the RCC. PDS believes that judges should be trusted to exercise discretion in sentencing defendants. Judges are in the best position to review the facts in each case and the unique history of each defendant. Judges make decisions informed by a presentence report, statements of victims, the community, and sometimes medical professionals. Judges should be trusted to weigh the equities in each case and impose, consistent with the law, a fair sentence.

2. With respect to RCC § 22A-807, Hate Crime Penalty Enhancement, PDS appreciates that the causal nexus between the crime and the bias is clarified in RCC § 22A-807. However, PDS has concerns about several of the broad categories of bias listed in the RCC. As acknowledged in the commentary for RCC § 22A-807, the list of protected categories is broader than other jurisdictions and includes several characteristics many states do not recognize, such as personal appearance, matriculation, marital status, and family responsibility.[16] PDS believes that it is appropriate to include these categories in the District's human rights law which prohibits discrimination in employment, housing, public accommodation, and education.[17] However, when used in the criminal code, these categories may allow for prosecution outside of the intended scope of the hate crime statute. For instance, by including marital status and family responsibility, a defendant who kills an ex-husband because of a bitter divorce or because the ex-husband fails to take on family responsibility may be subject to a hate crime enhancement. A teenager who commits a robbery motivated by anger at a complainant's flashy personal appearance could similarly be subject to a hate crime enhancement.[18] This expansion of the hate crime categories would allow for a sentencing enhancement to apply to what the legislature likely envisioned to be within the standard range of motives for the commission of an offense. Thus, PDS recommends removing the following categories from proposed §22A-807: marital status, personal appearance, family responsibility, and matriculation.

[15] The RCC § 22A-806(e) provides for at least the possibility of mandatory minimum sentences for the commission of repeat offenses. PDS understands that sentencing will be fully considered by the Commission at a later time.

[16] Commentary for RCC§ 22A-806 at 21.

[17] D.C. Code § 2-1402.01-§2-1402.41.

[18] PDS does not disagree with treating as a hate crime a crime committed because of a prejudice against a person's appearance or dress that is or appears to be different than the person's gender but believes that bias is covered by the "gender identity or expression" term in §22A-807.

MEMORANDUM

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

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

From: Laura E. Hankins, General Counsel

Date: July 18, 2017

Re: Comments on First Draft of Report No. 7: Recommendations for Chapter 3 of the Revised Criminal Code: Definition of a Criminal Attempt

In general, the Public Defender Service approves the recommendations in the First Draft of Report No. 7. PDS has the following concerns, however, and makes the following suggestions:

1. The Commentary refers to two cases with the name "*Jones v. United States*": *(Richard C.) Jones v. United States*, 124 A.3d 127 (D.C. 2015), cited on pages 7 and 10; and *(John W.) Jones v. United States*, 386 A.2d 308 (D.C. 1978), cited on pages 13-14 and 18. We suggest that the defendants' first names be added to these citations to make it easier to distinguish between the two cases.

2. We suggest omitting two hypothetical examples from Footnotes 2 and 8 of the Commentary to avoid unnecessary confusion about the scope and application of attempt.

   ▪ The last sentence of Footnote 2, on page 4, poses the following hypothetical: "For example, to determine whether a person arrested by police just prior to pulling a firearm out of his waistband acted with the intent to kill a nearby victim entails a determination that the person planned to retrieve the firearm, aim it at the victim, and pull the trigger."

   As written, this example suggests that a defendant could be convicted of attempted assault with intent to kill where he had not yet pulled a firearm out of his waistband. We believe that this conduct, without more, would be insufficient to sustain a conviction for attempted assault with intent to kill. Moreover, the example raises complex questions that this group has yet to resolve concerning the interplay between attempt and gradations of assault offenses. We therefore propose that the footnote be deleted to avert the risk that readers will draw incorrect inferences about sufficiency.

   ▪ Footnote 8, on page 5, includes among its examples of incomplete attempts "the attempted felony assault prosecution of a person who suffers a debilitating heart attack just as he or she is

about to exit a vehicle and repeatedly beat the intended victim." We believe that these facts, without more, provide an insufficient basis for an attempted felony assault conviction. This hypothetical likewise raises questions about the type of proof necessary to establish an attempted felony assault, where felony assault requires a specific degree of harm. We propose that the hypothetical be deleted.

3. PDS proposes modifying § 22A-301(a)(3) to read as follows (alterations are underlined):

> (3) The person<u>'s conduct</u> is either:
>
> > (A) <u>Reasonably adapted to and</u> dangerously close to <u>the accomplishment of</u> that offense; or
> >
> > (B) Would be dangerously close to <u>the accomplishment of</u> that offense if the situation was as the person perceived it, provided that the person's conduct is reasonably adapted to <u>the accomplishment of</u> that offense.

First, we suggest changing the subject of (a)(3) from "the person" to "the person's conduct," to make more explicit that the jury's focus should be on the conduct of the defendant.

Second, PDS proposes modifying subsection (A) to insert the phrase "reasonably adapted to" before the phrase "dangerously close," to make clear that the requirement of conduct "reasonably adapted" to completion of the target offense applies to *all* attempt charges, and not only those that fall under subsection (B). This alteration would comport with case law from the D.C. Court of Appeals, which has held that "[t]he government must establish conduct by the defendant that is reasonably adapted to the accomplishment of the crime . . . ." *Seeney v. United States*, 563 A.2d 1061, 1083 (D.C. 1989); *see also Williams v. United States*, 966 A.2d 844, 848 (D.C. 2009); *(John W.) Jones v. United States*, 386 A.2d 308, 312 (D.C. 1978). The current draft, which uses the "reasonably adapted" language only in subsection (B), creates the impression—at odds with case law—that this requirement does not exist for attempts that fall under subsection (A), and could lead the jury to conclude that the conduct requirements under subsection (A) are looser than under subsection (B). This alteration would also align the draft provision with the current Red Book instruction, which reflects current District law in this area and which requires proof that the defendant "did an act reasonably adapted to accomplishing the crime." Criminal Jury Instructions for the District of Columbia No. 7.101, Attempt (5th ed. rel. 14).

Inclusion of the "reasonably adapted" language in subsection (A) would have the additional benefit of giving some substance to the "dangerously close" requirement and ensuring that innocent conduct is not punished as an attempt. PDS supports the draft's adherence to the "dangerously close" standard for conduct, which reflects current case law. The term "dangerously close," however, is not defined. Consistent use of the "reasonably adapted" language in both (A) and (B) would help to establish a clearer limitation on the conduct that can give rise to an attempt conviction. We believe that clear and exacting conduct standards are essential in the context of attempt, because the defendant's thoughts and plans play such a critical role in the question of guilt, but must often be inferred from a defendant's actions.

Third, we suggest modifying both (A) and (B) to replace the phrases "committing that offense" and "commission of that offense" with the phrase "the accomplishment of that offense." Like the

phrase "reasonably adapted," the "accomplishment" language appears in both the current Redbook instruction on Attempt and DCCA case law. *See, e.g., Seeney*, 563 A.2d at 1083; *Williams*, 966 A.2d at 848. Maintaining that terminology in the statutory provision would thus provide continuity and consistency. It would also avert confusion about the point at which the target offense has been "committed." Just as the "dangerously close" standard requires the jury to focus on the defendant's proximity to completing the target offense, rather than his preparatory actions, the "accomplishment" language keeps the jury's focus on the completion of the target crime.

Comments of the U.S. Attorney's Office for the District of Columbia on D.C. Criminal Code Commission Recommendations

for Chapter 3 of the Revised Criminal Code: Definition of a Criminal Attempt (First Draft of Report No. 7)

and for Chapter 8 of the Revised Criminal Code: Penalty Enhancements (First Draft of Report No. 6)

Submitted July 21, 2017

The U.S. Attorney's Office for the District of Columbia maintains the positions it previously has articulated in its correspondence on December 18, 2014, to the former D.C. Sentencing and Criminal Code Revision Commission, and on June 16, 2016, to Kenyan McDuffie (then chairman of the Committee on the Judiciary & Public Safety of the District of Columbia Council). In response to the request of the District of Columbia Criminal Code Reform Commission, we provide the following preliminary comments on these materials provided for Advisory Group review:

RECOMMENDATIONS FOR CHAPTER 3 OF THE REVISED CRIMINAL CODE (DEFINITION OF A CRIMINAL ATTEMPT) First Draft of Report No. 7

- Section 22A-301(a): Definition of Attempt - COMMENTARY
  - Page 3: tenant → tenet
  - Pages 5 (text accompanying footnotes 8 and 9), 14-15, 37: Advisory Group should discuss further whether the DCCA sees a meaningful distinction between the "dangerous proximity" and "substantial step" tests, considering *Hailstock*

RECOMMENDATIONS FOR CHAPTER 8 OF THE REVISED CRIMINAL CODE
(PENALTY ENHANCEMENTS)
First Draft of Report No. 6

- Section 22A-805: Limitations on Penalty Enhancements - COMMENTARY

  - Page 4: USAO-DC agrees that subsections (b) and (c) "codify procedural requirements for penalty enhancements . . . required in *Apprendi* . . . and subsequent case law."

- Section 22A-807: Hate Crime Penalty Enhancement (at page 17)

  - Section title: Labeling it a "hate" crime is a change from current law, which refers to this as a "bias-related crime."

  - (c) Definitions: (iii)-(v) should be subheadings within (ii)

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: November 3, 2017

SUBJECT: First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions

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 Commission's First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-2001. Property Offense Definitions

RCC § 22A-2001 defines "coercion", "consent", "deceive", and "effective consent." Those definitions are then used throughout the offenses contained in the first drafts of Reports number 9, 10, and 11. When reviewing some of the offenses that use one or more of these terms it is unclear what the penalty would be for a person who meets all of the other elements of the offense except that the "victim" turns out to be law enforcement involved in a sting operation. As written it would appear that the person would only be guilty of an attempt. Assuming, that the Commission will recommend that, in general, the penalty for an attempt will be lower than the penalty for a completed offense, we believe that that penalty is insufficient in this context. Take

[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.

the offense of Financial Exploitation of a Vulnerable Adult or Elderly Person under RCC §22A-2208. The elements of that offense in Report #10 are:

(a) A person is guilty of financial exploitation of a vulnerable adult or elderly person if that person:

(1) Knowingly:

(A) Takes, obtains, transfers, or exercises control over;

(B) Property of another;

(C) With consent of the owner;

(D) Who is a vulnerable adult or elderly person;

(E) The consent being obtained by undue influence; and

(F) With intent to deprive that person of the property, or

(2) Commits theft, extortion, forgery, fraud, or identity theft knowing the victim to be a vulnerable adult or elderly person.[2]

Let's say that the police learn of a ring of criminals who prey on vulnerable adults. They set up a sting where the perpetrators believe that the police officer is a vulnerable adult. The perpetrators go through all of the acts to exercise undue influence[3], believe that they have excercised undue influence, and the police officer eventually gives them property. In this hypothetical, at the time that the perpetrator receives the property they "are practically certain that the police officer is a vulnerable adult and that they obtained his or her consent due to undo influence.[4] In this situation there is no reason why the perpetrators should not be subject to the same penalty as if they did the exact same things and obtained property from a person who was actually a vulnerable adult. To change the outcome, the Commission could change the definitions contained in RCC § 22A-2001 or have a general provision that states that in sting operations the person has committed the offense if the facts were as they believed it to be.

§ 22A-2003, Limitation on Convictions for Multiple Related Property Offenses.

Section 22A-2003 establishes a procedure whereby the trial court will only enter judgment of conviction on the most serious of certain specified property offenses that arise out of the same act or course of conduct. Should the Court of Appeals reverse the conviction it directs the trial court to resentence the defendant on the next most serious offense. Should the person have been found guilty at trial for multiple offenses that would merge under this standard, there could be successive appeals and resentencings.[5] Such a procedure would lead to increased litigation and

[2] See page 50 of First Draft of Report #10 – Recommendations for Fraud and Stolen Property Offenses.

[3] Undue influence is defined as "mental, emotional, or physical coercion that overcomes the free will or judgment of a vulnerable adult or elderly person and causes the vulnerable adult or elderly person to act in a manner that is inconsistent with his or her financial, emotional, mental, or physical well-being."

[4] See the definition of "knowingly" in § 22A-205, Culpable Mental State Definitions.

[5] The charges that merge under RCC § 22A-2003 (a) are theft, fraud, extortion, stolen property, and other property damage offenses (including any combination of offenses contained in

costs and an increase in the amount of time before a conviction can be finalized. Rather than create such a system, OAG recommends that the RCC instead adopt a procedure which has already been accepted by the Court of Appeals for barring multiple convictions for overlapping offenses.

Section 22A-2003 (c) states, "Where subsections (a) or (b) prohibit judgments of conviction for more than one of two or more offenses based on the same act or course of conduct, the court shall enter a judgment of conviction for the offense, or grade of an offense, with the most severe penalty; provided that, where two or more offenses subject to subsection (a) or (b) have the most severe penalty, the court may impose a judgment of conviction for any one of those offenses." The Commentary, at page 52, states:

> The RCC limitation on multiple convictions statute does not raise double jeopardy issues or create significant administrative inefficiency… jeopardy does not attach to a conviction vacated under subsection (c), and the RCC statute does not bar subsequent entry of a judgment of conviction for an offense that was previously vacated under subsection (c)… A conviction vacated pursuant to subsection (c) of the RCC statute may be re-instated at that time with minimal administrative inefficiency. Sentencing for a reinstated charge may entail some additional court time as compared to concurrent sentencing on multiple overlapping charges at the close of a case. However, any loss to procedural inefficiency appears to be outweighed by the benefits of improving penalty proportionality and reducing unnecessary collateral consequences convictions concerning substantially overlapping offenses. [emphasis added]

Notwithstanding the Commentary's assertion that multiple appeals and resentencings would have minimal administrative inefficiency and take some additional court time, such a procedure would lead to increased court inefficiencies and increased litigation costs and times.[6] For example, a person could be found guilty of three property offenses that would merge under the provisions proposed by the RCC. At sentencing the judge would sentence the person only to the offense with the most severe penalty. The defendant's attorney would then file an appeal based solely on the issues that pertain to that count, write a brief, and argue the appeal. The prosecutors would have to respond in kind. After some amount of time, perhaps years, should the Court of Appeals

Chapters 21, 22, 23, 24, or 25 of the RCC for which the defendant satisfies the requirements for liability). The charges that merge under RCC § 22A-2003 (b) are Trespass and Burglary (and any combination of offenses contained in Chapters 26 and 27 of the RCC for which the defendant satisfies the requirements for liability.)

[6] It should be noted that the increase in litigation expenses would not only be born by the prosecution entities and by some defendants, but by the court who, under the Criminal Justice Act, must pay for court appointed attorneys to brief and argue multiple appeals and appear at multiple sentencings.

agree with the defense position on that one count, the count would be reversed and the case would be sent back to the trial court for resentencing. The process would then repeat itself with an appeal on the count with the next most severe penalty. Should the defense win again, the process would repeat again. It is more efficient to have all the issues in a case briefed and argued once before the Court of Appeals and have the judgment finalized at the earliest time.

In *Garris v. United States*, 491 A.2d 511, 514-515 (D.C. 1985), the D.C. Court of Appeals noted with approval the following practice where two or more counts merge. It suggested that the trial court can permit convictions on both counts, allowing the Court of Appeals to determine if there was an error that affected one count but not the other. *Id.* ("No legitimate interest of the defendant is served by requiring a trial court to guess which of multiple convictions will survive on appeal."). Then, if no error is found, this Court will remand the case to the trial court to vacate one conviction, and double jeopardy will be avoided. If error was found concerning one count but not the other, no double jeopardy problem will arise because only one conviction would stand. *Id.*

On a separate note, Section 22A-2003 (c) ends by saying "where two or more offenses subject to subsection (a) or (b) have the most severe penalty, the court may impose a judgment of conviction for any one of those offenses." The Commentary does not explain, however, what standards the judge should use in choosing which offense should be retained and which offense should be vacated. As the penalty is the same, the defendant has reduced interest in which offense remains and which is vacated. Given the broad authority that the prosecutor has in choosing what, if any, offenses to charge and to negotiate a plea offer that meets the state's objectives, after a sentence has been imposed, it should be the prosecutor that decides which sentences should be retained and which should be vacated.

To accomplish the more efficient procedure proposed in *Garris* and to address how the determination should be made concerning which conviction should stand and which should be vacated, OAG proposes that the following language be substituted for RCC § 22A-2003:

(a) *Theft, Fraud, Extortion, Stolen Property, or Property Damage Offenses.* A person may initially be found guilty of any combination of offenses contained in Chapters 21, 22, 23, 24, or 25 for which he or she satisfies the requirements for liability; however, pursuant to paragraph (c), following an appeal, or if no appeal following the time for filing an appeal, the court shall retain the conviction for the offense, or grade of an offense, with the most severe penalty and vacate any other offense within these chapters which is based on the same act or course of conduct.

(b) *Trespass and Burglary Offenses.* A person may initially be found guilty of any combination of offenses contained in Chapters 26 and 27 for which he or she satisfies the requirements for liability; however, pursuant to paragraph (c), following an appeal, or if no appeal following the time for filing an appeal, the court shall retain the conviction for

the offense, or grade of an offense, with the most severe penalty and vacate any other offense within these chapters which is based on the same act or course of conduct.

(c) *Judgment to be Finalized after Appeal or Appeal Time has Run.* Following a remand from the Court of Appeals, or the time for filing an appeal has run, the court shall, in addition to vacating any convictions as directed by the Court of Appeals, retain the conviction for the offense, or grade of an offense, with the most severe penalty within subsection (a) or (b) and vacate any other offense within these chapters which are based on the same act or course of conduct. Where two or more offenses subject to subsection (a) or (b) have the same most severe penalty, the court shall impose a judgment of conviction for the offense designated by the prosecutor.

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: November 3, 2017

SUBJECT: First Draft of Report #9, Recommendations for Theft and Damage to Property Offenses[1]

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the Commission's First Draft of Report #9, Recommendations for Theft and Damage to Property Offenses. OAG reviewed this document and makes the recommendations noted below.[2]

[1] In OAG's memo on the First Draft of Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions, we argued against the proposal for successive appeals and resentencings proposed in § 22A-2003, Limitation on Convictions for Multiple Related Property Offenses. We proposed a system based upon *Garris v. United States*, 491 A.2d 511, 514-515 (D.C. 1985) were there would be a single appeal and then a remand where the court would retain the sentence for the offense with the most severe penalty and then dismiss specified offenses that arose out of the same act or course of conduct. If that proposal were adopted, conforming amendments would have to be made to the provisions in this Report. For example, RCC § 22A-2103, (e) pertaining to Multiple Convictions for Unauthorized Use of a Rented or Leased Motor Vehicle or Carjacking would have to reflect the new procedure.

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

COMMENTS ON THE DRAFT REPORT

§ 22A-2103, Unauthorized Use of a Motor Vehicle

Section 22A-2103 (a) establishes that a person commits this offense if he or she knowingly operates or rides as a passenger in a motor vehicle without the effective consent of the owner. Paragraph (c) states that only the operator of the motor vehicle is guilty of First Degree Unauthorized Use of a Motor Vehicle. A person who is a passenger in a vehicle he or she knows is being operated without effective consent is only guilty of second degree Unauthorized Use of a Motor Vehicle. This is a change from current law. As the commentary notes:

> … The current UUV statute is limited to a single grade, and it is unclear whether it reaches use as a passenger. However, liability for UUV as a passenger has been upheld in case law. In the revised UUV offense, liability for a passenger is explicitly adopted as a lesser grade of the offense. Codifying UUV case law for a passenger in the RCC does not change District case law establishing that mere presence in the vehicle is insufficient to prove knowledge, such as *In re Davis* and *Stevens v. United States*. Nor does codification of UUV for a passenger change the requirement in existing case law that a passenger is not liable if he or she does not have a reasonable opportunity to exit the vehicle upon gaining knowledge that its operation is unauthorized." [internal footnotes removed]

There are at least two reasons why the current single penalty scheme should be retained. First, a person who can be charged as a passenger in a UUV is necessarily an aider and abettor to its illegal operation and, therefore, faces the same penalty as the operator.[3] In fact, driving passengers in the stolen car is frequently the reason why the operator is using the vehicle in the first place. Second, stolen cars are frequently passed from driver to driver. A person who is a driver one moment may be a passenger the next and the passenger in a UUV may soon become the driver. The penalty for unlawful use of a motor vehicle should not be dependent on the luck of when the stolen car is stopped by the police.

§ 22A-2104. Shoplifting

The shoplifting proposal contains a qualified immunity provision. One of the requirements to qualify for the immunity under § 22A-2104(e)(1) is that "The person detaining or causing the arrest had, at the time thereof, probable cause to believe that the person detained or arrested had committed in that person's presence, an offense described in this section…" [emphasis added]

[3] See Redbook Instruction 3.200 AIDING AND ABETTING which states "To find that a defendant aided and abetted in committing a crime, you must find that the defendant knowingly associated himself/herself with the commission of the crime, that s/he participated in the crime as something s/he wished to bring about, and that s/he intended by his/her actions to make it succeed."

However, stores frequently rely on surveillance and other technology to identify would be shoplifters and so, not all persons who are validly stopped for shoplifting committed the offense "in that person's presence." For example, stores frequently rely on video technology to observe people in the store. A security officer may be in a room on a different floor observing someone hide merchandise or exchange price tags. Without a definition of "committed in the in the person's presence" that includes the use of surveillance technology, store personnel would not have qualified immunity for stopping a person based on watching them commit the offense through a surveillance system.

Another, common anti-theft feature that stores rely on to reduce shoplifting is the use of Radio frequency (RF and RFID) tags. When someone goes through the store's doorway without paying for something, the radio waves from the transmitter (hidden in on one of the door gates) are picked up by something hidden in a label or attached to the merchandise. This generates a tiny electrical current that makes the label or attachment transmit a new radio signal of its own at a very specific frequency. This in turn sets off an alarm. People who set off the alarm are justifiably stopped to see if they have merchandise that was not paid for even though the offense, arguably, did not occur in the store employee's presence (or at least the store employee did not actually notice the merchandise being hidden. If the person, in fact, has such merchandise, and are held for the police, the store personnel should still qualify for immunity. The gravamen for having qualified immunity should not be whether the offense occurred in the store employee's presence, but whether the store employee's stop was reasonable. The Commission should either remove the requirement that the offense occur "in that person's presence" or it should define that term to include situations where the shoplifter is identified because of some technology, wherever the store employee is actually located.

RCC § 22A-2504. Criminal Graffiti

(a) RCC § 22A-2504 (a) states that "A person commits the offense of criminal graffiti if that person:
    (1) knowingly places;
    (2) Any inscription, writing, drawing, marking, or design;
    (3) On property of another;
    (4) That is visible from a public right-of-way;
    (5) Without the effective consent of the owner."

There is no reason why this offense needs to have the element that the graffiti "…is visible from a public right-of-way…" A person who paints a marking on the back of a person's house (that is not visible from a public right-of-way) has caused just as much damage to the house as if he painted something on the front of the house. In addition, to the extent that Criminal Graffiti may

be considered as a plea option for an offense that has a greater penalty, its availability should not be contingent on whether the marking is visible from a public right-of-way. In fact, it is counter-intuitive that if more people can see the marking Criminal Graffiti could be used as a plea down offense, but if fewer people can see it, because of its location, that the defendant would only be exposed to an offense with a greater penalty.

Paragraph (e) provides for parental liability when a minor commits criminal graffiti. It states, "The District of Columbia courts shall find parents or guardians civilly liable for all fines imposed or payments for abatement required if the minor cannot pay within a reasonable period of time established by the court." While OAG appreciates that the Commission would want to include a provision that establishes parental responsibility, we request that paragraph (e) be stricken. We do this for two reasons. First, D.C. Code § 16-2320.01 authorizes the court to enter a judgment of restitution in any case in which the court finds a child has committed a delinquent act and it also provides that the court may order the parent or guardian of a child, a child, or both to make such restitution. The inclusion of RCC § 22A-2504 (e) is, therefore, unnecessary and could cause litigation concerning whether it trumps D.C. Code § 16-2320.01 or merely provides for a separate means to make parents and guardians liable for their children's behavior. In addition, there are no fine provisions contained in the juvenile disposition (sentencing) statute and, so, the court would never be in a position to require parents and guardians to be responsible for its payment. See D.C. Code § 16-2320.

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: November 3, 2017

SUBJECT: First Draft of Report #10, Recommendations for Fraud and Stolen Property 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 Commission's First Draft of Report #10, Recommendations for Fraud and Stolen Property Offenses. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-2201. Fraud.

Section 22A-2201 (a) establishes the offense of Fraud. It states:

Offense. A person commits the offense of fraud if that person:
(1) Knowingly takes, obtains, transfers, or exercises control over;
(2) The property of another;
(3) With the consent of the owner;
(4) The consent being obtained by deception; and
(5) With intent to deprive that person of the property.

[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.

In the Commentary, on page 5, it discusses what is meant by "Knowingly takes, obtains, transfers, or exercises control over…" It states, "For instance, the revised statute would reach conduct that causes the transfer of the victim's property (and otherwise satisfies the elements of the offense), whether or not the transfer is to the defendant or received by the defendant. The breadth of the new language in practice may cover all or nearly all fact patterns covered under the prior "causes another to lose" language." While we agree that the statute should reach this behavior, we suggest slightly modifying the statutory language to ensure that it is clear that it does. Section 22A-2201 (a)(1) actually states, that a person commits the offense when he or she "Knowingly … transfers…" the property. Before a person can transfer something, they must possess it in some way, which is not the case presented in the hypothetical. To ensure that the activity stated there is covered by the statute, it should actually say "causes the transfer." Then it is clear that a person is guilty of fraud "whether or not the transfer is to the defendant or received by the defendant."

RCC § 22A-2205. Identity Theft.

RCC § 22A-2205 criminalizes identity theft. We suggest that two additional situations be added to paragraph (a)(4) to cover situations where a person's identity was used to harm that person and where a person uses another's identifying information to falsely identify himself when being issued a ticket, a notice of infraction, during an arrest, to conceal his commission of a crime, or to avoid detection, apprehension, or prosecution for a crime. RCC § 22A-2205 states:

(a) A person commits the offense of identity theft if that person:
    (1) Knowingly creates, possesses, or uses;
    (2) Personal identifying information belonging to or pertaining to another person;
    (3) Without that other person's effective consent; and
    (4) With intent to use the personal identifying information to:
        (A) Obtain property of another by deception;
        (B) Avoid payment due for any property, fines, or fees by deception; or
        (C) Give, sell, transmit, or transfer the information to a third person to facilitate the use of the identifying information by that third person to obtain property by deception.

All the conditions outlined in RCC § 22A-2205 (a)(4) have to do with using somebody's identity to enrich the person committing identity theft or some third party. Unfortunately, people also use identity theft to embarrass someone or to get even with them for a perceived slight. For example, a person may setup a Facebook account, or other social media, using the identity of a person that they would like to hurt, "friend" their friends,

and then put up false or embarrassing posts and pictures.[2] While some stalking statutes might cover repeated behavior similar to what is presented here, a single use of someone's identity would not come under a stalking statute no matter how traumatizing the use of the victim's identity may be to the victim. The traumatic effects on the person whose identity was impersonated can be just as devastating to him or her as the financial loss that may occur under the statute as written. We, therefore, suggest that a paragraph (D) be added to RCC § 22A-2205 (a)(4) which states, "Harm the person whose identifying information was used."[3]

The other issue with RCC § 22A-2205 is that it narrows the scope of the current law. As noted in the Commentary, on page 39, "the revised statute eliminates reference to use of another person's identifying information to falsely identify himself at an arrest, to facilitate or conceal his commission of a crime, or to avoid detection, apprehension, or prosecution for a crime—conduct included in the current identity theft statute.[4] Most such conduct already is criminalized under other offenses, including the obstructing justice,[5] false or fictitious reports to Metropolitan Police,[6] and false statements.[7] All such conduct is criminalized under other offenses in the RCC, including the revised obstructing justice[8] and revised false statements offenses." Contrary to the assertion made in the quoted text, giving out false identifying information belonging to or pertaining to another person to identify himself at an arrest, to facilitate or conceal his commission of a crime, or to avoid detection, apprehension or prosecution for a crime is not criminalized elsewhere in the Code. OAG takes no position on whether RCC § 22A-

[2] The practice is so common that there are numerous websites that explain what a person can attempt to do to report an account for impersonation. See for example, https://www.facebook.com/help/167722253287296

[3] If the Commission accepts this suggestion, then an amendment would have to be made to paragraph (c), gradations and penalties, to establish what penalty, or penalties, this non-value based offense would have. This would could be handled similarly to how the Commission ranked a motor vehicle as a Second Degree Theft, in RCC § 22A-2101 without it having a stated monetary value.

[4] D.C. Code § 22-3227.02(3). Notably, while the current identity theft statute purports to criminalize use of another's personal identifying information without consent to identify himself at arrest, conceal a crime, etc., current D.C. Code § 22-3227.03(b) only provides a penalty for such conduct in the limited circumstance where it results in a false accusation or arrest of another person. [This footnote and the following three are footnotes to the quoted text.]

[5] D.C. Code § 22-722(6).

[6] D.C. Code § 5-117.05.

[7] D.C. Code § 22-2405. Further, supporting treating this offense as more akin to false statements is the fact that under current law penalty for 22-3227.02(3) versions of identity theft is just 180 days.

[8] RCC § 22A-XXXX.

2205 should be amended to add back the language that is currently in D.C. Code § 22-3227.02(3) or whether there should be a stand-alone offense that covers using personal identifying information belonging to or pertaining to another person, without that person's consent, to identify himself or herself at the time of he or she is given a ticket, a notice of infraction, is arrested; or to facilitate or conceal his or her commission of a crime; or to avoid detection, apprehension, or prosecution for a crime.[9] Note that under both the current law and OAG's suggestion the giving out of a fictitious name would not be an offense. The person has to give out the personal identifying information belonging to or pertaining to another person, without that person's consent. See D.C. Code § 22-3227.02(3).

RCC §22A-2208. Financial Exploitation of a Vulnerable Adult or Elderly Person

RCC §22A-2208 establishes an offense for the financial exploitation of a vulnerable adult or elderly person. The Commentary, on page 52, correctly notes that D.C. Code § 22-933.01. "…provides an affirmative defense if the defendant "knew or reasonably believed the victim was not a vulnerable adult or elderly person at the time of the offense, or could not have known or determined that the victim was a vulnerable adult or elderly person because of the manner in which the offense was committed." Further, the statute states that "[t]his defense shall be established by a preponderance of the evidence." [internal citations omitted]. RCC §22A-2208 would change current law and would instead require the government to prove the mental state of "knowingly" about the element that the victim was a vulnerable adult or elderly person and would remove the self-defense provision. If passed, the government would frequently not be able to meet its burden. How could the government prove the mental state of "knowingly" to the element that the person was 65 years old or that a given individual met the definition of a vulnerable adult[10] when all the defendant would have to do is put on something to show that he or she thought the person was 64 years old or had limitations that impaired the person's ability but that those limitations were not "substantial"? (Note that "substantial" is not a defined term.)

The current statute correctly establishes the burdens. It requires that government prove that the victim was, in fact, a vulnerable adult or elderly person and it provides an

[9] OAG's suggested language slightly expands the current law. While under current law it is illegal for a person to give someone else's name out at time of arrest, under OAG's proposal it would also prohibit the giving of such false information when the person is given a ticket or a notice of infraction. These two additional situations may also trigger state action against an innocent person and should likewise be made criminal.

[10] RCC § 22A-2001 (25) states that a vulnerable adult "means a person who is 18 years of age or older and has one or more physical or mental limitations that substantially impair the person's ability to independently provide for his or her daily needs or safeguard his or her person, property, or legal interests."

affirmative defensive, established by a preponderance of the evidence, that would allow the person to prove that he reasonably believed the victim was not a vulnerable adult of elderly person. All of the evidence concerning the person's belief are peculiarly within that persons' possession.

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: November 3, 2017

SUBJECT: First Draft of Report #11, Recommendations for Extortion, Trespass, and Burglary 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 #11, Recommendations for Extortion, Trespass, and Burglary Offenses. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT[2]

RCC § 22A-2603. Criminal Obstruction of a Public Way[3]

The offense of Criminal Obstruction of a Public Way would replace D.C. Code § 22-1307(a), crowding, obstructing, or incommoding. It omits clarifying language that was added in the

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.
[2] The Extortion statute, RCC § 22A-2301, is limited to obtaining property by coercion. We assume that the Commission is planning to draft a separate provision that criminalizes forcing a person to commit an act or refrain from committing an act by coercion, so we did not recommend changes to that proposal.
[3] To the extent that the comments and recommendations to this provision apply to RCC § 22A-2605, Unlawful Obstruction of a Bridge to the Commonwealth of Virginia, they should be considered as comments and recommendations to that provision.

Disorderly Conduct Amendment Act of 2010 (the Act). Although prior to 2010, D.C. Code § 22-1307(a) did not state a minimum number of people who had to obstruct the public way, the Court of Appeals read the common law requirement that three or more persons must act in concert for an unlawful purpose before anyone could be convicted of this offense.[4] To address this Court interpretation and to make it clear that a single person or two could arrange their bodies in such a way that they could obstruct a public way, the Act added that it was unlawful for a person to act alone or in concert with others. We, therefore, recommend that this language be added back into the lead in language contained in paragraph (a).

In addition, the current law makes it unlawful for a person to "crowd, obstruct, or incommode" the public way.[5] The proposal would limit the reach of the law to people who "render impassable without unreasonable hazard."[6] Under this formulation, it arguably would not be a crime for two people to lie down and block two lanes of a highway if police were on the scene directing traffic around them to avoid them being run over. Because of the police presence, despite the affect on traffic the two people may not be considered causing an unreasonable hazard. This despite the ensuing traffic jam and inconvenience to drivers, commuters, and pedestrians. To address this situation, and others, RCC § 22A-2603 (a) should be redrafted to state "obstruct or inconvenience. [proposed addition underlined].[7]

Finally, D.C. Code § 22-1307(a) makes it illegal to obstruct "The passage through or within any park or reservation."[8] The Commentary does not explain why RCC § 22A-2603 omits these areas. Absent a strong reason why it should be permissible to obstruct one of these areas, we suggest that they be retained in the law. To accomplish this, RCC § 22A-2603(a)(2) should be redrafted to say, "A park, reservation, public street, public sidewalk, or other public way."

[4] For example, see *Odum v. District of Columbia*, 565 A.2d 302 (D.C. 1989).

[5] D.C. Code § 22-1307 **(a)** states:

It is unlawful for a person, alone or in concert with others:

(1) To crowd, obstruct, or incommode:

(A) The use of any street, avenue, alley, road, highway, or sidewalk;
(B) The entrance of any public or private building or enclosure;
(C) The use of or passage through any public building or public conveyance; or
(D) The passage through or within any park or reservation; and

(2) To continue or resume the crowding, obstructing, or incommoding after being instructed by a law enforcement officer to cease the crowding, obstructing, or incommoding.

[6] See the definition of "obstruct" in RCC § 22A-2603 (b).

[7] The current law makes it a crime to inconvenience people and so adding this language would not expand the scope of the current law. To express this concept, D.C. Code § 22-1307(a) uses the word "incommode" which means "to inconvenience."

[8] See D.C. Code § 22-1307(a)(1)(D).

RCC § 22A-2604. Unlawful Demonstration

Paragraph (b) defines demonstration as including "any assembly, rally, parade, march, picket line, or other similar gathering by one or more persons conducted for the purpose of expressing a political, social, or religious view." D.C. § 22-1307(b)(2) describes a demonstration as "marching, congregating, standing, sitting, lying down, parading, demonstrating, or patrolling by one or more persons, with or without signs, for the purpose of persuading one or more individuals, or the public, or to protest some action, attitude, or belief." We believe that the current definition of a demonstration better describes the behavior that this provision is trying to reach. As the Commentary states that there is no intention to change the scope of the law on this point, we believe that RCC § 22A-2604 should be redrafted to include the current definition.

RCC § 22A-2701. Burglary

We have two suggested amendments to RCC § 22A-2701.[9] First, we agree with the basic formulation that "A person is guilty of first degree burglary if that person commits burglary, knowing the location is a dwelling and, in fact, a person who is not a participant in the crime is present in the dwelling…" However, the law should be clear that should the person enter the dwelling simultaneously with the victim or proceeds the victim by a couple of steps that those occurrences should also constitute first degree burglary. For example, it should not matter whether a person with gun forces someone to walk just a head of them into a dwelling to rape them or whether the person walks backwards with the gun on the victim into a dwelling intending on raping them; either way the statute should be clear that the person is guilty of burglary. The same should amendment should be made to second degree burglary.

Second, we suggest that the gradations and penalty section makes it clear that where a watercraft is used as a dwelling (e.g. houseboat), a person who commits the offense in paragraph (a) when a person is in the watercraft/dwelling is guilty of First Degree Burglary.

RCC § 22A-2702. Possession of Burglary and Theft Tools

Paragraph (a) states:

(a) Offense. A person commits the offense of possession of burglary and theft tools if that person:

(1) Knowingly possesses;

(2) A tool, or tools, created or specifically adapted for picking locks, cutting chains, bypassing an electronic security system, or bypassing a locked door;

(3) With intent to use the tool or tools to commit a crime.

As people are just as likely to commit a burglary by going through a window as a locked door, we suggest that RCC § 22A-2702(a)(2) be expanded to include tools created or specifically adapted for cutting glass.

[9] See RCC § 22A-2701(c)(1).

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Laura E. Hankins, General Counsel
Date:	November 3, 2017
Re:	Comments on First Drafts of Reports 8 through 11, Property Offenses

The Public Defender Service makes the following comments.

Report #8: Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions

1. Coercion.[1]

PDS makes two recommendations regarding the commentary explaining the meaning of "coercion." First, PDS recommends the modifying the explanation of sub-definition (H) of the definition at page 10 to read as follows:

> Subsection (H) covers threats to inflict wrongful economic injury on another person. It is intended to include not only causing wrongful financial losses but also situations such as threatening labor strikes or consumer boycotts when ~~. While labor activities are not inherently problematic, when~~ threats of labor or consumer activity are issued to order to personally enrich a person, and not to benefit the workers as a whole~~, such threats may constitute a criminal offense~~.

As currently written, the second sentence implies that simply threatening a labor strike or a consumer boycott may be "coercion." The rest of the paragraph, however, seems to say that such threat is only coercion if it is done for the personal enrichment of a person, rather than for the benefit of a group. The paragraph should be modified such that it is clear that a mere threat of a labor strike, without more, does not meet the definition of "coercion."

Second, PDS recommends rewriting the explanation for (J), the residual sub-definition of coercion. The residual sub-definition states that "'coercion' means causing another person to fear

[1] RCC § 22A-2001(5).

that, unless that person engages in particular conduct then another person will … perform any other act that is calculated to cause *material harm* to another person's health, safety, business, career, reputation, or personal relationships."[2] Currently, the explanation, at page 10 of Report #8, states that the conduct of threatening to lower a student's grade would fall within the provision, implying that any threat to lower any grade would necessarily constitute "material harm." PDS strongly disagrees. PDS agrees with the suggestion made during the November 1, 2017 public meeting of the Advisory Group to explain this residual sub-definition with an example that is clearly a threat of material harm, falling within the sub-definition, and an example that equally clearly is a threat of de minimis harm, falling outside the sub-definition.

2. Deceive and deception.[3]

The definition of "deceive" has unequal sub-definitions. Sub-definitions (A), (B), and (C) each have a "materiality" requirement as well as additional negative conduct. Sub-definitions (A) and (C) require a "false impression" and sub-definition (B) requires a person act to prevent another. Sub-definition (D), in contrast, makes it "deception" merely to fail to disclose a known lien, adverse claim, or other legal impediment to the enjoyment of property. Thus, it would be "deception" for a person to disclose an adverse claim to someone whom the person knows already has knowledge of the adverse claim. As was discussed at the November 2, 2017 public meeting of the Advisory Group, this sub-definition is most likely to be used when "deceive" is used in Fraud, RCC § 22A-2201, and perhaps also when used in Forgery, RCC § 22A-2205. PDS requests that the explanations for those offenses in Report #9 and the explanation of this sub-definition in Report #8, state that the deception must be causally connected to the consent. Thus to be convicted of Fraud, the person must not merely have obtained the owner's consent and failed to disclose a known lien or adverse claim, the person must have, knowingly, obtained the owner's consent *because* the person failed to disclose a known lien or adverse claim, etc.

3. Dwelling. [4]

PDS strongly recommends rewriting the definition of "dwelling" to read:

> "Dwelling" means a structure, or part of a structure, that is ~~either designed for lodging or residing overnight, or that is~~ used for lodging or residing ~~overnight~~. In multi-unit buildings, such as apartments or hotels, each residential or lodging unit is an individual dwelling.

The most significant problem with the Report #8 proposed definition is that by including structures that are "designed" for residing or lodging it is vague and if strictly applied, too broad. Across the original City of Washington, particularly in the Capitol Hill and Foggy Bottom neighborhoods, and in Georgetown, there are numerous structures that were "designed" as residences or lodgings, and were even used that way for years, that have since been converted solely for office or business use. The rooms inside some of these structures may not have even

[2] Report #8 at page 3 (emphasis added).

[3] RCC § 22A-2001(8).

[4] RCC §22A-2001(10).

changed. The kitchen and bathrooms may remain the same but the living and bedroom areas are now full of desks, bookshelves and computers.[5] To avoid the possibility that a converted house will be defined as a "dwelling" because of its original "design" and to avoid the courts defining which "design" is dispositive, the original or the redesigned interior, the definition of "dwelling" should be rewritten so that the actual use of the structure is dispositive.

Rewriting the definition to exclude "design" solves another problem. PDS does not disagree with categorizing as a "dwelling" "a car if a person is using the car as the person's primary residence." PDS does disagree, however, with categorizing as a "dwelling" a camper that is "designed" for residing or lodging but that is parked in front of a person's primary residence and used more often as a family vehicle than for camping.[6] It would be disproportionate, a result the reformed code should avoid, to treat a camper differently from a car merely because of "design."

The reason "dwelling" is distinguished from other structures in the RCC should inform the definition. The term is used in RCC arson, reckless burning, trespass, and burglary. In each, the term is used in a gradation with a higher punishment. PDS posits that this distinction is justified because "dwellings" are places where people expect privacy, where people can lock the door and feel it is safe to rest and safe to keep their possessions, where they can control who enters and who must leave. The Report #8 defines "dwelling" as a place "used for residing and lodging overnight". "Residing" and "lodging" are easy to understand terms; neither needs further modification.[7] The use of the word "overnight" is confusing. Is it to convey that even a single night could make a structure a "dwelling?" Is it meant to imply that sleep, which most people do at night, is a strong factor to consider when determining if a structure is for residing or lodging? Is it meant to exclude structures where sleeping might take place during the daytime? If someone consistently works a night shift and always sleeps in his rented room during the day, is that room not a "lodging" and therefore not a "dwelling"?

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[5] Importantly, the proposed "dwelling" definition does not allow for the reverse problem. There are also many buildings in D.C. that were originally designed for commercial or public use, such as warehouses or schools, that have since been converted to "loft" residences or condominiums, though the façade and even some internal design elements of the original building have not been changed. See for example, The Hecht Co. Warehouse, http://www.hechtwarehouse.com/. Because the Report #8 definition includes structures "used" as residences or for lodging, that the structures were "designed" for commercial use is not disqualifying. (Shockingly, see also the Liberty Crest Apartments, located on the grounds of Lorton Reformatory and their tasteless and insensitive retention of some original design elements. https://libertycrestapartments.com/).

[6] From this writer's childhood, see, the VW camper, https://en.wikipedia.org/wiki/Volkswagen_Westfalia_Camper, which the writer regularly drove in high school and college. See also, the RoadTrek, which was also parked regularly in front of a primary residence and was a family car far more often than a camping "residence." http://www.roadtrek.com/

[7] "Reside" means to settle oneself or a think in a place; to dwell permanently or continuously: have a settled abode for a time; "lodging" means a place to live, a place in which to settle or come to rest, a sleeping accommodation, a temporary place to stay. See Webster's Third New International Dictionary.

While sleeping in a place is a strong indication that the place is a "dwelling," it should not be dispositive. PDS objects to the term "dwelling" including, as Report #8 says it would, "a room in a hospital where surgeons or resident doctors might sleep between lengthy shifts." Other than the fact that people sleep there, there is nothing else about such a room that makes it a "dwelling." The people intended to sleep there do not control who else has access to the room; presumably, anyone hired by the hospital into certain positions and given certain security badges can enter the room. Such a room would not be distinguishable from a daycare center, where the infants and toddlers might sleep during their long "shifts," or from the pre-kindergarten rooms in the elementary school where those children might be expected to sleep during naptime every day. A person who enters the daycare room or the pre-k classroom with the intent to steal a computer therein has burgled a building, not a dwelling.

Finally, the definition and the explanation should make clear that in a multi-unit building, each residential or lodging unit is a separate dwelling but that also necessarily means that areas of the building that are not used for residing or lodging are not dwellings. The vestibule of the apartment building, the lounge in the college dorm, and the "party room" and the fitness room in the condominium building are not "dwellings."

4. Financial Injury. [8]

The "legal fees" sub-definition of "financial injury" is a significant and unwarranted expansion of the current law. [9] The Report #8 proposed definition's separate listing of "legal fees" is supposed to be "clarificatory" and "not intended to substantively change current District law." (See page 28.) However, the definition to which it "generally corresponds,"[10] D.C. Code § 22-3227.01, links "attorney fees" to the cost of clearing a person's credit rating, to expenses related to a civil or administrative proceeding to satisfy a debt or contest a lien, etc. Unmooring "legal fees" from those categories of losses, expands what fees could be considered part of "financial injury." For example, if the allegedly financially injured person is a witness at the criminal trial but hires an attorney because of a 5th Amendment issue that could arise tangentially, adding in the cost of that attorney could be considered "legal fees" under the Report #8 definition but definitely would not be considered "attorney fees" pursuant to D.C. Code § 22-3227.01. PDS recommends rewriting the definition to read as follows:

> "Financial injury" means all monetary costs, debts ….including, but not limited to:
>
> (A) The costs of clearing the person's credit rating, …;
>
> (B) The expenses…;
>
> (C) The costs of repairing…;
>
> (D) Lost time or wages …; and

[8] RCC §22A-2001(14).

[9] No doubt as a result of auto-formatting, the "legal fees" sub-definition of financial injury" is labeled as (J). All of the sub-definitions are mislabeled as (F) through (J). Correct formatting would label them (A) through (E), with (E) being "legal fees."

[10] Report #8 at page 28.

(E) Legal fees incurred for representation or assistance related to (A) through (D).

5. Motor vehicle. [11]

The term "motor vehicle" should more clearly exclude modes of transportation that can be propelled by human effort. A "moped" can be propelled by a small engine but it can also be pedaled, meaning it can operate simply as a bicycle. It should not qualify as a "motor vehicle." Also, the definition should be clear that it is a "truck tractor" that is a "motor vehicle;" a semitrailer or trailer, if detached from the truck tractor, is not a motor vehicle. The definition should be rewritten as follows:

> "Motor vehicle" means any automobile, all-terrain vehicle, self-propelled mobile home, motorcycle, ~~moped,~~ scooter, truck, ~~truck tractor,~~ truck tractor with or without a semitrailer or trailer, bus, or other vehicle solely propelled by an internal combustion engine or electricity or both, including any such ~~non-operational~~ vehicle temporarily non-operational that is being restored or repaired.

6. Services. [12]

The definition of "services" should be rewritten as follows to except fare evasion:

> "Services" includes, but is not limited to:
> (A) Labor, whether professional or nonprofessional
> (B) …
> (C) ~~Transportation, telecommunications,~~ Telecommunications, energy, water, sanitation, or other public utility services, whether provided by a private or governmental entity;
> (D) Transportation, except transportation in vehicles owned and/or operated by the Washington Metropolitan Area Transit Authority or other governmental entity;
> (E) The supplying of food ….

As "services" is defined in Report #8, fare evasion could be prosecuted as theft or, potentially as fraud, both of which would be prosecuted by the U.S. Attorney's Office. There is a separate fare evasion offense in the D.C. Code, at D.C. Code §35-216. It is prosecuted by the Office of the Attorney General for D.C.[13] and because it is, it may be resolved through the post-and-forfeit

[11] RCC § 22A-2001(15).

[12] RCC § 22A-2001(22).

[13] D.C. Code § 35-253.

process.[14] Offenses prosecuted by the USAO, including theft and fraud, are categorically not eligible for resolution through post-and-forfeit.

The PDS recommendation to modify the definition of "services" would still provide for a "U.S. offense," theft, or even possibly fraud, but would make exclusively a D.C. offense that of fare evasion on a WMATA vehicle or other public transportation.

If fare evasion is criminalized as theft, it would exacerbate the consequences of the enforcement of what is really a crime of poverty. It will subject more people to the arrest, detention, criminal record and other consequences of contact with the criminal justice system as a result of failing to pay a fare that ranges from $2 to $6.

PDS supports Bill 22-0408, currently pending before the D.C. Council, to decriminalize fare evasion (D.C. Code §35-216). Even if that effort is unsuccessful, however, the Revised Criminal Code should exclude the conduct of fare evasion on WMATA or public transportation, allowing for exclusive local enforcement.

7. Limitation on Convictions for Multiple Related Property Offenses.

PDS strongly supports proposed RCC § 22A-2003, Limitation on Convictions for Multiple Related Property Offenses. The proposal represents a more thoughtful, comprehensive approach with predictable results than having to resort to the "Blockburger test" or the scattershot inclusion of offenses at D.C. Code § 22-3203. However, the grouping of theft, fraud and stolen property offenses pursuant to subsection (a) as completely separate from the grouping of trespass and burglary offenses pursuant to subsection (b) leaves one notable gap. Though likely not strictly a lesser included offense, a person necessarily commits the offense of trespass of a motor vehicle[15] every time he or she commits the offense of unauthorized use of a vehicle.[16] A person cannot knowingly operate or ride in as a passenger a motor vehicle without the effective consent of the owner without having first knowingly entered and remained in a motor vehicle without the effective consent of the owner. It may also be the case that a person necessarily commits the offense of trespass of a motor vehicle when he or she commits the offense of unauthorized use of property and the property is a motor vehicle.[17] However, because UUV and UUP are in Chapter 21 and TMV is in Chapter 26, RCC § 22A-2003 provides no limitation on convictions for these

[14] D.C. Code § 5-335.01(c). "The post-and-forfeit procedure may be offered by a releasing official to arrestees who: (1) meet the eligibility criteria established by the OAG; and (2) are charged with a misdemeanor that the OAG, in consultation with the MPD, has determined is eligible to be resolved by the post-and-forfeit procedure." Fare evasion may not have been determined eligible for resolution by the post-and-forfeit procedure and an individual arrested for it may not meet other eligibility criteria; however, because it is an OAG misdemeanor, it is an offense that the OAG could determine, in consultation with MPD, to be eligible for post-and-forfeit resolution. In contrast, no offense prosecuted by the USAO is eligible.

[15] RCC §22A-2602.

[16] RCC § 22A-2103.

[17] RCC § 22A-2102.

multiple *related* property offenses. PDS recommends amending RCC § 22A-2003 to address this problem.

Report #9: Recommendations for Theft and Damage to Property Offenses

1. Theft.[18]

PDS recommends changes to the gradations of theft[19] to make penalties for theft of labor more fair and proportionate. "Labor" as a type of property should be valued as time and not as a monetary fair market value. As currently structured, "property" is defined to include "services," which is defined to include "labor, whether professional or nonprofessional." Theft of property, therefore, includes "theft of labor." "Value" means the fair market value *of the property* at the time and place of the offense.[20] The gradations for theft are keyed to different levels of "value." For example, it is third degree theft if the person commits theft and "the property, in fact, has a value of $250 or more." Presumably, if the "property" obtained without consent of the owner were the owner's labor, the fair market value of that labor would be calculated based on the wages or salary of the owner. This would mean that stealing, to use the colloquial term, 8 hours of labor from a professional who charges $325 per hour would result in a conviction of 2nd degree theft. Second degree theft requires the property have at least a value of $2,500 (or that property be, in fact, a motor vehicle). $325 x 8 = $2,600. In contrast, stealing 8 hours of labor from a worker in the District making minimum wage would result in a charge of 4th degree theft. Fourth degree theft requires the property have any value. As of July 1, 2017, the minimum wage in the District was $ 12.50 per hour.[21] $12.50 x 8 = $100. The Fair Shot Minimum Wage Amendment Act will increase the minimum wage every year until July 1, 2020 when the wage will be set at $15 per hour. A full day's work at that top minimum wage rate still will not pass the third-degree theft threshold of $250. $15 x 8 = $120. Stealing a full days' work at the top minimum wage rate is <u>two</u> gradations lower than stealing even the rustiest of clunkers. The professional robbed of 8 hours of labor is not 26 times more victimized than the minimum wage worker robbed of 8 hours of labor. (325 ÷ 12.50 = 26.) And the person convicted of stealing 8 hours from the professional should not be punished as if his crime was categorically worse than had he or she stolen from a low-wage worker. PDS proposes that when the property is labor, the gradation should be keyed to time, specifically to hours of labor, rather than to monetary value. Thus, PDS proposes rewriting the gradations for theft as follows:

Aggravated theft -
(1) the property, in fact, has a value of $250,000 or more; <u>or</u>
<u>(2) the property, in fact, is labor, and the amount of labor is 2080 hours[22] or more.</u>

[18] RCC § 22A-2101.

[19] RCC § 22A-2101(c).

[20] RCC § 22A-2001(24)(A).

[21] See D.C. Law 21-044, the Fair Shot Minimum Wage Amendment Act of 2016.

[22] 2080 hours is fifty-two 40-hour weeks, or one year of work.

1st degree -
(1) the property, in fact, has a value of $25,000 or more; or
(2) the property, in fact, is a motor vehicle and the value of the motor vehicle is $25,000 or more; or
(3) the property, in fact, is labor, and the amount of labor is 160 hours[23] or more

2nd degree -
(1) the property, in fact, has a value of $2,500 or more; or
(2) the property, in fact, is a motor vehicle; or
(3) the property, in fact, is labor, and the amount of labor is 40 hours[24] or more

3rd degree -
(1) the property, in fact, has a value of $250 or more; or
(2) the property, in fact, is labor and the amount of labor is 8 hours[25] or more.

4th degree -
(1) the property, in fact, has any value; or
(2) the property, in fact, is labor and is any amount of time.

PDS recommends this same penalty structure be used for fraud, RCC § 22A-2201(c), and extortion, RCC §22A-2301(c).

2. Unauthorized Use of a Motor Vehicle. [26]

PDS recommends amending unauthorized use of a motor vehicle to eliminate riding as a passenger in a motor vehicle from criminal liability. Being in a passenger in a car, even without the effective consent of the owner, should not be a crime. Where the passenger is aiding and abetting the driver, the passenger can be held liable. Where the passenger and the driver switch roles, and the government can prove that the passenger has also been a driver, liability would lie. But merely riding in a car should not result in criminal liability. Decriminalizing the passenger also eliminates the problem of having to determine when the passenger knew he or she lacked effective consent of the owner and whether, after that time, the passenger had an opportunity to leave the vehicle but failed to do so. If riding as a passenger were decriminalized, there would only be a single penalty grade for the offense.

[23] 160 hours is four 40-hour weeks, or one month of work.

[24] 40 hours is five 8-hour days, or one workweek.

[25] 8 hours is one workday.

[26] RCC § 22A-2103.

3. Shoplifting.[27]

PDS recommends two amendments to the offense of shoplifting. First, element (2) should be amended to read: "personal property that is or was displayed, held, stored, or offered for sale." This change would take care of the problem of property that is still in "reasonably close proximity to the customer area"[28] but that is not presently for sale. For example, a person shoplifts[29] a seasonal item, such as a snow shovel or beach ball, that has just been moved to the back store room. Two, the qualified immunity provision at subsection (e) should be amended to replace the phrase "within a reasonable time" where it appears[30] with the phrase "as soon as practicable." Qualified immunity should only be allowed for a person who as promptly as possible notifies law enforcement, releases the individual or surrenders him or her to law enforcement. The District should not shield from liability a shop owner or agent who engages in a form of vigilante justice by locking a person in a room and taking their time to contact law enforcement.

4. Arson. [31]

PDS strongly objects to the revision of arson as proposed in Report #9. First, PDS objects to the significant lowering of the mental state for arson. While the D.C. Code may be silent as to the required mental state for a number of criminal offenses, the Code is explicit that malice is the culpable mental state for arson.[32] The D.C. Court of Appeals has held that the definition of "malice" is the same for arson and malicious destruction of property, which is the same as the malice required for murder.[33] The Court has defined malice as "(1) the absence of all elements of justification, excuse or recognized mitigation, and (2) the presence of either (a) an actual intent to cause the particular harm which is produced or harm of the same general nature, or (b) the wanton and willful doing of an act with awareness of a plain and strong likelihood that such harm may result."[34] The Court has noted that the "actual intent to cause the particular harm" corresponds to the "purposely" state of mind in the Model Penal Code and the "wanton and willful" act with "awareness of a plain and strong likelihood that such harm may result" "blends

[27] RCC § 22A-2104.

[28] Report #9 at page 36.

[29] Knowingly takes possession of the personal property of another that is *or was* offered for sale with intent to take or make use of it without complete payment.

[30] The phrase "within a reasonable time" appears once in RCC § 22A-2104(e)(3) and twice in RCC § 22A-2104(e)(4). RCC § 22A-2104(e)(4) should be rewritten: "The person detained or arrested was released ~~within a reasonable time of~~ as soon as practicable after detention or arrest, or was surrendered to law enforcement authorities ~~within a reasonable time~~ as soon as practicable.

[31] RCC § 22A-2501.

[32] D.C. Code § 22-301; "Whoever shall maliciously burn or attempt to burn any dwelling…" (emphasis added).

[33] *See Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987); *Thomas v. United States*, 557 A.2d 1296, 1299 (D.C. 1989)

[34] *Harris v. United States*, 125 A.3d 704, 708 (D.C. 2015).

the Model Penal Code's 'knowingly' and 'recklessly' states of mind."[35] The Revised Criminal Code proposes to use the mental state of "knowing" and eliminates mitigation. The effect is a significant and unjustifiable lowering of the mental state, which then greatly expands the conduct the revised offense criminalizes. PDS proposes that the mental state of "purpose" be applied to the RCC offense of arson.[36]

Second, the revised arson offense should not extend to a "business yard." A "business yard" is *land*, which is securely fenced or walled and where goods are stored or merchandise is traded.[37] It is "mainly *areas* that are surrounded by some sort of barrier, such as a fence, where goods are kept for sale."[38] While it is possible to damage land as a result of starting a fire or an explosion, it does not make sense to criminalize causing damage to land that happens to be securely fenced. If the point is to punish conduct that damages the fence or the wall, that is criminalized by criminal damage to property.[39] Similarly if the point is to punish conduct that damages the goods stored within the business yard, that too can be prosecution as a violation of the criminal damage to property offense. But there is no reason to distinguish between starting a fire that damages goods stored in a business yard and goods that happen to be within a fenced area but not for sale, or goods for sale but stored momentarily in an open parking lot. If, however, a fire set in a business yard damages the adjacent business *building*, then that is arson.

Third, the term "watercraft" is too broad. It would include canoes and rubber rafts, particularly a raft fitted for oars. Starting a fire that damages a rubber raft is not of the same seriousness as fire that damages a dwelling or building. PDS is not suggesting that damaging a canoe or a raft should not be a crime, only that it not be deemed "arson." Damaging a canoe or raft should be prosecuted as "criminal damage to property." The definition of "watercraft" should be similar to that of "motor vehicle"; it should be restricted to vessels that are not human-propelled. PDS recommends the following definition be added to RCC §22A-2001.

> "Watercraft" means a vessel for travel by water that has a permanent mast or a permanently attached engine.

Fourth, arson should require that the dwelling, building, (narrowly-defined) watercraft, or motor vehicle be *of another*. That is the current law of arson and it should remain so. Damaging one's own dwelling, building, etc. should be proscribed by the reckless burning offense.[40] Setting fire to one's own dwelling knowing that it will damage or destroy another's dwelling would be arson.

Fifth, the gradation of second degree arson should read: "A person is guilty of second degree arson if that person commits arson and the amount of damage is $2,500 or more." What is

[35] *Harris*, 125 A.3d at 708 n.3.

[36] PDS would also accept a mental state of knowing plus the absence of all elements of justification, excused or recognized mitigation.

[37] RCC § 22A-2001(3).

[38] Report #8 at page 8 (emphasis added).

[39] RCC § 22A-2503.

[40] RCC § 22A-2502.

proposed as revised second degree arson, that the person merely commits arson," should be third degree arson and it should have a misdemeanor classification. Thus, there will be four gradations of arson in total.

5. Reckless Burning. [41]

PDS recommends amending the revised reckless burning offense. First, for the reasons explained above with respect to arson, "building yard" should be removed from the offense and "watercraft" should be defined. Second, there should be gradations created as follows:

(c) *Gradations and Penalties*.
(1) *First Degree Reckless Burning*.
(A) A person is guilty of first degree reckless burning if that person commits reckless burning and the dwelling, building, watercraft, or motor vehicle, in fact, is of another.
(B) First degree reckless burning is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) *Second Degree Reckless Burning*.
(A) A person is guilty of second degree reckless burning if that person commits reckless burning.
(B) Second degree reckless burning is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

Starting a fire to one's own building *purposely* to damage another's building would be arson. Starting a fire to one's own building *reckless* as to the fact that the fire damages another's building would be first degree reckless burning. Starting a fire that damages only one's own building would be second degree reckless burning.

6. Criminal Damage to Property. [42]

PDS strongly objects to the revision that eliminates the offense of malicious destruction of property and replaces it with the much broader offense of criminal damage to property. Like revised arson, the offense of criminal damage to property significantly and unjustifiably lowers the mental state that currently explicitly applies to the offense, thereby greatly expanding the conduct criminalized by the offense. As it does for revised arson and for the same reasons, PDS strongly recommends that the mental state for criminal damage to property be "purposely."[43]

PDS also recommends adding mental states to two of the gradations. As currently written, it is second degree criminal damage to property to knowingly damage or destroy property that, <u>in fact</u>, is a cemetery, grave, or other place for the internment of human remains,[44] or that, <u>in fact</u>, is

[41] RCC § 22A-2502.

[42] RCC § 22A-2503.

[43] PDS would also accept a knowing mental state <u>plus</u> the absence of all elements of justification, excused or recognized mitigation.

[44] RCC § 22A-2503(c)(3)(ii) (emphasis added).

a place of worship or a public monument.[45] Rather than strict liability, PDS recommends that these elements require that the person be reckless as to the fact the property is a grave, etc. or a place of worship. An object weathered and worn down over time may not appear to be grave marker. A building with a façade of a residence or a business may be used as a place of worship but because of the façade, will not appear to be a place of worship.

7. Criminal Graffiti. [46]

With respect to revised criminal graffiti, PDS recommends eliminating the mandatory restitution and parental liability provisions. Without speculating as to the reasons why, indigent people are charged with crimes in D.C. Superior Court in numbers that are grossly higher than their numbers in the District of Columbia. Requiring restitution from individuals and families that cannot afford to pay it is a waste of judicial resources. A mandatory restitution order cannot be enforced through contempt because the person is unable, not unwilling, to pay. Most such orders, therefore, will simply be unenforceable. Restitution when the person can afford it is fair and the law should provide courts the discretion to impose such an order.

Report #10: Recommendations for Fraud and Stolen Property Offenses

1. Check Fraud.[47]

PDS recommends amending the offense for clarity.

> A person commits the offense of check fraud if that person:
> (1) Knowingly obtains or pays for property;
> (2) By using a check;
> (3) Knowing at the time of its use that the check ~~which~~ will not be honored in full upon its presentation to the bank or depository institution drawn upon.

If the revised offense does not require an "intent to defraud," then it is important that it be clear that the "knowing" that the check will not be honored occur at the time the check is used. It must be clear that gaining knowledge after using the check that the check will not be honored is not check fraud.

PDS objects to the permissive inference stemming from a failure to promptly repay the bank.[48] While true that a *permissive* inference means a jury is not required to apply it, such inferences still unfairly and inappropriately point the jury towards conviction. A law that serves to highlight

[45] RCC § 22A-2503(c)(3)(iii) (emphasis added).

[46] RCC § 22A-2504.

[47] RCC § 22A-2203.

[48] This permissive inference currently exists in the Redbook Jury Instructions at §5-211, though not in D.C. Code § 22-1510 which criminalizes uttering.

certain facts and suggests how those facts should be interpreted, allows the ignoring of other facts or context. Permissive inferences operate as an explicit invitation to make one specific factual inference and not others; though nominally permissive, such inferences signal that this is *the* inference jurors should draw. The permissive inference in revised check fraud, like others of its kind, "eases the prosecution's burden of persuasion on some issue integrally related to the defendant's culpability" and "undercut[s] the integrity of the jury's verdict."[49] "By authorizing juries to "find" facts despite uncertainty, such inferences encourage arbitrariness, and thereby subvert the jury's role as a finder of fact demanding the most stringent level of proof."[50]

The permissive inference in check fraud is additionally problematic *because* the revised check fraud offense has eliminated the explicit element that the person have an "intent to defraud.". For revised check fraud, the person must knowingly obtain or pay for property by using a check, knowing at the time the person uses the check that it will not be honored in full upon its presentation to the bank. The problem with this permissive inference is that it suggests that it is check fraud to fail to make good on the check within 10 days of receiving notice that the check was not paid by the bank. The permissive inference is supposed to mean that failing to make good on the check within 10 days of notice tells jurors something about what the person was thinking at the time the person presented the check. What the permissive inference does, however, is expand the time frame by suggesting that notice (or knowledge) that the check will not be honored, has not thus far been honored, constitutes check fraud if the bank is not made whole.

2. Unlawful Labeling of a Recording.[51]

   For the reasons explained above about the unfairness of highlighting certain facts and then sanctioning by law a particular interpretation of those facts, PDS objects to the permissive inference in the revised unlawful labeling of a record offense.

3. Alteration of Motor Vehicle Identification Number.[52]

   PDS recommends amending the gradations to clarify that whether it is the value of the motor vehicle or the value of the motor vehicle part that determines the gradation depends on whether the alteration of the identification number was intended to conceal the motor vehicle or the part. If the intention was to conceal the part, then the gradation will not be decided based on the value of the motor vehicle, but rather based on the value of the part.

   PDS also has concerns that the revised alteration of motor vehicle identification number offense sets too low the value used to distinguish the first degree from second degree gradation. If set at $1,000 as currently proposed almost all alteration of VINs would be charged as a first degree offense and second degree altering a vehicle identification number would only be available after

[49] Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 Harv. L. Rev. 1187, 1216 (1979).

[50] *Id*.

[51] RCC §22A-2207.

[52] RCC §22A-2403.

a plea. If the purpose of separating the offense into degrees is to distinguish between offenses with different levels of severity, than the $1000 dollar limit will fail to do so.

Report #11 Recommendations for Extortion, Trespass, and Burglary Offenses

1. Trespass.[53]

PDS again objects to the creation of a statutory permissive inference. The prosecution can argue and prove that property was signed and demarcated in such a way that it would be clear that entry is without the effective consent of the owner. The revised offense should not be drafted in such a way that alleviates or lessens the prosecution's burden of persuasion. If the revised offense maintains this permissive inference, PDS recommends that the language regarding signage should state that the signage must be visible *prior to* or *outside of* the point of entry.

Consistent with the intent of the RCC to separate attempt to commit trespass from the trespass statute and make attempt trespass subject to the general attempt statute, revised trespass should not criminalize the partial entry of a dwelling, building, land, or watercraft.[54] A partial entry of the physical space properly should be treated as an attempt to trespass. For instance, if a person tries to squeeze under a chain link fence in order to trespass on land, but he gives up because his head and chest cannot fit under the fence, that conduct should be charged as attempted trespass, not trespass. To the extent that the partial entry is to commit another crime, for instance to take property through a hole in the fence, numerous other statutes would cover that offense. To truly treat attempted trespass differently than trespass, the revised offense cannot accept partial entry as satisfying the element of knowingly entering or remaining.

The commentary explains: "A person who has been asked to leave the premises must have a reasonable opportunity to do so before he or she can be found guilty of a remaining-type trespass."[55] PDS believes that this provision should be added to the statutory language for the clarity of judges and practitioners.

The revised trespass offense defines the consent element of trespass as "without the effective consent of the occupant, or if there is no occupant, the owner." This element fails to address joint possession, joint occupancy, and joint ownership of property. The commentary explains that it is creating a "legal occupancy" model of trespass to address the conflicting rights of owners and occupants. This approach seems sensible when dealing with court orders barring a particular individual's access. But it leaves roommates, cohabitating spouses, and business cotenants subject to a trespass charge when they remain in a space that they lawfully occupy after an equal co-tenant demands that they vacate. It also subjects the guests of a cotentant to a trespass charge

[53] RCC § 22A-2601.

[54] See Report #11 at page 12.

[55] Report #11 at page 12.

when another tenant opposes the guest.[56] For instance, one roommate feuding with another over the upkeep of space could demand that the first roommate leave and not come back. When the messy roommate returns to occupy her rightful place in the home, pursuant to the revised offense, the messy roommate would be subject to arrest for trespass. The definition would also subject to arrest any visitor approved by one roommate but not another.

The revised offense creates this anomaly that one can be guilty of trespass on one's own land, because it discards the "entry without lawful authority" element of the unlawful entry statute.[57] To address the rights of cotenants, including their right to remain on property and have guests on property despite objections of an equal cotenant, PDS recommends rewriting the third element of the offense as follows:

> Without the effective consent of ~~the~~ an occupant, or if there is no occupant, ~~the~~ an owner.

This phrasing would establish that the accused could provide the consent to enter or remain on the property. In addition, the commentary should explicitly state that more than one person can be an occupant and that absent a superior possessory interest of the other occupant, it is not trespass for an occupant to enter or remain in a dwelling, building, land, or watercraft, or part therefore, even if the other occupant does not consent.

The commentary recognizes that trespass on public property is inherently different because of First Amendment concerns: "[T]he DCCA has long held that individual citizens may not be ejected from public property on the order of the person lawfully in charge absent some additional, specific factor establishing their lack of right to be there."[58] PDS believes that this statement should be included in the statutory language rather than in the commentary. A similar statement regarding the exclusion of liability for First Amendment activity is included in the statutory language of revised criminal obstruction of a public way,[59] and revised unlawful demonstration.[60]

2. Burglary.[61]

The revised burglary offense has the same joint occupancy problem as revised trespass does. Revised burglary, by doing away with the current burglary statute's requirement that the property

[56] Under property law, tenants and cotenants generally have a right to have invited guests on the property. Without a contractual limitation on a tenant's right to invite guests of his choosing, a landlord cannot unconditionally bar a tenant's guests from visiting the tenant or traversing common areas in order to access the tenant's apartment. *State v. Dixon*, 725 A.2d 920, 922 (Vt. 1999).

[57] *See Jones v. United States*, 282 A.2d 561, 563 (D.C. 1971), (noting entry without lawful authority is a requisite element of the offense of unlawful entry).

[58] Report #11 at page 20.

[59] RCC §22A-2603.

[60] RCC §22A-2604.

[61] RCC § 22A-2701.

is "of another," allows the burglary conviction of a joint tenant who, after being told to leave the apartment by a roommate without lawful authority to do, enters his own home with intent to steal a television belonging to the roommate. While the theft of the television would be unlawful, the conduct should not give rise to the additional, more severely punished, offense of burglary since the individual in fact had authority to enter the residence. As in trespass, the burglary definition fails to address the rights of cotenants and their guests. PDS again recommends amending the third element as follows:

> Without the effective consent of ~~the~~ an occupant, or if there is no occupant, ~~the~~ an owner.

Additionally, as with trespass, the commentary should explain that an equal occupant cannot be convicted of burglary though another occupant does not consent to the entry.

PDS strongly objects to treating partial entry the same as a full entry. Reaching in through a home's open window to steal something laying just inside is not the same as picking a lock and entering the same home at night and stealing the same object now laying on the floor of the bedroom of sleeping children. Revised burglary should distinguish between these two vastly different scenarios. To do so, PDS urges the RCC make partial entry into a dwelling or building, watercraft, or part thereof an attempt burglary rather than a completed offense. As stated in the commentary, burglary is a location aggravator. A location based aggravator makes sense because of the potential danger posed by individuals entering or remaining inside of dwellings or buildings. The danger inherent in that situation is not present when someone reaches a hand through a window or puts a stick through a chain link fence to extract an item.

PDS further proposes that, like with arson, a defendant must be *reckless* as to the fact that a person who is not a participant is present in the dwelling or building, rather than having an "in fact" strict liability standard. In the vast majority of cases when a defendant enters a home and that home happens to be occupied, the defendant will have been reckless as to occupancy. When a dwelling or building is used as a home or business, defendants can expect occupants or guests to be inside at any time, regardless of whether the lights are on or off, whether there is a car near the building, or whether there looks like there is activity from the windows. However, there will be instances, when a defendant enters a dwelling that truly appears to vacant and abandoned. For instance, if a defendant uses a crowbar to open a boarded up door in what appears to be an abandoned rowhouse in order to steal copper pipes and discovers inside this house, which lacks heat or running water, a squatter who entered through other means, without a *mens rea* applicable to the occupancy status of the home, that conduct would constitute first degree burglary. It would constitute first degree burglary although the defendant had every reason to believe that the seemingly abandoned building was unoccupied. By adding the requirement that a defendant must be reckless as to whether the dwelling is occupied, the RCC would appropriately limit the severely increased penalties of first degree burglary to situations that warrant the increased penalty. Further because recklessness could typically be proved contextually – in that the home does not appear to be boarded up – providing the mens rea does not decrease the applicability of the first degree burglary statute.

MEMORANDUM

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

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

From: Laura E. Hankins, General Counsel

Date: December 18, 2017

Re: Comments on First Draft of Report No. 12: Recommendations for Chapter 3 of the Revised Criminal Code – Definition of a Criminal Conspiracy

The Public Defender Service makes the following comments on the First Draft of Report No. 12.

1. PDS recommends the offense of criminal conspiracy be applicable only to conduct that involves conspiring to commit a felony offense. It is PDS's belief that conspiracy to commit a misdemeanor offense is almost never charged by the Office of the United States Attorney. Thus, limiting liability to felony offenses would merely reflect, not restrict, current practice. The underlying rationale for a separate substantive offense of criminal conspiracy is that agreement by multiple individuals for concerted unlawful action has the potential to increase the danger of the crime and the likelihood of its successful commission.[1] If the RCC accepts the notion that a criminal agreement is a "distinct evil,"[2] that "evil" is certainly less when the object of the conspiracy is a misdemeanor offense. A conspiracy to commit a misdemeanor offense frequently lacks the complex planning and commitment to criminal enterprise that warrants the punishment of the agreement and a single overt act as a separate additional offense. For instance, an agreement to shoplift may be formed by two teenagers, one who agrees to distract the clerk by asking for something behind the counter while the other takes something from the store. This conspiracy required *de minimis* planning, and resulted in no more harm than action by one individual. Both teenagers could be found guilty of shoplifting, under a theory of liability of

[1] See Developments in the Law-Criminal Conspiracy, 72 Harv. L. Rev. 922, 923-924 (1959).

[2] *United States v. Recio*, 537 U.S. 270, 274 (2003) (quoting *Salinas v. United States*, 522 U.S. 52, 65 (1997)).

aiding and abetting or conspiracy, but where the societal harm did not increase as a result of the agreement itself, the teenagers should not be subject to the separate offense of conspiracy to commit shoplifting.

Misdemeanor conduct should be a line of demarcation below which separate offense liability cannot attach. This would be similar to the line of demarcation in the present statute of possession of a firearm during a crime of violence. The crime of violence serves as a demarcation line above which there can be liability for a separate offense. We do not separately punish possession of a firearm while driving recklessly or while committing disorderly conduct as a third substantive offense in addition to the possession of the firearm. Finally, allowing conspiracy liability where the underlying offense is a misdemeanor creates unfettered discretion for prosecutors. Since RCC § 22A-303 does not at this time propose penalty gradations, it appears likely that conspiracy would be criminalized as a felony; prosecutors could escalate misdemeanor conduct into a felony conviction without any showing of greater societal harm in the majority of instances when defendants act together.

2. PDS recommends technical amendments to two subsections to increase the clarity of the language of criminal conspiracy.

   A) PDS supports having the RCC continue the District's current bilateral approach to conspiracy. PDS believes, however, that the requirement that a criminal conspiracy must be bilateral or mutual could be written more clearly. To that end, PDS proposes amending to RCC § 22A-303(a)(1) to read as follows: "Purposely ~~agree~~ came to an agreement to engage in or aid the planning or commission of conduct which, if carried, out, will constitute every element of that planned [felony] offense or an attempt to commit that planned [felony] offense." Replacing "purposefully agree" with "purposefully come to an agreement" more clearly conveys the mutuality of the agreement that is the *sine quo non* of the District's current approach to conspiracy.[3]

   Clarifying that the (alleged) coconspirators must agree to engage in (or aid the planning or commission of) conduct which would constitute every element of the planned offense further bolsters the joint nature of the agreement required for criminal conspiracy liability. While "proof of a formal agreement or plan in which everyone sat down together and worked out the details"[4] is not required for conviction, liability does require that the "coconspirators" come to an agreement about the same conduct, conduct that if engaged in would result in the commission of the specific planned (charged) offense. So if the charge is conspiracy to commit a robbery and the evidence demonstrates that while coconspirator X believed the agreed upon conduct was to rob someone, coconspirator Y believed the agreed upon conduct was to assault someone, the lack of mutual agreement would result in a not guilty finding for the conspiracy to commit robbery charge. Though cited in the section explaining intent

[3] Report #12 at pages 6-7 codifying a bilateral approach to conspiracy.

[4] Report #12 at page 7, quoting D.C. Crim. Jur. Instr. § 7.102.

elevation, the Connecticut Supreme Court's opinion in *State v. Pond* is instructive here as well.[5] While the Connecticut Supreme Court in *Pond* extended its "specific intent" analysis to "attendant circumstances," its analysis began with requiring "specific intent" with respect to conduct elements, stating the "general rule" that "a defendant may be found guilty of conspiracy … only when he specifically intends that *every element of the object crime* be committed."[6]

B) PDS recommends amending the Principles of Culpable Mental State Elevation subsection, RCC §22A-303(b), to substitute "and any" where the draft uses the disjunctive "or." The commentary to the RCC makes clear that the principle of intent elevation, adopted by the RCC, requires that in forming an agreement the parties intend to cause any result required by the target offense and that the parties act with intent as to the circumstances required by the target offense.[7] The use of "or" as the bridge might wrongly suggest to a reader that the mental state elevation requirement is satisfied if applied to a required circumstance or result. PDS asserts that the proposed amendment better conveys the principle that mental state elevation applies to any required circumstance[8] and to any required result.[9]

3. Finally, PDS recommends that the RCC include language that acknowledges that where a conspiracy crosses jurisdictional lines and the conspiracy is planned in a jurisdiction where the conduct is not against the law, the legality of the conduct in the place where the agreement was formed may be relevant to the determination of whether the government has proved sections (a) and (b). As currently drafted section (e) could be read to bar the defense from arguing that the cross-jurisdiction disparity in legality is relevant to the considerations in (a) and (b).

[5] Report #12 at page 38; *State v. Pond*, 108 A.3d. 1083 (Conn. 2015).

[6] *Pond*, 108 A.3d at 463 (emphasis added).

[7] Report #12 at page 41.

[8] If an offense has more than one possible circumstance, such as whether something is dwelling or business yard, then it applies to at least one such circumstance.

[9] If an offense has more than possible result, such as damaging or destroying, then it applies to at least one such result.

Fully revised as PDS recommends, criminal conspiracy in the RCC would read as follows:

§ 22A-303 CRIMINAL CONSPIRACY

(a) DEFINITION OF CONSPIRACY. A person is guilty of ~~a~~ conspiracy to commit ~~an offense~~ a felony when, acting with the culpability required by that felony offense, the person and at least one other person:

(1) Purposely ~~agree~~ come to an agreement to engage in or aid the planning or commission of conduct which, if carried out, will constitute every element of that planned felony offense or an attempt to commit that planned felony offense; and

(2) One of the parties to the agreement engages in an overt act in furtherance of the agreement.

(b) PRINCIPLES OF CULPABLE MENTAL STATE ELEVATION APPLICABLE TO RESULTS AND CIRCUMSTANCES OF TARGET OFFENSE. Notwithstanding subsection (a), to be guilty of a conspiracy to commit ~~an offense~~ a felony, the defendant and at least one other person must intend to bring about any result ~~or~~ and any circumstance required by that planned felony offense.

(c) JURISDICTION WHEN OBJECT OF CONSPIRACY IS LOCATED OUTSIDE THE DISTRICT OF COLUMBIA. When the object of a conspiracy formed within the District of Columbia is to engage in conduct outside the District of Columbia, the conspiracy is a violation of this section if:

(1) That conduct would constitute a ~~criminal~~ felony offense under the D.C. Code performed in the District of Columbia; and

(2) That conduct would also constitute a criminal offense under:

(A) The laws of the other jurisdiction if performed in that jurisdiction; or

(B) The D.C. Code even if performed outside the District of Columbia.

(d) JURISDICTION WHEN CONSPIRACY IS FORMED OUTSIDE THE DISTRICT OF COLUMBIA. A conspiracy formed in another jurisdiction to engage in conduct within the District of Columbia is a violation of this section if:

(1) That conduct would constitute a ~~criminal~~ felony offense under the D.C. Code performed within the District of Columbia; and

(2) An overt act in furtherance of the conspiracy is committed within the District of Columbia.

(e) LEGALITY OF CONDUCT IN OTHER JURISDICTION IRRELEVANT. Under circumstances where §§ (d)(1) and (2) can be established, it is ~~immaterial and~~ no defense to a prosecution for conspiracy that the conduct which is the object of the conspiracy would not constitute a criminal offense under the laws of the jurisdiction in which the conspiracy was formed, however it may be relevant to whether the defendant acted with the mental states required by RCC § 22A-303(a) and (b).

(__) PENALTY. [Reserved].

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: December 19, 2017

SUBJECT: First Draft of First Draft of Report #12, Definition of a Criminal Conspiracy

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 #12, Definition of a Criminal Conspiracy. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-303 CRIMINAL CONSPIRACY

The offense of Criminal Conspiracy would replace D.C. Code § 22-1805a. The current offense is broader than that proposed in the Draft Report. D.C. Code § 22-1805a (1) states in relevant part:

> If 2 or more persons conspire either to commit a criminal offense or to defraud the District of Columbia or any court or agency thereof in any manner or for any purpose, each shall be fined … or imprisoned … [emphasis added]

[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.

RCC § 22A-303 (a) states:

> DEFINITION OF CONSPIRACY. A person is guilty of a conspiracy to commit an offense when, acting with the culpability required by that offense, the person and at least one other person:
>
> (1) Purposely agree to engage in or aid the planning or commission of conduct which, if carried out, will constitute that offense or an attempt to commit that offense; and
>
> (2) One of the parties to the agreement engages in an overt act in furtherance of the agreement.

The proposed language does not contain the underlined provision in D.C. Code § 22-1805a (1) pertaining to "defraud[ing] the District of Columbia or any court or agency thereof in any manner or for any purpose." OAG suggests that either RCC § 22A-303 be redrafted so that the Code continues to criminalize conspiracy to defraud "the District of Columbia or any court or agency thereof" or that the Commission draft a separate offense which reaches this behavior. The Commission should not recommend the repeal of D.C. Code § 22-1805a unless the replacement(s) criminalizes both conspiracy to commit a crime and conspiracy to defraud the District of Columbia or any court or agency thereof.

What is less clear is whether § 22A-303 narrows the applicability of current conspiracy law pertaining to whether a person can be prosecuted for conspiracy when that person "conspires" with an undercover law enforcement officer in a sting operation. RCC § 22A-303 (b) states, "Notwithstanding subsection (a), to be guilty of a conspiracy to commit an offense, the defendant and at least one other person must intend to bring about any result or circumstance required by that offense." Arguably a person who "conspires" with an undercover officer has not "conspired" with another person who intends to bring about a particular result or circumstance.[2] There are good reasons, however, that such behavior should be illegal. As Report #12, on page 25, quotes, an actor "who fails to conspire because her 'partner in crime' is an undercover officer feigning agreement is no less personally dangerous or culpable than one whose colleague in fact possesses the specific intent to go through with the criminal plan." [citation omitted].[3] OAG was only able to find one D.C. Court of Appeals case where a person was convicted at trial of conspiracy based upon conversations with an undercover officer. The case, however, does not discuss the issue of whether a person can be convicted of "conspiring" with a police officer. It was reversed on other grounds.[4]

[2] See footnote 7, on page 2, and related text.
[3] In addition, Report #12, on page 26, notes that the unilateral approach to conspiracy, the one that permits prosecution for conspiracy where the other party is an undercover officer, "reflects the majority practice in American criminal law…" See page 25 of Report #12 for an explanation of the "unilateral approach to conspiracy."
[4] See *Springer v. United States*, 388 A.2d 846, where the appellant was convicted by a jury of conspiracy to commit first-degree murder and of solicitation to commit a felony based upon evidence of tape recordings -- and transcripts thereof -- of conversations between the appellant and an undercover MPD detective.

OAG suggests that either RCC § 22A-303 (b) be redrafted so that a person may be convicted of conspiracy notwithstanding that the "co-conspirator" is an undercover officer working a sting operation or that the Commission draft a separate offense which reaches this behavior. The Commission should not recommend the repeal of D.C. Code § 22-1805a unless the replacement criminalizes conspiracy in a sting context or unless a separate offense is created that criminalizes this behavior.

RCC § 22A-303 (c) and (d) would narrow the current scope of the District's jurisdiction to prosecute offenses when the object of the conspiracy is located outside the District or when the conspiracy is formed outside the District. Both paragraphs contain the phrase "That conduct would constitute a criminal offense under the D.C. Code if performed in the District of Columbia."[5] [emphasis added] Unless the intent is to only encompass offenses in enacted titles (such as this one), these paragraphs should use the phrase "District law"; it should not be specific to the Code. OAG, therefore, recommends that all references to "D.C. Code" in paragraphs (c) and (d) be changed to "District law."[6]

[5] Paragraph (c)(2)(B) also contains a reference to "The D.C. Code."
[6] D.C. Code § 22-1805a (d) uses the phrase "would constitute a criminal offense." It is not limited to D.C. Code offenses.

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: March 9, 2018

SUBJECT: Third Draft of Report #2, Basic Requirements of Offense Liability

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 #12, Definition of a Criminal Conspiracy. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-206 HIERARCHY OF CULPABLE MENTAL STATES

RCC § 22A-206 should separately define the term "enhanced recklessness" and account for it in the hierarchy of culpable Mental states. RCC § 22A-206, as written, includes the definitions of purpose, knowledge, intent, recklessness, and negligence, as well as the hierarchy of the culpable mental states. Proof of a greater culpable mental state satisfies the requirements for a lower state. RCC § 22A-206 (d) (1) defines recklessness with respect to a result and (d)(2) defines recklessness with respect to a circumstance. On pages 20 through 22 the Commentary explains how recklessness differs from "enhanced recklessness." The explanation of enhanced recklessness is contained in RCC § 22A-206 (d)(3). As enhanced recklessness differs from recklessness, it should not be treated as a subpart of the definition of recklessness. Instead, the

[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.

definition should stand on its own and should follow the formatting of the other definitions in RCC § 22A-206. In other words, RCC § 22A-206 (d)(3) should be deleted and replaced with a new paragraph. That paragraph should be entitled "ENHANCED RECKLESSNESS DEFINED" and should be followed by two paragraphs that explains how "A person acts with enhanced recklessness" with respect to a result and a circumstance. The hierarchy should make clear that proof of recklessness is satisfied by proof of enhanced recklessness.

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: March 9, 2018

SUBJECT: First Draft of Report #13, Penalties for Criminal Attempts

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 #13, Penalties for Criminal Attempts. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-301 CRIMINAL ATTEMPTS

RCC § 22A-301 (c) (1) establishes that general penalty scheme for attempts. It states, "An attempt to commit an offense is subject to one half the maximum imprisonment or fine or both applicable to the offense attempted, unless a different punishment is specified in § 22A-301 (c) (2)."[2] We believe that the intent of this provision is to permit a sentence to be imposed that is up to ½ the stated imprisonment amount for the completed offense, ½ the stated fine amount, or up to ½ the stated imprisonment term and up to ½ the stated fine amount. As written, it is unclear, however, if the phrase "½ the stated" only modifies the word "imprisonment" or whether it also

[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] OAG believes that it cannot fully evaluate this proposal until actual penalties are assigned to the underlying offenses. We are also curious as to how this proposal will affect the percentage of trials that are jury demandable.

modifies “fine” “or both.” We believe that this needs to be clarified either in the proposal or in the Commentary. If the Commission chooses to clarify this penalty provision in the Commentary, it should give an example.

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: March 9, 2018

SUBJECT: First Draft of Report #14 Recommendations for Definitions for Offenses Against Persons

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 #14 Recommendations for Definitions for Offenses Against Persons. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-1001. Offense Against Person's Definition

RCC § 22A-1001 (3) defines the word "Coercion." When the lead in language is read with many of the subparagraphs it is not clear which person must be affected. For example, the lead in language when read with the first subparagraph states, "'Coercion' means causing another person to fear that, unless that person engages in particular conduct, then another person will…" (A) Inflict bodily injury on another person…" It would be clearer if (A) stated, "Inflict bodily injury on that person or someone else." All other paragraphs that are phrased like (A) should be similarly amended.

[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.

RCC § 22A-1001 (11) defines the term "Law enforcement officer." Unlike D.C. Code § 22-405(a), this definition does not include District workers who supervise juveniles. A sentence should be added that states that a law enforcement officer also means "Any officer, employee, or contractor of the Department of Youth Rehabilitation Services."[2] In addition, neither this section nor the corresponding assault offenses address the jurisdictional provision contained in current law. D.C. Code § 22-405(a) includes a provision within the definition of a law enforcement officer that includes "any officer or employee of the government of the District of Columbia charged with the supervision of juveniles being confined pursuant to law in any facility of the District of Columbia regardless of whether such institution or facility is located within the District." RCC § 22A-1001 (11) must include such a statement or the District would lose jurisdiction to prosecute offenses that occur at New Beginnings.

RCC § 22A-1001 (15) defines the term "Protected person." Within the class of people who are protected are: a law enforcement officer, public safety employee, transportation worker, and District official or employee, but only "while in the course of official duties." See RCC § 22A-1001 (15) (D)-(G). It is unclear, however, whether one of these people would fall under this definition if they were assaulted, as a direct result of action they took in their official capacity, after they clocked out of work or whether they must be working at the time of the assault. A person may be assaulted or threatened at home for actions that they took on the job. In other words, what are the limits of the term "while in the course of official duties." To clarify, this definition should be expanded to say, "while in the course of official duties or on account of those duties."

RCC § 22A-1001 (17) defines the term "Serious Bodily injury." It includes within its definition "… obvious disfigurement." The question that must be clarified is obvious to whom? For example, if a person shoots off some else's big toe, depending on what shoe the victim wears the toe being missing may – or may not – be obvious. Similarly, if someone is shot on the inner thigh and has a scar, that scar may be obvious to the victim's spouse or other family members, but not to the general public. The Commission should consider either addressing this issue in the definition itself or in the Commentary.

RCC § 22A-1001 (18) defines the term "Significant bodily injury." It is unclear, however, if the government just fails to prove serious bodily injury, RCC § 22A-1001 (17), whether it would necessarily prove significant bodily injury. To improve proportionality, etc., the definition of significant bodily injury should always include the subset of offenses that are included in the definition of serious bodily injury. To use the example from the previous paragraph, if the government proves that the person was disfigured, but doesn't prove that it was obvious, then the disfigurement should qualify as a significant bodily injury.

[2] As many Department of Youth Rehabilitation Services facilities are staffed by contractors, as opposed to employees, the proposed language is a slight expansion of current law.

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: March 9, 2018

SUBJECT: First Draft of Report #15 Recommendations for Assault & Offensive Physical Contact 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 #15 Recommendations for Assault & Offensive Physical Contact Offenses. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-1202. Assault[2]

[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] In OAG's Memorandum concerning the First Draft of Report #14, Recommendations for Definitions for Offenses Against Persons, we noted that the proposed definition did not include the grant of jurisdictional authority that exists in current law. D.C. Code § 22-405(a) contains a provision that includes within the definition of a law enforcement officer, "any officer or employee of the government of the District of Columbia charged with the supervision of juveniles being confined pursuant to law in any facility of the District of Columbia regardless of whether such institution or facility is located within the District." If the jurisdictional issue is not resolved in RCC § 22A-1001 (11) then it needs to be resolved here, and in other substantive provisions.

RCC § 22A-1202 defines the offense of "Assault." Paragraph (a) establishes the elements for aggravated assault. Paragraph (A)(4) addresses protected persons in two contexts. RCC § 22A-1202 states, in relevant part, "A person commits the offense of aggravated assault when that person…:

(4) Recklessly, under circumstances manifesting extreme indifference to human life, causes serious bodily injury to another person; and
(A) Such injury is caused with recklessness as to whether the complainant is a protected person; or
(B) Such injury is caused with the purpose of harming the complainant because of the complainant's status as a:
(i) Law enforcement officer;
(ii) Public safety employee;
(iii) Participant in a citizen patrol;
(iv) District official or employee; or
(v) Family member of a District official or employee;

This provision raises the question of what, in practice, it means to be reckless as to whether the complainant is a protected person. The definition of "protected person" includes a person who is less than 18 years old …and a person who is 65 years old or older.[3] As the Commentary notes, recklessly is a culpable mental state, defined in RCC § 22A-206, means that the accused must disregard a substantial and unjustifiable risk that the complainant is a "protected person." So, if a perpetrator sees a person who is 67 years old, looks her over, and decides that she looks to be in her early 60s, and then assaults the woman, is the perpetrator disregarding a substantial and unjustifiable risk that the complainant is a "protected person"? Clearly, it is inappropriate to penalize a 67-year-old victim by taking her out of the class protected persons for looking like she is in better health than her age would otherwise indicate. People who attack persons in their 60s and 70s should bear the risk that they are assaulting a protected person and will be committing an aggravated assault.

There are two ways that the Commission can clarify, or correct, this issue. The first is to directly address this issue in the Commentary making it clear that in this situation assaulting the 67-year-old woman would be an aggravated assault. The second is to change the mental state that is associated with age related offenses. To do this, the phrase "with recklessness as to whether the complainant is a protected person" would be split into two phrases. The first would be "when the person is, in fact, a protected person as defined in RCC § 22A-1001 (15) (A) and (B)" and the other would be "with recklessness as to whether the complainant is a protected person as defined in RCC § 22A-1001 (15) (C) through (H)." This would preserve the mental state of

[3] See RCC § 1001 (15) generally. The definition of "protected person" further requires that if the victim is a person who is less than 18 years old that the defendant must, in fact, be at least 18 years old and be at least 2 years older than the victim.

recklessness as an element for all non-age related protected persons, while establishing an "in fact" requirement for age related protected persons.

The elements of second degree assault are established in RCC § 22A-1202 (c). It states that:

> A person commits the offense of second degree assault when that person:
> (1) Recklessly causes bodily injury to another person by means of what, in fact, is a dangerous weapon;
> (2) Recklessly causes significant bodily injury to another person; and
> (A) Such injury is caused with recklessness as to whether the complainant is a protected person; or
> (B) Such injury is caused with the purpose of harming the complainant because of the complainant's status as a:
> (i) Law enforcement officer;
> (ii) Public safety employee;
> (iii) Participant in a citizen patrol;
> (iv) District official or employee; or
> (v) Family member of a District official or employee; [emphasis added]

RCC § 22A-1202 (c)(1) enhances the penalty over third, fourth, and fifth degree assault because the perpetrator causes bodily injury by using a dangerous weapon. It addresses society's interest in discouraging the use of weapons during an assault. RCC § 22A-1202 (c)(2) enhances the penalty provision when the perpetrator causes significant bodily injury to any protected person or to certain protected persons when the injury is caused with the purpose of harming the complainant because of the person's government affiliation. It addresses society's interest in discouraging assaults against law enforcement personal, government workers, and others involved in public safety or citizen patrols, as well as family members of a District official or employees. RCC § 22A-1202 (c)(1) and (c)(2), therefore, serve different societal interests.

As these two sets of elements are both penalized as second degree assault, there is no additional penalty for a person using a gun while causing significant bodily injury to a law enforcement officer, public safety employee, participant in a citizen patrol, District official or employee, or a family member of a District official or employee. In other words, if the perpetrator plans on causing significant bodily injury, they may as well use a dangerous weapon. To make the penalties proportionate, a person who uses a dangerous weapon against a person listed in RCC § 22A-1202 (c)(2)(B) and causes significant bodily injury should be subject to a higher penalty than if they use a dangerous weapon in assaulting one of those persons and only cause bodily injury. The Commission should create a new degree of assault that comes between the current first and second degree assaults to accommodate this offense.[4]

[4] A similar argument can be made concerning the need to amend aggravated assault under RCC § 22A-1202 (a).

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: March 9, 2018

SUBJECT: First Draft of Report #16 Recommendations for Robbery

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 #16 Recommendations for Robbery. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-1201. Robbery

OAG would like to memorialize an observation that it discussed with the Commission. The Commission is charged with using clear and plain language in revising the District's criminal statutes.[2] We believe that the idea is to make the Code more understandable. We have described the problem as multi-step nesting. For example, in order to determine the elements of robbery (including which degree is appropriate in a given circumstance), one has to look up the elements of criminal menacing, and in order to determine the elements of criminal menacing, one must look up the elements of assault. While there are many sound drafting principles for using this approach to criminal code reform, it does leave proposals that may not be "clear" to a person who is trying to understand the elements of this offense.

[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] See D.C. Code § 3-152 (a)(1).

OAG would like the Commission to clarify the amount of force that is necessary to complete a robbery. OAG understands from conversations with the Commission that a person who grabs a purse out of someone's hand or from out from under someone's arm would be guilty of third degree robbery. Specifically, the force that is needed merely to take the purse would meet the requirement in Section 1201 (d) (4)(A) that it was accomplished by "Using physical force that overpowers any other person present…" On the other hand, the force that is necessary to complete a pick pocket (where the victim is unaware of the taking), would not be sufficient to convert the taking to a robbery. To ensure that the proposal is interpreted as intended, the Commission should consider adding more hypotheticals to the Commentary.

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: March 9, 2018

SUBJECT: First Draft of Report #17 Recommendations for Criminal Menace & Criminal Threat 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 #17 Recommendations for Criminal Menace & Criminal Threat Offenses. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

Both RCC § 22A-1203 and RCC § 22A-1204. Criminal Menace and Criminal Threat

OAG would suggest that that the titles to Sections 1203 and 1204 be changed to drop the word "Criminal." Instead of calling them "Criminal Menacing" and "Criminal Threats", we believe that they should simply be called "Menacing" and "Threats." By adding the word "criminal" to the name it unnecessarily raises the question what a non-criminal menacing and non-criminal threat is. The words "menacing" and "threat" meet the requirements of D.C. Code § 3-152(a) that the Criminal Code to "Use clear and plain language."

[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.

In addition, the Commentary should make clear that the effective consent defense in both offenses,[2] is the consent to being menaced or threatened, not consent to the underlying conduct constituting the offenses of homicide, robbery, sexual assault, kidnapping, and assault (and for criminal threats, the offence of criminal damage to property).[3]

[2] See RCC § 22A-1203 (e) and RCC § 22A-1204 (e).
[3] See RCC § 22A-1203 (a)(3) and (b)(2) and RCC § 22A-1204 (a)(2) and (b)(2).

MEMORANDUM

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Laura E. Hankins, General Counsel
Date:	March 9, 2017
Re:	Comments on First Draft of Report 13, Penalties for Criminal Attempts

The Public Defender Service makes the following comments on Report #13, Penalties for Criminal Attempts. PDS agrees with the principle embodied in proposed RCC 22A-301 of a substantial punishment reduction between completed and attempted criminal conduct. However, PDS strenuously objects to any revision of the criminal code that will result in longer periods of incarceration for individuals convicted of crimes. While before the RCC's sentencing provisions are drafted it is difficult to say exactly how many and by how much sentences will increase under RCC § 22A-301(c), it is clear that many sentences will increase under RCC § 22A-301. The commentary itself concedes[1] that pursuant to RCC §22A-301(c) various non-violent property offenses, currently punishable as misdemeanors with a maximum imprisonment term of 180 days,[2] would become felony offenses punishable by a term of years. This would not only increase the length of incarceration, it would also have negative consequences for persons' prospects for housing, education, and employment. By making some attempt offenses felonies rather than misdemeanors, options for record sealing and diversion programs would also likely decrease. Sentences for crimes such as attempted burglary, which under D.C. Code § 22-1803 carries a statutory maximum of 5 years imprisonment, may also increase under RCC § 22-301(c). Since the District has no locally accountable control over how offenses are ultimately prosecuted, whether diversion programs are offered, and what sort of plea offers are available to defendants, the District must take exceptional care in labeling offenses felonies and establishing statutory maxima.

[1] Report #13, page 14.

[2] D.C. Code § 22- 1803.

The principal benefit of the RCC's default rule of a 50% reduction between attempted and completed criminal conduct is bringing order and uniformity to legislation that has evolved piecemeal. Increased incarceration is too high a price to pay for the benefit of a clearer statutory scheme.

Therefore, for attempts, PDS proposes: 1) maintaining the sentencing consequences of D.C. Code § 22-1803, with a maximum punishment of 180 days of incarceration, for property offenses and other non-violent offenses covered in that section and the RCC equivalent; 2) maintaining the sentencing consequences of D.C. Code § 22-1803, with a five year maximum sentence for attempted crimes of violence such as burglary, as defined in D.C. Code § 23-1331; and 3) replacing D.C. Code § 22-401 (assault with intent to kill, rob, or poison or to commit first degree sexual abuse, second degree sexual abuse or child sexual abuse) with the RCC proposal to make the statutory maximum for the attempt crime half of that for the completed offense.

MEMORANDUM

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Laura E. Hankins, General Counsel
Date:	March 9, 2017
Re:	Comments on First Drafts of Reports 14 through 17, Offenses Against Persons

The Public Defender Service makes the following comments.

Report #14: Recommendations for Definitions for Offenses Against Persons

1. PDS recommends strengthening the definition of "bodily injury." PDS supports the overall structure of assault and offensive physical contact proposed for the RCC. To reduce unnecessary overlap of offenses and to improve the proportionality of penalties, RCC creates a number of assault gradations and creates a new offense of Offensive Physical Contact. Offensive Physical Contact "punishes as a separate offense … low-level conduct that was previously not distinguished from more serious assaultive conduct in current law."[1] The offense "criminalizes behavior that does not rise to the level of causing bodily injury or overpowering physical force."[2] PDS heartily endorses that approach. However, that approach becomes hollow when "bodily injury" is defined to include fleeting physical pain. To give real meaning to the distinction between "assault" and "offensive physical contact," the definition of "bodily injury" must be rewritten to set a higher floor for "assault", thus creating a more realistic ceiling for "offensive physical contact." PDS recommends "bodily injury" require at least moderate physical pain. Specifically, the definition should read: "'Bodily injury' means moderate physical pain, illness, or any impairment of physical condition." This proposal creates a more clear progression of criminalized physical touching: offensive physical contact; bodily injury, which requires moderate physical pain; significant bodily injury, which requires a bodily injury that warrants hospitalization or immediate medical treatment to abate severe pain; and serious bodily injury,

[1] Report #15, page 52.

[2] Report #15, page 50.

which requires a substantial risk of death, protracted disfigurement, or protracted impairment of a bodily member.

2. PDS recommends clarifying in the commentary for the definition of "dangerous weapon" that the issue of whether an object or substance "in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury"[3] is a question of fact, not a question of law.

3. PDS notes that the use and definition of the umbrella term "protected person" expands the application of certain enhancements to allow for greater punishment than in current law. For example, under current law the enhancement when the complainant is a minor only applies to offenses that are "crimes of violence," which does not include simple assault;[4] however, RCC Fourth Degree Assault would allow for increased punishment for conduct that results in (mere) bodily injury of a protected person.[5] Similarly, the elderly enhancement in current law does not apply to simple assault,[6] but bodily injury assault would be punished more severely if committed against a protected person (elderly person). Under current law, there is no law enforcement enhancement for the offense of robbery in contrast with RCC section 1201 for robbery.[7] PDS does not object to this expansion only because it is included in the proposed restructuring of assaults and robbery that incorporates a number of currently free-standing penalty enhancements, thus preventing stacking of enhancements.[8]

<u>Report # 15: Recommendations for Assault & Offensive Physical Contact Offenses</u>

1. The commentary states that for both Section 1202(a)(4)(A) and (a)(4)(B), the complainant must be a protected person.[9] However, the statutory language does not specify that the complainant must "in fact" be a protected person. As it is currently written, the "protected person" circumstance element could be read to apply when a person causes the requisite injury reckless as to whether the complainant might be a protected person regardless of whether the complainant actually is. Thus, PDS recommends that wherever the "protected person" circumstance element

[3] See RCC § 22A-1001(4)(F).

[4] See D.C. Code §§ 22-3611, 23-1331, 22-404.

[5] RCC § 22A-1202(e)(1).

[6] See D.C. Code § 3601.

[7] Compare D.C. Code §22- 2801 and RCC § 22A-1201(a)(2)(B), (b)(2)(iii), (c)(2)(iii).

[8] See e.g., Report #15, page 22.

[9] See Report #15, page 7. Although the commentary on this point only cites "protected person" for aggravated assault, presumably the requirement that the complainant actually be a protected person extends to each gradation that has a "protected person" circumstance element.

appears, it be rewritten to clarify that the circumstance element requires that the complainant must, *in fact*, have that status. For example, aggravated assault should be rewritten as follows:

"(4) Recklessly, under circumstances manifesting extreme indifference to human life, causes serious bodily injury to another person; and

(A) Such injury is caused with recklessness as to whether the complainant is a protected person and the complainant, in fact, is a protected person; or

(B) (i) Such injury is caused with the purpose of harming the complainant because of the complainant's status as a:

~~(i)~~(I) Law enforcement officer;

~~(ii)~~(II) Public safety employee;

…

~~(v)~~(V) Family member of a District official or employee; and

(ii) the complainant, in fact, has that status;

2. PDS recommends eliminating the use of the mental state "recklessly, under circumstances manifesting extreme indifference to human life" where it is used throughout the assault section. The added component of "under circumstances manifesting extreme indifference" means that the various gradations of RCC Assault fail to merge with (become lesser included offenses of) RCC Robbery. For example, Aggravated Robbery requires Third Degree Robbery plus recklessly causing serious bodily injury by means of a dangerous weapon. Aggravated Assault, in contrast, requires recklessly under circumstances manifesting extreme indifference to human life causing serious bodily injury by means of a dangerous weapon. Because each offense has an additional element - aggravated robbery requires 3rd degree robbery and aggravated assault requires "under circumstances manifesting extreme indifference to human life" - they do not merge. PDS recommends replacing the "reckless with extreme indifference" mental state with "knowing" for the more serious gradation and with simple "recklessness" for the less serious gradations. "Knowing" and "reckless" are easier to differentiate from each other and more of the gradations of assault will merge with gradations of robbery.

Specifically, PDS recommends rewriting the four most serious gradations of assault as follows:

"**Section 1202. Assault**

(a) *Aggravated Assault.* A person commits the offense of aggravated assault when that person:

(1) Purposely causes serious and permanent disfigurement to another person;

(2) Purposely destroys, amputates, or permanently disables a member or organ of another person's body;

(3) Knowingly ~~Recklessly, under circumstances manifesting extreme indifference to human life,~~ causes serious bodily injury to another person by means of what, in fact, is a dangerous weapon; or

(4) Knowingly ~~Recklessly, under circumstances manifesting extreme indifference to human life,~~ causes serious bodily injury to another person; and

(A) Such injury is caused knowing ~~with recklessness as to whether~~ the complainant is a protected person; or

(B) Such injury is caused with the purpose of harming the complainant because of the complainant's status as a:

(i) Law enforcement officer;

(ii) Public safety employee;

(iii) Participant in a citizen patrol;

(iv) District official or employee; or

(v) Family member of a District official or employee;

(b) *First Degree Assault*. A person commits the offense of first degree assault when that person:

(1) Recklessly~~, under circumstances manifesting extreme indifference to human life,~~ causes serious bodily injury to another person by means of what, in fact, is a dangerous weapon; or

(2) Recklessly causes serious ~~significant~~ bodily injury to another person ~~by means of what, in fact, is a dangerous weapon~~; and

(A) Such injury is caused with recklessness as to whether the complainant is a protected person; or

(B) Such injury is caused with the purpose of harming the complainant because of the complainant's status as a:

(i) Law enforcement officer;

(ii) Public safety employee;

(iii) Participant in a citizen patrol;

(iv) District official or employee; or

(v) Family member of a District official or employee;

(c) *Second Degree Assault.* A person commits the offense of second degree assault when that person:

(1) Recklessly causes significant bodily injury to another person by means of what, in fact, is a dangerous weapon;

(2) Recklessly causes serious bodily injury to another person;

(3) Recklessly causes significant bodily injury to another person; and

(A) Such injury is caused with recklessness as to whether the complainant is a protected person; or

(B) Such injury is caused with the purpose of harming the complainant because of the complainant's status as a:

(i) Law enforcement officer;

(ii) Public safety employee;

(iii) Participant in a citizen patrol;

(iv) District official or employee; or

(v) Family member of a District official or employee;

(d) *Third Degree Assault.* A person commits the offense of third degree assault when that person:

(1) Recklessly causes significant bodily injury to another person; or

(2) Recklessly causes bodily injury to another person by means of what, in fact, is a dangerous weapon; …

3. PDS objects to increasing the severity of assault based on strict liability as to whether the object that is the means of causing the requisite injury is a "dangerous weapon."[10] For example, a person commits RCC Fifth Degree Assault when that person recklessly causes bodily injury to another person;[11] a person commits RCC Second Degree Assault when that person recklessly causes bodily injury to another person by means of what, *in fact, is a dangerous weapon*.[12] PDS recommends that the mental state of "negligence" apply to whether the object that is the means by which the requisite injury is caused is a "dangerous weapon." A series of hypotheticals will illustrate the unfairness of strict liability and the ease with which the prosecution will likely be able to prove negligence in most cases.

   A. Defendant hits complainant with a light cloth purse. Beading on the purse scratches the complainant and causes a "bodily injury" → Perhaps RCC 2nd degree offensive physical contact. Perhaps RCC 5th degree assault, if the jury finds that the defendant was aware of a substantial risk that hitting someone with a cloth purse would result in a bodily injury. But not a more severe gradation of assault because the cloth purse is not a per se dangerous weapon.[13] If the offense allowed strict liability, it's unlikely that the jury would find "in fact" that the cloth purse was a dangerous weapon, that is, that the defendant used it in a manner that was likely to cause death or serious bodily injury. A negligence standard would probably lead to the same result -- it is unlikely that the jury would find that the defendant was negligent in failing to perceive a substantial risk that the cloth purse, "in the manner of its actual use, was likely to cause death or serious bodily injury."[14]

   B. Defendant lunges at the complainant with a switchblade, nicks the complainant, causing bodily injury → perhaps 2nd degree assault, if the jury finds that the defendant recklessly caused bodily injury by means of an object -- if strict liability were the standard, the jury would find that "in fact" the switchblade was a per se dangerous weapon;[15] likely the same result if negligence were the standard as the jury would almost surely find that the

[10] This objection and corresponding recommendation applies throughout the Offenses Against Persons Chapter of the RCC, not just to the Assault Section.

[11] RCC § 22A-1202(f) at Report #15, page 4.

[12] RCC §22A-1202(c)(1) at Report #15, page 3 (emphasis added).

[13] See RCC §22A-1001(4)(A) – (E).

[14] See RCC §22A-1001(4)(F).

[15] See RCC §22A-1001(4)(B); (13)(E).

defendant was negligent in failing to perceive a substantial risk that the object in her hand was a switchblade, a per se dangerous weapon.

C. Defendant swings heavy cloth purse at complainant's derriere, the heavy object inside the purse, a Kindle tablet, causes bodily injury (physical pain) → similar to (A) but more likely than (A) to result in RCC 5th degree assault (versus just RCC 2nd degree offensive physical contact) because the jury might more easily find that the defendant was aware of a substantial risk that swinging a heavy cloth purse would cause bodily injury. But like (A), this would likely not result in a more severe assault gradation. A Kindle tablet is not a per se dangerous weapon. If the standard were negligence, it is unlikely that the jury would find that the defendant was negligent in failing to perceive a substantial risk that the manner in which she used the heavy cloth purse/Kindle tablet would likely result in death or serious bodily injury. It is similarly unlikely that strict liability has a different result; it is improbable that the jury would find, in fact, that the cloth purse/Kindle tablet, in the manner in which it was used was likely to cause death or serious bodily injury.

D. Defendant swings heavy cloth purse at complainant's derriere, the heavy object inside the purse causes bodily injury (physical pain). The heavy object is a firearm, a per se dangerous weapon.[16] If strict liability were the standard, the defendant in this scenario could be found guilty of RCC 2nd degree assault if the jury found that the defendant was aware of a substantial risk that swinging a heavy cloth purse would cause bodily injury; if the jury found that it was the heavy object in the purse that caused the bodily injury, then "in fact" the heavy object was a firearm, which is a per se dangerous weapon. Thus, the defendant is guilty of recklessly causing bodily injury by means of what, in fact, is a dangerous weapon. However, the negligence standard could lead to a different result, a result more proportionate to the previous hypos. To find the defendant guilty of RCC 2nd degree assault, the jury would have to find, much like in (C), that the defendant was aware of a substantial risk that the conduct of swinging a heavy cloth purse would result in bodily injury. Then, again, if the jury found that it was the heavy object within the cloth purse that caused the bodily injury, the jury would have to find that the defendant failed to perceive a substantial risk that the "heaviness" was a firearm (a per se dangerous weapon) or find that the defendant failed to perceive a substantial risk that the heavy object was used in a manner that was likely to cause death or serious bodily injury. It is possible that there will be evidence to show that the defendant was aware that the heaviness was a "firearm" or, more accurately, there could be evidence that would create a substantial risk that the heaviness is a firearm and the defendant was negligent in failing to perceive that risk. Even though using a firearm as a weight in a cloth purse to hit someone on their derriere is not the intended use of a firearm and is not likely to cause death or serious bodily injury, PDS does not object to applying the per se dangerous weapon to enhance assault in this way. PDS strongly objects however to enhancing

[16] See RCC § 22A-1001(4)(A).

assault to a more severe gradation based on strict liability that the mystery heavy object happens to be a firearm.

PDS recommends the dangerous weapon circumstance element be worded as follows (with modifications as necessary for the various levels of bodily injury): "recklessly causes bodily injury to another person by means of ~~what, in fact, is~~ an object and is negligent as to the object being a dangerous weapon."

4. PDS objects to Fourth Degree Assault criminalizing negligently causing bodily injury with an unloaded firearm. Criminalizing negligent conduct is severe and should be done rarely. The particular problem with Fourth Degree Assault is applying such a low mental state to conduct that is indistinguishable from conduct that would have the same result. Negligently causing bodily injury by means of an unloaded firearm is indistinguishable from negligently causing bodily injury by means of a cloth purse/Kindle tablet or by means of a rubber chicken. What sets a firearm apart from other objects or even other weapons is its use *as a firearm* (to fire a projectile at a high velocity), not its use as a heavy object or club. For this reason, PDS does not object to criminalizing negligently causing bodily injury by the discharge of a firearm. Fourth Degree Assault should be rewritten as follows: "Negligently causes bodily injury to another person by means of the discharge of what, in fact, is a firearm as defined at D.C. Code § 22-4501(2A)~~, regardless of whether the firearm is loaded~~;…"

Report #16: Recommendations for Robbery

1. PDS recommends rewriting Third Degree Robbery (on which all of the more serious gradations are based) and Second Degree Criminal Menace so that they are not circular. As currently written, one of the ways to commit Third Degree Robbery is to take property of another from the immediate actual possession or control of another by means of committing conduct constituting a Second Degree Criminal Menace.[17] Second Degree Criminal Menace can be committed when a person communicates to another person physically present that the person immediately will engage in conduct against that person constituting Robbery.[18] PDS agrees with the approach that a form of robbery could be committed by taking property of another by means of having made a communication threatening bodily injury and agrees that a form of criminal menacing could be committed by threatening to take property by use of force. Each offense statute however should be rewritten to specify culpable conduct without circular references to other offense statutes.
2. PDS objects to incorporating attempt conduct into the completed Robbery offense. Heretofore, the RCC has adopted the laudable principle of punishing attempts separately from completed

[17] RCC §22A-1201(d)(4)(C).

[18] RCC §22A-1203(b)(2)(B). Note, RCC §22A-1203(b)(2) uses the word "defendant;" this is clearly a typo and should be changed to "person."

conduct. [19] However, PDS is willing to accept incorporating attempt in this instance on two conditions. One, the commentary must include a concise statement that the attempt only applies to the element of taking or exercising control over the property; attempted or "dangerously close" conduct will not suffice for any other element of Robbery. Two, element (4) must be rewritten to eliminate the "facilitating flight" language.

RCC Robbery does not have a requirement of asportation or movement of the property.[20] That makes sense; if a completed robbery no longer requires property to have been taken – indeed, it does not require that there even be property[21] – then completed robbery cannot require property to have been moved.[22] Similarly, flight or facilitating flight is intrinsically tied to taking (controlling) the property. "A thief who finds it necessary to use force or threatened force after a taking of property in order to retain possession may in legal contemplation be viewed as one who never had the requisite dominion and control of the property to qualify as a 'possessor.' Hence, it may be reasoned, the thief has not 'taken' possession of the property until his use of force or threatened force has effectively cut off any immediate resistance to his 'possession.'"[23] District case law supports the nexus between taking property and flight. *Williams v. United States*,[24] cited in Report #16 to support the notion that force after the taking constitutes "robbery,"[25] does hold that the robbery was "still in progress" when the defendant was fleeing. However, *Williams* is clear in basing its analysis on "the asportation of goods" and in examining the particular circumstances that the defendant "was acting as a principal in effecting a robbery *by carrying away the proceeds of that robbery*."[26] Because pursuant to RCC Robbery, the robbery can be completed without having exercised control of the property (or without there being property) and

[19] See e.g., Report #9, page 54, Arson; Report #9, page 70, Reckless Burning; Report #9, page 81, Criminal Destruction of Property; Report # 10, page 6, Fraud; Report # 11, page 5, Extortion.

[20] Report #16, page 12.

[21] See Report #16, page 13, n. 56 ("For example, if a person causes bodily injury to another in an attempt to take property from that person, but finds that other person does not actually possess any property …, that person could still be found guilty of robbery.")

[22] Compare robbery that requires a taking ("shall take") and has an asportation requirement, even if minimal with armed carjacking that allows "attempts to do so" and does not require asportation.

[23] Report #16, page 16, n. 80 (Quoting 4 Charles E. Torcia, Wharton's Criminal Law § 463, at 39-40 (15th ed. 1996))(emphasis added).

[24] 478 A.2d 1101 (D.C. 1984).

[25] Report #16, page 16, n. 82.

[26] *Williams*, 478 A.2d at 1105. ("The asportation under our analysis continues so long as the robber indicates by his actions that he is dissatisfied with the location of the stolen goods immediately after the crime…" (emphasis added)).

because there is no "carrying away" requirement, District law does not, in fact, support extending the duration of robbery to include flight. Thus, "robbery" should complete when the person takes, exercises control over, or attempts to take or exercise control over, the property of another from the immediate actual possession or control of another by means of [physical force that overpowers]. This construction does not mean that the intent to take the property must be formed before the force is used nor does it mean that the force must be used with the purpose of creating an opportunity to take property.[27] It does mean, however, that the force necessary to elevate the conduct from a theft from the person to a robbery must occur before or simultaneous to the taking of the property; the force must create the opportunity to take or exercise control or the attempt to take or exercise control of the property. If the force occurs after the property is taken, then it is not a robbery. The taking is a theft from person and the force might separately be an assault.

3. As noted above, PDS supports the intent embodied in the structure of proposed RCC Chapter 12 to reduce unnecessary overlap of offenses and to improve the proportionality of penalties. Though the offenses are obviously meant to stack and build on each other, various "stray" elements mean that the offenses will not merge using a strict elements analysis. In addition, the way robbery is written, a more serious gradation could be charged based on an injury to someone other than the "victim" of the robbery (the robbery victim being the person in actual possession or control of the property).[28] It would not reduce overlap of offenses nor improve the proportionality of penalties to allow a conviction of a more severe gradation of robbery based on injury to a non-robbery victim and also allow an assault conviction for injury to the non-robbery victim when if the force were used against only the robbery victim, the assault or offensive touching or menacing conduct would merge.

   To further carry out the intent of the proposed structure, PDS strongly recommends that the RCC include a section that limits convictions for multiple related offenses against persons. Modeled on RCC § 22A-2003,[29] PDS proposes the following language be added to Chapter 12 of the RCC.

   > RCC § 22A-1206. Limitation on Convictions for Multiple Related Offenses Against Persons.
   >
   > (a) *Robbery, Assault, Criminal Menacing, Criminal Threats, or Offensive Physical Contact Offenses.* A person may be found guilty of any combination of offenses

[27] See Report #16, page 12, n. 17.

[28] An example would be a person who knocks Bystander out of the way in order to take wallet sitting on table in front of "robbery victim." The overpowering force used against Bystander would raise this taking to a robbery even though the property was in the control of the "robbery victim." See also Report #16, page 6, n. 14.

[29] See Report #8, First Draft at page 49.

contained in Chapter 12[30] for which he or she satisfies the requirements for liability; however, the court shall not enter a judgment of conviction for more than one of these offenses based on the same act or course of conduct against the same complainant or based on the same act or course of conduct when the offense against one person is used to establish a gradation for an offense against another person.

(b) *Judgment to be Entered on Most Serious Offense.* Where subsection (a) prohibits judgments of conviction for more than one of two or more offenses based on the same act or course of conduct against the same complainant, the court shall enter a judgment of conviction for the offense, or grade of an offense, with the most severe penalty; provided that, where two or more offenses subject to subsection (a) have the most severe penalty, the court may impose a judgment of conviction for any one of those offenses.

Report #17: Recommendations for Criminal Menace & Criminal Threats Offenses

PDS recommends that the RCC omit the words "criminal" in the titles of criminal threats and criminal menace language. The language is redundant and could cause the offenses to be judged more harshly in the contexts of employment, housing, and education.

[30] At this time, PDS is proposing this section to apply to robbery, assault, criminal menacing, criminal threats, and offensive physical contact. PDS anticipates proposing expanding this section or proposing another one to limit multiple related offenses for those offenses and homicide, sexual assaults, and kidnapping.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: May 11, 2018

SUBJECT: First Draft of Report #18 Solicitation and Renunciation

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 #18 Solicitation and Renunciation. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-304. Renunciation Defense to Attempt, Conspiracy, and Solicitation

Section 22A-304(a)(1) says that for the defendant to be able to use the affirmative defense of renunciation, the defendant must have engaged in conduct "sufficient to prevent commission of the target offense." The discussion of that provision says it was drafted that way to include situations where the defendant attempts to "persuade" a solicitee who was actually an informant not to commit a crime he or she was never going to commit in the first place. However, in order for the conduct to be "sufficient to prevent the commission of the target offense", the defendant's actions must have at least decreased the likelihood of the offense happening. But when a defendant is "persuading" an informant not to act, the defendant's actions have no effect on the probability that the criminal conduct will take place. This provision should be rewritten to specifically include both situations; where the defendant engages in conduct that is sufficient to

[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.

prevent the commission of the target offense, as well as where the defendant's actions would have been sufficient to prevent the offense, if the circumstances were as the defendant believed them to be. The provision could be redrafted as follows:

> (a) DEFENSE FOR RENUNCIATION PREVENTING COMMISSION OF THE OFFENSE. In a prosecution for attempt, solicitation, or conspiracy in which the target offense was not committed, it is an affirmative defense that:
>
> (1) The defendant engaged in conduct sufficient to prevent commission of the target offense or would have been sufficient to prevent the commission of the target offense if the circumstances were as the defendant believed them to be;
>
> (2) Under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent.

Section 22A-304(b)'s title states that it is the provision that defines when a renunciation is voluntary and complete. However, the paragraph that follows actually says what isn't voluntary and complete renunciation. It states, "A renunciation is not 'voluntary and complete' within the meaning of subsection (a) when it is motivated in whole or in part by… [certain circumstances]." This implies that a renunciation is voluntary and complete as long as none of the elements in (b) are satisfied.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: May 11, 2018

SUBJECT: First Draft of Report #19. Homicide

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 #19, Homicide. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-1101. Murder

Section 22A-1101 (a)(2)(E) makes it an aggravated murder when the requisite elements are met and "The defendant committed the murder after substantial planning…" As noted on page 6 of the memorandum, "Subsection (a)(2)(E) specifies that substantial planning is an aggravating circumstance. Substantial planning requires more than mere premeditation and deliberation. The accused must have formed the intent to kill a substantial amount of time before committing the murder." The phrasing of this subparagraph raises several issues. First, the plain meaning of the term "substantial planning" sounds as if the planning has to be intricate.[2] However, the Comment portion just quoted makes it sound like the word "substantial" refers to the amount of time the intent was formed prior to the murder. These provisions should be redrafted to clarify

[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] In other words, the planning was of considerable importance, size or worth.

whether the intent is to have the enhancement apply when the perpetrator plans the murder some period prior to actually committing it (even if it is a simple plan to just shoot the victim), whether the plan to commit the murder has to have many steps to it (even if it was conceived almost instantaneously with the commission of crime), or whether either will suffice.

If the term "substantial planning" refers to the time between the planning and the commission of the offense and that "Substantial planning requires more than mere premeditation and deliberation" How much more – and how will anyone know? As the discussion points out, premeditation can happen in the blink of an eye. How much more is needed for substantial planning?

Section 22A-1101 (a)(2)(I) makes it an aggravated murder when the requisite elements are met and "In fact, the death is caused by means of a dangerous weapon." However, this is a change from current District law. As noted on page 14 of the memorandum "Current D.C. Code § 22-4502 provides enhanced penalties for committing murder "while armed" or "having readily available" a dangerous weapon." While there may be arguments for not providing an enhancement for an unseen weapon that is not used, there should be enhancements for when weapons are used or brandished. For example, a perpetrator shoots a person in chest and then sits on the bleeding victim and chokes him to death. While it cannot be said that "the death was caused by means of a dangerous weapon" the use of the gun certainly prevented the victim from defending herself. Similarly, victims may be less likely to defend themselves if assailants have guns aimed at them while they are being assaulted. To take these scenarios into account, we suggest that § 22A-1101 (a)(2)(I) be redrafted such that the enhancement applies any time a weapon is displayed or used, whether or not it in fact caused the death.

Section 22A-1101 (f) establishes a mitigation defense. Subparagraph (1)(B) says one mitigation defense to murder is "[a]cting with an <u>unreasonable belief</u> that the use of deadly force was necessary…" [emphasis added] Our understanding is that this was intentional, and wasn't meant to say "<u>reasonable</u>." We ask because of the discussion of it on page 9 of the memorandum. That discussion seems to say that a reasonable belief of necessity would be a complete defense to murder, while an unreasonable belief merely mitigates murder down to manslaughter. But the leadoff sentence in the comment implies the opposite. It says that "[s]ubsection (f)(1)(B) defines mitigating circumstances to include acting under <u>a reasonable</u> belief that the use of deadly force was necessary" [emphasis added] – suggesting that a reasonable belief merely mitigates down to manslaughter. This discussion needs to be clarified.

Subparagraph (3) of § 22A-1101(f) explains the effect of the mitigation defense. It states:

> (A) If the government fails to prove the absence of mitigating circumstances beyond a reasonable doubt, but proves all other elements of murder, the defendant shall not be found guilty of murder, but may be found guilty of first degree manslaughter.

> (B) If the government fails to prove the absence of mitigating circumstances beyond a reasonable doubt, but proves all other elements of murder, and that the defendant was reckless as to the victim being a protected person, the defendant shall not be found guilty of murder, but may be found guilty of aggravated manslaughter.

Paragraphs (A) and (B) dictate what the defendant is guilty of if the government fails to prove the absence of mitigation circumstances beyond a reasonable doubt. We have a few observations and suggestions concerning this provision.

First, paragraphs (A) and (B) are written in terms of what a trier of fact may do as opposed to what the law is concerning mitigation (i.e. "shall not be found guilty of murder, but may be found guilty…"). These paragraphs should be rewritten to state what the law is concerning mitigation, as follows:

> (A) If the government fails to prove the absence of mitigating circumstances beyond a reasonable doubt, but proves all other elements of murder, the defendant is not guilty of murder, but is guilty of first degree manslaughter.
>
> (B) If the government fails to prove the absence of mitigating circumstances beyond a reasonable doubt, but proves all other elements of murder, and that the defendant was reckless as to the victim being a protected person, the defendant is not guilty of murder, but is guilty of aggravated manslaughter.

Second, a successful mitigation defense results in a conviction for either first degree or aggravated manslaughter not withstanding that, but for the mitigation defense, the person committed an aggravated murder, first degree murder, or second degree murder. In other words, the penalties for committing these offenses are no longer proportionate to the conduct. More egregious conduct is penalized the same as less egregious conduct. There are a number of ways that the Commission could make these offenses proportionate. For example, a successful mitigation defense could lower the offense by one level.[3]

[3] Under this proposal a person who would have been guilty of aggravated murder, but for a successful mitigation defense would be guilty of first degree murder, and a person who would have been guilty of first degree murder, but for a successful mitigation defense would be guilty of second degree murder.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: May 11, 2018

SUBJECT: First Draft of Report #20. Abuse & Neglect of Children, Elderly, and Vulnerable Adults

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 #20 - Abuse & Neglect of Children, Elderly, and Vulnerable Adults.

COMMENTS ON THE DRAFT REPORT

RCC § 22A- Section 1501 and 1502. Child Abuse and Child Neglect.[1]

The Commission should consider changing the names of these proposed offenses. The terms "child abuse" and "child neglect" have long been associated with the District's child welfare system. See D.C. Code § 16-2301 (9). Calling the criminal offense and the civil offense by the same name will cause unnecessary confusion. We recommend renaming the RCC child abuse provision, "criminal cruelty to a child" and renaming RCC child neglect, "criminal harm to a child."[2]

RCC § 22A- Section 1501. Child Abuse.

[1] Third Degree Child Abuse includes "Recklessly … us[ing] physical force that overpowers a child." As noted in previous memoranda and discussions, the term "overpower" is not defined.
[2] There may be other names that the Commission may choose that avoids confusion with the child welfare system.

In establishing the offense degree, the Child abuse statute utilizes the terms "serious bodily injury" and "significant bodily injury" that were developed to distinguish between the various degrees of offenses against persons. While those definitions may be appropriate when distinguishing between injuries for adults, they are not sufficient to distinguish between injuries to a baby or small child. Either the definitions need to be expanded or additional degrees of child abuse need to be established. For example, it appears that the following injuries to a baby would not qualify as a first or second degree child abuse: regularly failing to feed the baby for 24 hours; causing a laceration that is .74 inches in length and less than a quarter of an inch deep; failing to provide medicine as prescribed, which causes the baby to suffer pain, problems breathing, or a serious rash; holding a baby's hand against a stove causing a first degree burn; and chocking the child, but not to the point of loss of consciousness.[3] As drafted, a parent who injured a child in one of the ways described in these examples would be guilty of third decree child neglect along with parents who merely "Recklessly fail[ed] to make a reasonable effort to provide food, clothing, shelter, supervision, medical services, medicine, or other items or care essential for the physical health, mental health, or safety of a child." [4]

RCC § 22A- §1501 (f)(1) establishes the parental discipline defense. Subparagraph (D) limits the defense to conduct that does not include burning, biting, or cutting the child; striking the child with a closed fist; shaking, kicking, or throwing the child; or interfering with the child's breathing. We suggest that that list be expanded to include, interfering with the child's <u>blood flow to the brain or extremities.</u>

[3] This is a representative list of injuries that someone may inflict on a baby that, under the current draft, appears either to be a third degree child abuse or not child abuse at all.
[4] Similarly, it is not clear what offense a parent would be committing if the parent intentionally blew PCP smoke into a baby's face or fed the baby food containing drugs, which did not cause a substantial risk of death or a bodily injuy.

MEMORANDUM

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

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

From: Laura E. Hankins, General Counsel

Date: May 11, 2018

Re: Comments on First Draft of Report No. 18, Solicitation and Renunciation

The Public Defender Service objects to the restriction in proposed RCC § 22A-304, Renunciation Defense to Attempt, Conspiracy, and Solicitation, that the defense is only available if the target offense was not committed. PDS recommends that the District of Columbia join the "strong plurality of reform jurisdictions [that] relax the … requirement that the target of the offense attempt, solicitation, or conspiracy actually be prevented/thwarted."[1]

Specifically, PDS recommends rewriting subsection (a) of RCC §22A-304 as follows:

> (a) DEFENSE FOR RENUNCIATION PREVENTING COMMISSION OF THE OFFENSE. In a prosecution for attempt, solicitation, or conspiracy ~~in which the target offense was not committed~~, it is an affirmative defense that:
>
> (1)(A) The person ~~defendant~~ gave a timely warning to law enforcement authorities; or
>
> (B) The person made a reasonable effort to prevent the commission of the target offense; ~~engaged in conduct sufficient to prevent commission of the target offense;~~
>
> (2) Under circumstances manifesting a voluntary and complete renunciation of the person's ~~defendant's~~ criminal intent.

The PDS proposal does more to further both the incapacitating dangerous persons and the deterrence purposes of the renunciation defense.[2] For a solo criminal venture, "renouncing" the target offense,

[1] Report #18, pages 47- 48.

[2] Report # 18, page 49.

particularly when done under circumstances manifesting a voluntary and complete renunciation of the person's criminal intent, will almost always actually prevent the commission/completion of the target offense. Both the dangerousness and the deterrence purposes are served; the defendant's "reward of remission of punishment"[3] results in society benefitting from less crime. Even where the criminal venture involves more than one person, if the venture would end if one key person decides to stop participating, then the target offense will be actually prevented if that key person renounces. The problem is how to motivate a person to try to prevent or thwart the criminal venture if the venture will likely go forward whether that person continues his participation or not. The greater the chance that one of the [potential] participants will receive "the reward of remission of punishment," the greater the chance society has of benefitting from less crime. Where there is some chance that the crime will not actually be thwarted despite a person's reasonable efforts, the person's motivation to attempt renunciation then depends on the person's perception of his or her chances of being apprehended. If the person can just walk away from the venture, believing there is little chance that his involvement (solicitation or conspiracy or even steps sufficient to comprise attempt) will be prosecuted or maybe even realized by law enforcement authorities, there is more incentive to walk away and less incentive to make efforts to thwart the target offense, particularly by contacting law enforcement. Requiring that a person give timely warning to law enforcement or make other reasonable efforts to prevent the commission of the target offense encourages renunciation, encourages a person to take steps that might be sufficient to prevent the target offense and to take those steps even when they cannot guarantee they will be sufficient. Society benefits more from encouraging a potential participant to take a chance on preventing the crime rather than taking a chance on getting away with the crime (the crime of attempt, solicitation and/or conspiracy).

[3] Report #18, page 49.

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	The Public Defender Service for the District of Columbia
Date:	May 11, 2018
Re:	Comments on First Draft of Report No. 19, Homicide

PDS has the following comments and suggestions for the RCC's homicide offenses.

1. Elimination of Aggravated Murder and Reconsideration of Aggravating Circumstances

PDS proposes that the RCC eliminate the offense of aggravated murder, RCC § 22A-1101(a). One problem with RCC § 22A-1101(a), identified by PDS at the May 2nd public meeting of the CCRC, is its inclusion of "in fact, the death was caused by means of a dangerous weapon" as a circumstance element sufficient to raise first degree murder to aggravated murder. The use of a dangerous weapon is exceedingly common in homicides – it is how most murders are committed. According to the Metropolitan Police Department Annual Report for 2016[1], during the previous five year period, 91% of homicides were committed with a gun or knife. Blunt force trauma accounted for 7% of homicides, the vast majority of which would have also involved the use of an object that would likely meet the definition of "dangerous weapon." For the remaining 2% of homicides, 1% was committed by strangulation and 1% by other means not specified. Thus the RCC's definition would make between 91 and 98 percent of all homicides in the District an "aggravated murder." The RCC's goal of creating proportionality between offenses would be defeated if every homicide could be charged as aggravated murder.

Rather than having an offense of aggravated murder, PDS suggests that the RCC retain first degree and second degree murder as in the current Code. PDS questions the need for having any aggravating circumstances to add to the maximum punishment for murder. Both first and second degree murder will already carry high statutory maximum prison sentences, leaving room for judges to exercise their discretion to sentence defendants to greater sentences based on the

[1] Available at: https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/MPD%20Annual%20Report%202016_lowres.pdf

particular circumstances of the case or the unique vulnerability of the decedent. Statutes allowing for even greater sentences for murder in particular instances are thus not necessary.

However, in so far as the CRCC believes it needs to include in the RCC certain aggravating circumstances, such as for instance, the killing of a child or of a police officer, PDS suggests that the RCC include a separate enhancement or aggravator provision. While other parts of the RCC incorporate traditional enhancements or aggravators within different offense grades, PDS recommends the RCC treat murder differently. A separate statute for aggravating factors would also provide clarity because as currently drafted many of the aggravating factors listed in RCC § 22A-1101 cannot be logically applied in the sections where they have been assigned. For instance, it is first degree murder when a person acting with "extreme recklessness"[2] causes the death of another[3] after substantial planning.[4] A separate enhancement section would resolve the factual impossibilities included in this drafting.

2. Reconsideration of Aggravators

As drafted, the RCC provides an aggravating factor to homicide where the decedent is a minor, an adult age 65 or older, a vulnerable adult, a law enforcement officer, a public safety employee, a participant in a citizen patrol, a transportation worker, a District employee or official, or a family member of a District official or employee. While some of these aggravators are long-standing or included in the Code as stand-alone offenses, for instance the murder of a police officer in the course of his or her duties[5], the RCC proposes to add the murder of District employees and their family members to the list of possible aggravators. This addition is not justified. There is not a unique and across the board vulnerability for all District of Columbia employees and their families that warrants their addition to this list. For example, a dispute at the Fort Totten Waste Transfer Station that leads to the death of a District employee is not categorically more dangerous to the community than an employee's death at a similar privately-run facility. PDS recommends removing District employees and their family members from this list of possible aggravators. If there is a particular vulnerability that makes the murder of a District employee more dangerous or blameworthy, judges will have sufficient discretion to sentence defendants to the statutory maximum in such instances. Since the statutory maxima will necessarily be high for murder offenses, it will allow for judicial differentiation in sentencing in instances where the defendant's culpability is heightened because of the decedent's status.

[2] "Extreme recklessness" is shorthand for "recklessly, under circumstances manifesting extreme indifference to human life," the mens rea for second degree murder at RCC § 22A-1101(c).

[3] RCC §§ 22A-1101(b)(2), (c).

[4] RCC § 22A-1101(b)(2)(E).

[5] D.C. Code § 22-2106, murder of law enforcement officer.

The RCC also provides aggravators when the defendant mutilated or desecrated the decedent's body or when the defendant knowingly inflicted extreme physical pain or mental suffering for a prolonged period of time immediately prior to the decedent's death. This type of evidence typically would not be relevant to the question of whether the defendant committed the charged offense and therefore would often be inadmissible in a criminal trial.[6] However, as the RCC is currently drafted, evidence of these aggravating circumstances would have to be presented to a jury and would be presented at the same time as all the other evidence in the case. In cases where the defense asserts that another individual committed the crime or that the defendant was misidentified, the evidence of torture or desecration of the decedent's body would be highly inflammatory and would not add anything to the jury's consideration of the key questions in the case.[7] For this reason, PDS recommends that if the RCC keeps these provisions as aggravators, the RCC should also include a requirement that this evidence can only be introduced and proved at a separate hearing in front of a jury following an initial guilty verdict.

PDS also questions the need for a separate aggravator for homicides perpetuated because the decedent was a witness in a criminal proceeding or had provided assistance to law enforcement. This aggravating circumstance would also be charged as the separate substantive offense of obstruction of justice.[8] Creating an aggravating circumstance that will be amply covered by a separate offense contravenes the CCRC's goal of streamlining offenses and eliminating unnecessary overlap.

3. Elevation of Mens Rea in First Degree Murder

PDS recommends that the RCC use the mens rea of purposely in first degree murder. RCC § 22A-1101(b), first degree murder, currently requires a mens rea of knowingly rather than purposely. While the definitions of knowingly and purposely are closely related, purposely is a

[6] Only relevant evidence is admissible in a criminal trial. For evidence to be relevant, it must be "related logically to the fact that it is offered to prove, ... the fact sought to be established by the evidence must be material ... and the evidence must be adequately probative of the fact it tends to establish." *Jones v. United States*, 739 A.2d 348, 350 (D.C.1999) (internal citations omitted). The trial judge has the discretion to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. "Unfair prejudice" within this context means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Mercer v. United States*, 724 A.2d 1176, 1184 (D.C. 1999).

[7] *See Chatmon v. United States*, 801 A.2d 92, 101 (D.C. 2002) (noting that the prosecutor's repeated reference to a photo of the decedent in a pool of blood while asking jurors to come to a decision that they could live with was improper and calculated to enflame the passions of the jury without adding to the proof in the case).

[8] D.C. Official Code § 22-722, obstruction of justice.

higher mental state and requires a "conscious desire" to bring about a particular result.[9] The RCC should use the highest mental state to describe the most serious and severely punished crimes in the Code. The RCC requires purposely as the mental state for aggravated assault (RCC § 22A-1202), child abuse (RCC § 22A-1501), first degree abuse of a vulnerable adult (RCC § 22A-1503), and unlawful obstruction of a bridge to the Commonwealth of Virginia (RCC § 22A-2605). The RCC should not use a lower mens rea for first degree murder.

4. Retention of the Element of Premeditation and Deliberation in First Degree Murder

PDS recommends that first degree murder in the RCC have as an element that the person acted with premeditation and deliberation as is currently required by the Code for first degree murder. RCC § 22A-101(b) removes this element from first degree murder. While the CCRC notes in the commentary that the DCCA has interpreted this element as requiring little more than turning a thought over before reaching the decision to kill,[10] in practice, this element is critical to separating impulsive murders from those committed with some degree of forethought. The distinction has been important for the United States Attorney's Office in making decisions about charging a homicide as first degree or second degree murder. The element of premeditation and deliberation has appropriately limited the cases that the United States Attorney's Office brings as first degree murder to those where there is the additional culpability of some form of deliberation. Rash homicides that take place over the course of several angry seconds or that stem from immediate action after or during a dispute may meet the technical definition of deliberation, but are not charged this way. The additional reflection is a meaningful way of differentiating between the offenses of first degree and second degree murder and should not be lightly set aside by the CCRC.

5. Drafting Recommendation for First Degree Murder

RCC § 22A-1101 Murder.

(b) *First Degree Murder.* A person commits the offense of first degree murder when that person:

(1) ~~Knowingly~~ Purposely causes the death of another person; ~~or~~
(2) with premeditation and deliberation; ~~or~~
~~(2) Commits second degree murder and either:~~
~~(A) The death is caused with recklessness as to whether the decedent is a protected person;~~
~~(B) The death is caused with the purpose of harming the complainant because of the complainant's status as a:~~
~~(i) Law enforcement officer;~~

[9] RCC § 22A-206(a), purpose defined.

[10] Report #19, pages 25-26.

~~(ii) Public safety employee;~~
~~(iii) Participant in a citizen patrol;~~
~~(iv) District official or employee; or~~
~~(v) Family member of a District official or employee;~~
~~(C) The defendant knowingly inflicted extreme physical pain or mental suffering for a prolonged period of time immediately prior to the decedent's death;~~
~~(D) The defendant mutilated or desecrated the decedent's body;~~
~~(E) The defendant committed the murder after substantial planning;~~
~~(F) The defendant committed the murder for hire;~~
~~(G) The defendant committed the murder because the victim was or had been a witness in any criminal investigation or judicial proceeding, or because the victim was capable of providing or had provided assistance in any criminal investigation or judicial proceeding;~~
~~(H) The defendant committed the murder for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; or~~
~~(I) In fact, the death is caused by means of a dangerous weapon.~~

6. Drafting Recommendation for Second Degree Murder

PDS recommends changes to RCC § 22A-1101(c), second degree murder, to accommodate the changes made to first degree murder and the retention of premeditation and deliberation in first degree murder. PDS recommends adding to the definition of second degree murder, murders that are committed knowingly, but without premeditation and deliberation. Many of the District's homicides that are committed with firearms would constitute knowingly causing the death of another. In such instances, where there is not premeditation and deliberation, that individual's mental state much more closely aligns with knowing that death is certain than with being reckless that death may result. Where the conduct is knowing, but without premeditation and deliberation, the offense definition and the instructions that a jury receives should more closely fit the conduct. It would be a fiction to call that mental state in all instances merely one of recklessness. The option of knowingly committing the homicide should exist within second degree murder.

PDS therefore recommends the following language:

(c) *Second Degree Murder*. A person commits the offense of second degree murder when that person:

(1) Knowingly causes the death of another person; or

(2) Recklessly, under circumstances manifesting extreme indifference to human life, causes the death of another person; or

(3) Negligently causes the death of another person, other than an accomplice, in the course of and in furtherance of committing, or attempting to commit aggravated arson, first degree arson, [first degree sexual abuse, first degree child sexual

abuse,] first degree child abuse, second degree child abuse, [aggravated burglary], aggravated robbery, first degree robbery, second degree robbery, [aggravated kidnapping, or kidnapping]; provided that the person or an accomplice committed the lethal act; and

7. Availability of Mitigation Defense

PDS recommends rewriting part of the mitigation defense to recognize that the defendant may act with belief that deadly force was necessary to prevent someone other than the decedent from unlawfully causing death or serious bodily injury. For example, the defendant may have believed (unreasonably) that X was about to kill or seriously injure him; when reaching for a gun, the defendant is jostled so he fatally shoots Y rather than X. Just as a person would still be liable if he with premeditation and deliberation aimed to shoot X but due to poor aim or a defective firearm fatally shot Y instead, a person should still be able to avail himself of the mitigation defense if he causes the death of someone other than the person he believes is threatening death or seriously bodily injury. Further, the change PDS proposes would bring this part of the mitigation defense, at RCC § 22A-1101(f)(1)(B), in line with another, at RCC § 22A-1101(f)(1)(A). As explained in Report # 19, the "'extreme emotional disturbance' [that is mitigating pursuant to § 22A-1191(f)(1)(A)] need not have been caused wholly or in part by the decedent in order to be adequate."[11]

PDS proposes rewriting §22A-1101(f) as follows:

(f) *Defenses.*
(1) *Mitigation Defense.* In addition to any defenses otherwise applicable to the defendant's conduct under District law, the presence of mitigating circumstances is a defense to prosecution under this section. Mitigating circumstances means:
(A) Acting under the influence of an extreme emotional disturbance for which there is a reasonable cause as determined from the viewpoint of a reasonable person in the defendant's situation under the circumstances as the defendant believed them to be;
(B) Acting with an unreasonable belief that the use of deadly force was necessary to prevent ~~the decedent~~ another person from unlawfully causing death or serious bodily injury; ….

8. Burden of Proof for Mitigation Defense

RCC § 22A-1101(f)(2) frames mitigating circumstances in first and second degree murder as an element or multiple elements that must be disproved by the government if "evidence of mitigation is present at trial." PDS recommends that RCC §22A-1101(f)(2,) burden of proof for

[11] Report #19, page 18.

mitigation defense, mirror DCCA case law on the amount of evidence that must be presented to trigger the government's obligation to disprove the existence of any mitigating circumstances. Under current law, a defendant is entitled to a jury instruction such as mitigation for first degree and second degree murder or self defense if "the instruction is supported by any evidence, however weak."[12]

PDS recommends redrafting RCC § 22A-1101(f)(2) as follows:

> *Burden of Proof for Mitigation Defense*.
>
> If <u>some</u> evidence of mitigation<u>, however weak,</u> is present at trial, the government must prove the absence of such circumstances beyond a reasonable doubt.

9. <u>Manslaughter</u>

For clarity and consistency, PDS recommends that the RCC eliminate the offense of aggravated manslaughter, RCC § 22A-1102(a) and group status based aggravators where the decedent is, for instance a law enforcement officer or public safety employee, in a separate aggravator statute.

PDS believes that manslaughter should remain a lesser included offense of first and second degree murder and therefore would request a specific statutory provision that makes manslaughter a lesser included offense of murder even if the elements of the revised offenses do not align under the *Blockburger* test.[13]

[12] *Murphy-Bey v. United States*, 982 A.2d 682, 690 (D.C. 2009); *see also Henry v. United States*, 94 A.3d 752, 757 (D.C. 2014) (internal citations omitted) "Generally, when a defendant requests an instruction on a theory of the case that negates his guilt of the crime charged, and that instruction is supported by any evidence, however weak, an instruction stating the substance of the defendant's theory must be given."

[13] *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

MEMORANDUM

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

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

From: The Public Defender Service for the District of Columbia

Date: May 11, 2018

Re: Comments on First Draft of Report No. 20, Abuse & Neglect of Children, Elderly, and Vulnerable Adults

The Public Defender Service makes the following comments RCC Section 1501, Child Abuse.

1. Age Difference between the Child and the Adult

RCC § 22A-1501(a)-(c), first through third degree child abuse, prohibits abusive acts committed against children by parents, guardians, individuals acting in a parental role and by anyone, regardless of any parental role, who is more than two years older than the child. Under this definition, an 18 year old who fights with a 15 year old may be found guilty of child abuse. This would be the case although the 15 and 18 year old go to school together, take the same classes and play sports together. In this context, 15 and 18 year olds are very much peers, and physical conflicts between them should not be given the label of child abuse. The label does not make sense given the close age of the individuals involved and the comparable vulnerability of the 15 year old. A 15 year old is often as large and as strong as an 18 year old. A 15 year old often has a substantial degree of independence and the ability to seek help from members of his neighborhood or school community. A conviction for child abuse comes with significantly more stigma and probable collateral consequences than a conviction for assault. This is the case in part because the offense of child abuse connotes predatory and violent conduct towards young children who are incapable of defending themselves against adults. When the actors are 15 and 18 and the age difference is a little more than two years, the label of child abuse should not apply. PDS proposes the age difference be four years as it is with child sexual abuse at D.C. Code §§ 22-3008, 22-3009.

PDS therefore suggests the following modification to RCC§ 1501(a)-(c):

(2) In fact:

(A) that person is an adult at least ~~two~~ four years older than the child; or

(B) that person is a parent, legal guardian, or other person who has assumed the obligations of a parent.

2. Criminalizing the Use of Physical Force that Overpowers a Child

RCC §22A-1501(c), third degree child abuse, criminalizes any use of physical force that overpowers a child. Young children who are so much smaller than adults are easy to overpower with physical force without causing any physical or emotional harm. For instance, a child who is pushing in line, or cutting in line, could be carried to the back of a line by an adult with no relationship to the child. Physically removing a 10 year old to the back of a line in a way that does not cause any injury to the child should not be criminalized as child abuse. That contact may be a fourth or fifth degree assault pursuant to RCC § 22A-1202(e) and (f) and should be charged as such. Charging it as assault will adequately address the conduct without exaggerating the harm to the child by labeling the offense as child abuse.

PDS therefore recommends that the RCC amend third degree child abuse as follows:

(c) *Third Degree Child Abuse.* A person commits the offense of third degree child abuse when that person:

(1)

(A) In fact, commits harassment per § 22A-XXXX, menacing per § 22A-1203, threats per § 22A-1204, restraint per § 22A-XXXX, or first degree offensive physical contact per § 22A-1205(a) against another person, with recklessness that the other person is a child; or

(B) Recklessly causes bodily injury to~~, or uses physical force that overpowers,~~ a child; and

(2) In fact:

(A) That person is an adult at least ~~two~~ four years older than the child; or

(B) That person is a parent, legal guardian, or other person who has assumed the obligations of a parent.

3. Burden of Proof for Parental Discipline Defense

PDS also recommends a change in the RCC's language for the trigger for the reasonable parental discipline defense. RCC § 22A-1501(f)(2) provides that "if evidence is present at trial of the defendant's purpose of exercising reasonable parental discipline, the government must prove the

absence of such circumstances beyond a reasonable doubt."[1] The question of whether any exercise of parental discipline is reasonable is uniquely within the province of the jury. It is a fact-based inquiry that, according to the District of Columbia Jury Instructions, involves consideration of the child's age, health, mental and emotional development, alleged misconduct on this and other occasions, the kind of punishment used, the nature and location of the injuries inflicted, and any other evidence deemed relevant.[2] Any judicial finding on whether the issue of reasonable parental discipline has been raised should focus on whether there has been any evidence, however weak, that the defendant's purpose was parental discipline, not on the reasonableness of that discipline. Therefore PDS recommends removing "reasonable" from the burden of proof language.

In addition, for consistency with requests in other provisions, PDS suggests the following language:

> (f)(2) Burden of Proof for Parental Discipline Defense. If <u>some</u> evidence, <u>however weak</u>, is present at trial of the defendant's purpose of exercising ~~reasonable~~ parental discipline, the government must prove the absence of such circumstances beyond a reasonable doubt

4. <u>Merger Provision</u>

In order to limit offense overlap and duplication, PDS recommends that the RCC include a specific merger provision to allow for the merger of offenses prohibiting the abuse and neglect of vulnerable persons and assault offenses.

[1] Emphasis added.

[2] Criminal Jury Instructions for the District of Columbia, No. 4.100 (5th ed., rev.2017).

MEMORANDUM

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Laura E. Hankins
Date:	July 13, 2018
Re:	Comments on First Draft of Report No. 21, Recommendations for Kidnapping and Related Offenses

In general, the Public Defender Service for the District of Columbia supports the Criminal Code Reform Commission's approach to reforming the District's kidnapping statute, D.C. Code § 22-2001, by narrowing the offense of "kidnapping" and creating the offense of "criminal restraint." PDS makes the following specific comments.

1. PDS proposes rewriting Criminal Restraint, RCC §22A-1404, to address a number of issues related to how the offense treats families and guardians.

    A. Criminal restraint needs to be rewritten to clarify that (a)(2)(A), (B), and (C) are for conduct involving adult complainants and (a)(2)(D) is the only alternative available for charging criminal restraint of a person who is a child under the age of 16. This approach is supported by the commentary, which notes that the current kidnapping statute fails to specify and the DCCA has failed to determine "whether a person can commit kidnapping by taking a child with the child's consent, but without the consent of a parent or legal guardian." The commentary goes on to explain, "[h]owever, the RCC criminal restraint statute specifies that a person may commit criminal restraint by interfering with the freedom of movement of a person under the age of 16, if a parent, legal guardian, or person who has assumed the obligations of a parent has not freely consented to the interference, *regardless of whether the person under 16 has provided consent*."[1] If the consent of the person under 16 can be disregarded, then it should be clear that a person cannot be charged with criminal restraint pursuant to (a)(2)(A), (B), or (C), all of which base liability on whether the defendant had the consent of the person with whose freedom s/he interfered.

[1] Report # 21, page 35 (emphasis added).

B. PDS agrees with the Commission's decision to "set the age of consent for interference with freedom of movement at 16 years."[2] However, the Commission failed to account for the fact that persons under age 18 are still "children," both under current D.C. law, see e.g., D.C. Code § 16-2301(3), and as proposed for the RCC, see §22A-1001(23). And children must follow the instructions of their parent(s) or they may be found to be a "child in need of supervision." D.C. Code § 16-2301(8) defines a "child in need of supervision" as a child who "is habitually disobedient of the reasonable and lawful commands of his parent, guardian, or other custodian and is ungovernable."[3] Thus, a 16-year-old cannot decide to live someplace other than where his parent says he must live. A parent who tells her 17-year-old, "Stay in your room or you'll be sorry," should not be committing a criminal offense, even if the words are considered a threat to cause bodily injury (assuming the "threat" is to exercise reasonable parental discipline). PDS proposes that the 16 and 17 year olds be able to give or withhold consent regarding their freedom of movement with respect to persons who are not their parent or guardian; however, if a parent or guardian substantially interferes with the freedom of movement of a 16 or 17-year-old, then the conduct should not be criminal restraint.[4]

C. PDS strongly objects to the elimination of the "parent to a minor exception" to Kidnapping in D.C. Code §22-2001.[5] Understood in the context of the breadth of the kidnapping statute, excepting the conduct of parents to minors is sound policy that recognizes that minors must obey their parents' lawful commands, perhaps particularly with respect to their freedom of movement. "We're going on a trip and you're coming with us." "Go to your room." Do not leave this house." "You're living with your grandmother for the summer." RCC § 22A-1404, as drafted in Report # 21, fails to recognize this relationship. It criminalizes the conduct of parents but provides a defense. PDS proposes that for Criminal Restraint the conduct of parents, with respect to their children under age 18, be excepted from criminal liability as under the current statute.

D. PDS agrees with the Commission's recognition that persons age 18 or older may have legal guardians with the legal authority to dictate the freedom of movement of their wards.[6] However, the Commission fails to define "legal guardian" or recognize the variety of "guardianships," and grants too much authority to "legal guardians" and not enough authority to wards.

[2] Report # 21, page 35.

[3] D.C. Code § 16-2301(8)(A)(iii).

[4] The conduct of the parent or guardian could still be criminal under the child abuse and neglect statutes.

[5] "Whoever shall be guilty of …kidnapping… any individual by any means whatsoever, and holding or detaining…such individual … *except, in the case of a minor, by a parent thereof*, shall, upon conviction thereof, be punished by imprisonment…" D.C. Code § 22-2001 (emphasis added).

[6] See RCC §22A-1404(a)(2)(D) ("When that person is a child under the age of 16 *or a person assigned a legal guardian*…") (emphasis added).

District law allows for the appointment of a "guardian" to an "incapacitated individual" pursuant to Chapter 20 of Title 21 of the D.C. Code. An "incapacitated individual" is "an adult whose ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that he or she lacks the capacity to manage all or some of his or her financial resources or to meet all or some essential requirements for his or her physical health, safety, habilitation, or therapeutic needs without court-ordered assistance or the appointment of a guardian or conservator."[7] An adult might also be only "an incapacitated individual for health-care decisions."[8] A "guardian" may be a "temporary guardian," who is appointed for a finite period of time to serve as an "emergency guardian," a "health-care guardian," or a "provisional guardian."[9] A guardian may also be a "general guardian," whose guardianship is neither limited in scope nor in time by the court,[10] or a "limited guardian," whose powers are limited by the court and whose appointment may be for a finite period of time or for an indeterminate period of time.[11] In guardianship proceedings, the court is to "exercise [its] authority …so as to encourage the development of maximum self-reliance and independence of the incapacitated individual."[12] "When the court appoints a guardian, it shall appoint the type of guardianship that is least restrictive to the incapacitated individual in duration and scope…."[13] A general or a limited guardian may "take custody of the person of the ward and establish the ward's place of abode within or without the District, if consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward."[14] However, no guardian to an incapacitated individual has the power "to impose unreasonable confinement or involuntary seclusion, including forced separation from other persons…."[15]

PDS proposes that the offense of "criminal restraint" follow the framework of the guardianship laws by maximizing the self-reliance and independence of the person, despite the fact that they have a guardian, and do so by recognizing their ability to consent or to withhold consent to the substantial interference with their movement. On the other hand, guardians who have the legal authority to take physical custody of their ward should not be criminally liable for exercising that authority. Relatedly, a guardian with the authority to take physical custody of a person, meaning they have authority to dictate or restrict their ward's freedom of movement at least to some degree, should have

[7] D.C. Code § 21-2011(11).

[8] D.C. Code § 21-2011(11A).

[9] D.C. Code § 21-2011(8)(A).

[10] D.C. Code § 21-2011(8)(B).

[11] D.C. Code § 21-2011(8)(C).

[12] D.C. Code § 21-2044(a).

[13] Id.

[14] D.C. Code § 21-2047(b)(2).

[15] D.C. Code § 21-2047.01(7).

that authority accorded respect in the criminal code by criminalizing the conduct of a person who substantially interferes with the ward's freedom of movement without the consent of the guardian.

E. PDS proposes that, rather than making it a defense to a prosecution under what is currently RCC §22A-1404(a)(2)(D) that a person is a "relative" of the complainant, "relatives" be excepted from (a)(2)(D). The result is the same, the "relative" will not be convicted. The difference is whether on the way to that inevitable result, the relative can be charged with a crime, have an arrest record, be subject to pretrial detention or restrictions on his or her life, such as requirements to wear a GPS monitor, to submit to drug testing, to observe a curfew or a stay away for person(s) and/or location(s). In addition, because (a)(2)(D) necessarily involves a person under the age of 16, the conduct which constitutes that offense is always aggravated if the relative is more than 2 years older than the child. Since the aggravated form of the offense can almost always be charged, the burdens and risks of arrest – a worse charge on the arrest record, a greater likelihood of pretrial detention - correspondingly increase. The more fair and merciful approach would be to except the conduct rather than make it a defense.

In light of the above objections and proposals, PDS proposes rewriting the offense definition for criminal restraint as follows:

(a) *Offense Definition*. A person commits the offense of criminal restraint when that person:
  (1) Knowingly interferes to a substantial degree with another person's freedom of movement;
  (2) In one of the following ways;
    (A) When that person in fact is 18 years of age or older and, in fact, that person does not have a guardian with the legal authority to take physical custody of that person,:
      (i) Without that person's consent;
      (ii) With that person's consent obtained by causing bodily injury or a threat to cause bodily injury; or
      (iii) With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury; or
    (B) When that person is 16 or 17 years of age and the defendant is not the parent, legal guardian, or person who has assumed the obligations of a parent to that person:
      (i) Without that person's consent;
      (ii) With that person's consent obtained by causing bodily injury or a threat to cause bodily injury; or
      (iii) With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately

would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury; or

(C) When that person is a child under the age of 16 and the defendant is not a relative or legal guardian of the child, without the effective consent of that child's parent, person who has assumed the obligations of a parent, or legal guardian; or

(D) When that person is 18 years of age or older and has a guardian with the legal authority to take physical custody of that person, without the effective consent of that guardian.

2. PDS proposes that criminal restraint have a "Good Samaritan" defense for instances when a person substantially interferes with another's freedom of movement because the person has a reasonable belief that such interference is necessary to prevent imminent bodily harm to the other person. For example, a stranger seeing a young child wandering alone might, even knowing he does not have the consent of the child's parent, detain the child while he calls the police for help. Or an adult child of an elderly parent with dementia or Alzheimer's but who is not the "guardian" of their parent might, despite the protestations of the parent, bolt the doors of their shared home to prevent the parent from wandering off in the night and getting lost or wandering into traffic. PDS proposes the following language –

(d) *Defenses*. (1) It is a defense to prosecution under this section that the defendant acted based on a reasonable belief that such action was necessary to protect the complainant from imminent physical harm.

(2) Burden of proof – If evidence, however weak, is present at trial of the defendant's purpose to protect the complainant from imminent physical harm, the government must prove the absence of such circumstances beyond a reasonable doubt.

3. PDS proposes rewriting Kidnapping, RCC §22A-1402, to change how parents and guardians are treated under the offense. As it did for criminal restraint, PDS proposes that guardians of adult wards be treated separately and have their consent tied to the guardian's authority to take physical custody of their ward. PDS also proposes separate sections for persons who are 18 years of age or older, persons who are 16 or 17 years of age, and persons who are children under the age of 16. Although both persons who are 18 years of age or older and 16 and 17 year old are of the age of consent, PDS proposes treating them separately in order to accommodate guardians. Persons who are 18 years of age may or may not have guardians who have the legal authority to take physical custody of them, and that possibility matters for whether the consent of the adult (ward) or the guardian controls. In contrast, 16 and 17 year olds, always have guardians with the legal authority to take them in physical custody; they are generally called "parents." However, PDS supports the decision to make 16 the "age of consent" for freedom of movement. Unlike with criminal restraint, where PDS proposed excepting parents and, in some instances relatives, from criminal liability, PDS recognizes that the "with intent" element in kidnapping sufficiently narrows the criminal conduct. With one exception, PDS does not disagree that a parent,

guardian, or other relative, may not hold their minor child for ransom or reward, use their minor child as a shield of hostage, to facilitate the commission of any felony, etc. However, a parent, guardian, or person who has assumed the obligations of a parent must be free (not criminally liable) to substantially interfere with the freedom of movement with their minor child (under age 18) with the intent to inflict bodily injury when that infliction is in the exercise of parental discipline.

Specifically, PDS recommends that the offense definition of Kidnapping be written as follows:

(a) *Offense Definition*. A person commits the offense of kidnapping when that person:
  (1) Knowingly interferes to a substantial degree with another person's freedom of movement;
  (2) In one of the following ways;
    (A) When that person in fact is 18 years of age or older and, in fact, that person does not have a guardian with the legal authority to take physical custody of that person,:
      (i) Without that person's consent;
      (ii) With that person's consent obtained by causing bodily injury or a threat to cause bodily injury; or
      (iii) With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury; or
    (B) When that person is 16 or 17 years of age:
      (i) Without that person's consent;
      (ii) With that person's consent obtained by causing bodily injury or a threat to cause bodily injury; or
      (iii) With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury; or
    (C) When that person is a child under the age of 16, without the effective consent of that child's parent, person who has assumed the obligations of a parent, or legal guardian; or
    (D) When that person is 18 years of age or older and has a guardian with the legal authority to take physical custody of that person, without the effective consent of that guardian; 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 bodily injury upon the complainant, <u>except in the exercise of parental discipline by a parent, legal guardian, or person who</u>

has assumed the obligations of a parent against a complainant under the age of 18;

(E) ~~or to commit~~ Commit a sexual offense as defined in RCC XX-XXXX against the complainant;

(F) Cause any person to believe that the complainant will not be released without suffering significant bodily injury, or a sex offense as defined in RCC XX-XXXX;

(G) Permanently deprive a parent, legal guardian, or other lawful custodian of custody of a minor; or

(H) Hold the person in a condition of involuntary servitude.

PDS also recommends adding the term "parental discipline" to subsection (c), Definitions, and defining it by reference to the "parental discipline defense" for child abuse at RCC §22A-1501(f).

4. PDS recommends adding a Good Samaritan defense to Kidnapping, using the same language as proposed for Criminal Restraint.

5. PDS objects to aggravating kidnapping or criminal restraint based on the aggravator "with the purpose of harming the complainant because of the complainant's status."[16] Conduct against a law enforcement officer, public safety employee, citizen patrol member, or District official or employee is aggravated pursuant to subsection (a)(2)(A), when that person is a "protected person." The additional aggravator at subsection (a)(2)(B) is not justified. There is not a unique and across the board vulnerability for all District of Columbia employees and their families that warrants their addition to this list.

[16] Subsection (a)(2)(B) of both aggravated kidnapping and aggravated criminal restraint.

MEMORANDUM

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	July 13, 2018
Re:	Comments on First Draft of Report 22, Accomplice Liability and Related Provisions

The Public Defender Service for the District of Columbia makes the following comments on Report #22, Accomplice Liability and Related Provisions.

1. RCC § 22A-210 provides that a person is an accomplice in the commission of an offense by another when that person is "acting with the culpability required by that offense." Report #22 at footnote 5, states that any broader aspect of culpability, such as "proof of premeditation, deliberation, or the absence of mitigating circumstances" is encompassed within culpability when required by the specific offense.

   PDS wholeheartedly agrees with footnote 5 and believes it is consistent with and required by *Wilson-Bey v. United States*.[1] PDS is concerned, however, that this view of what culpability encompasses will not be applied if it remains only in a footnote to the commentary. RCC § 22A-201(d), Culpability Requirement Defined states that "culpability requirement" includes each of the following: "(1) The voluntariness requirement, as provided in § 22A-203; (2) The causation requirement, as provided in § 22A-204; and (3) The culpable mental state requirement, as provided in § 22A-205." It is unclear whether "premeditation, deliberation, or the absence of mitigating circumstances" are "culpability requirements" for principle liability given this definition and also unclear whether, from this definition, premeditation and deliberation and any lack of mitigating circumstances would be necessary for accomplice liability. Without a statutory definition broad enough to encompass premeditation, deliberation, and absence of mitigating circumstances, there is a substantial risk that culpability for accomplice liability would be

[1] *Wilson-Bey v. United States*, 903 A.2d 818, 822 (2006) (holding that in any prosecution for premeditated murder, whether the defendant is charged as a principal or as an aider or abettor, the government must prove all of the elements of the offense, including premeditation, deliberation, and intent to kill).

watered down. Even if practitioners and judges found footnote 5 to argue from, the narrow culpability requirement definition could be read to supersede a footnote from the commentary. PDS proposes amending the definition of "culpability requirement" to include premeditation and deliberation and any lack of mitigation.

2. RCC § 22A-210(a)(2) allows for accomplices to be held liable when, with the requisite culpability required for the offense, the defendant "purposely encourages another person to engage in specific conduct constituting that offense." The act of encouraging a criminal offense, even with the intent required for the commission of the offense, extends criminal liability to those who merely utter words in support of an offense but who have no meaningful impact on whether the offense is carried out.

   For example, two friends may be walking together after leaving a bar when one friend sees her ex-husband's car. The ex-wife hates her ex-husband and her friend knows all the reasons behind the hatred. The ex-wife sees a piece of metal on the ground and raises it to smash the windshield of her ex-husband's car. As she raises the piece of metal, she says to her friend, "I'm going to smash his windshield." The friend replies "go for it." Under RCC §22A-2503, criminal damage to property, the friend who said "go for it" would only need to possess a mental state of recklessness to be held liable as an accomplice for criminal damage to property. RCC § 22A-206 states that a person acts with recklessness with respect to a result when "(A) that person is aware of a substantial risk that conduct will cause the result; and (B) the person's conduct grossly deviates from the standard of care that a reasonable person would observe in the person's situation." It is PDS's understanding from the commentary to Report #22 and from the position of the CRCC that any causation requirement from RCC 22A § 201(d) would not apply to the substantive offense of criminal damage to property. Thus, the friend's encouraging words, "go for it" do not have to be a but for cause for the criminal damage to property.

   It unfair to hold people criminally liable for mere words, even if they are specific, when those words have no meaningful impact on the commission of an offense. The ex-wife was going to smash the window even in the absence of the encouraging words of "go for it." In such circumstances only one individual should be criminally liable for the conduct. Therefore, for the encouragement prong of RCC 22A-210, PDS recommends that the CRCC insert causation language to prevent punishment for de minimus conduct.

PDS suggests the following revision:

(a) DEFINITION OF ACCOMPLICE LIABILITY. A person is an accomplice in the commission of an offense by another when, acting with the culpability required by that offense, the person:

> (1) Purposely assists another person with the planning or commission of conduct constituting that offense; or

(2) Purposely encourages another person to engage in specific conduct constituting that offense and the encouragement is a substantial factor in the commission of the offense.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: July 13, 2018

SUBJECT: First Draft of Report #21. Recommendations for Kidnapping and Related 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 #21 - Recommendations for Kidnapping and Related Offenses.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-1401. Aggravated Kidnapping

The offense definition of aggravated kidnapping includes when a person commits kidnapping with the purpose of harming the complainant because of the complainant's role in public safety or their status as a District official or employee, or a family member of a District official or employee.[2] The word "harm", however, is not defined. Merriam-Webster defines harm as

[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] RCC § 22A-1401 (a)(2)(B) establishes that one of the ways that a person commits aggravated kidnapping is when they commit kidnapping as defined in RCC § 22A-1402 and who does this "With the purpose of harming the complainant because of the complainant's status as a [:] Law enforcement officer; Public safety employee; Participant in a citizen patrol; District official or employee; or Family member of a District official or employee…"

"physical or mental damage."[3] Therefore, one would assume that this word has a broader meaning then the phrase "bodily injury" which is contained in the definition of the underlining offense of kidnapping or that term would have been used in the aggravated assault provision. See RCC § 22A-1402(a)(3)(D). To avoid needless litigation, the Commission should either define the word "harm" or explain in the Commentary the difference between the definitions of "harm" and "bodily injury."

RCC § 22A-1401(d) states, "Multiple Convictions for Related Offenses. A person may not be sentenced for aggravated kidnapping if the interference with another person's freedom of movement was incidental to commission of any other offense."[4] This limitation appears to be included to address the situation where the victim was moved or detained for a brief distance or a brief period of time so that another crime can be committed. (e.g. The victim is moved from the mouth of an alley a few feet in so that he can immediately be robbed). What is left unanswered, however, is the boundaries of this exception. (e.g. The victim is moved from the mouth of an alley a few feet in so that he can be robbed but because a movie lets out the victim is kept in the alley for 20 minutes until everyone walks by.) The Commentary should give examples of what is clearly incidental to the commission of another crime and what is not.[5]

RCC § 22A-1402. Kidnapping

The offense of kidnapping requires that the person interferes with the victim's freedom of movement in specified ways. Paragraph (a)(2) lists those ways.[6] One of the ways is "With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury…" See RCC § 22A-1402 (a)(2)(C). It is not apparent from the text or the Commentary how the government could prove this counterfactual. The

[3] See https://www.merriam-webster.com/dictionary/harm

[4] The same limitation on sentencing is contained in the kidnapping, aggravated criminal restraint, and criminal restraint provisions. See RCC § 22A-1402 (e), RCC § 22A-1403 (d), and RCC § 22A-1404 (e).

[5] The same issue arises in the context of RCC § 1403, Aggravated Criminal Restraint, and RCC § 1404, Criminal Restraint. See RCC § 1403(a)(2)(B) and RCC § 1404(a)(2)(C).

6 RCC § 22A-1402 (a)(2) establishes the ways that a person's freedom of movement should not be substantially interfered with. They are:

(A) Without that person's consent;
(B) With that person's consent obtained by causing bodily injury or a threat to cause bodily injury;
(C) With that person's consent obtained by deception, provided that, if the deception had failed, the defendant immediately would have obtained or attempted to obtain consent by causing bodily injury or a threat to cause bodily injury; or
(D) When that person is a child under the age of 16 or a person assigned a legal guardian, without the effective consent of that person's parent, person who has assumed the obligations of a parent, or legal guardian;

victim in this situation has been deceived. He or she would have no way of knowing what the person would have done had the deception failed and, so, the government would not have evidence that enables it to meet this offense prong. The Commentary does not shed any light either on how this element would be proved or whether any other Model Penal Code jurisdiction has adopted an element that requires the government to prove what would have happened, but did not.

Additionally, to be convicted of kidnapping the deceived victim, the government must prove the first element of the offense, that is that the person "knowingly interferes to a substantial degree with another person's freedom of movement." See RCC § 1402(a)(1). But so long as the deception lasts, it cannot be said that the victim's freedom of movement was curtailed because the victim chose to be in the location where he or she was.

The same issue arises when the victim is under the age of 16. Paragraph (a)(2) states that a person can commit the offense of kidnapping, "When that person is a child under the age of 16 or a person assigned a legal guardian, without the effective consent of that person's parent, person who has assumed the obligations of a parent, or legal guardian." See RCC § 22A-1402 (a)(2)(D). On page 12 of the Commentary it states, "enticing a child to get into a car and remain in the car as it drives away with the truthful promise of candy at the final destination may constitute kidnapping assuming the defendant also satisfied the intent requirement under subsection (a)(3)."[7] However, to be convicted of kidnapping a child the government must also prove the first element of the offense, that is that the person "Knowingly interferes to a substantial degree with another person's freedom of movement." See RCC § 1402(a)(1). But if the child willingly goes into the car and happily stays there then it cannot be shown that the child's freedom of movement has been interfered with. The child has merely been persuaded to stay in the car.[8]

The offense of kidnapping requires that the person restrains the victim's movement with a specified intent. Subsection RCC 22A-1402 § (a)(3)(A) specifies that kidnapping includes acting with intent to hold the complainant for ransom or reward. However, the Commentary, on page 11 states, "Holding a person for ransom or reward requires demanding anything of pecuniary

[7] RCC § 22A-1402 (a)(3) establishes the intent element for kidnapping. They are 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 bodily injury upon the complainant, or to commit a sexual offense as defined in RCC XX-XXXX against the complainant;
(E) Cause any person to believe that the complainant will not be released without suffering significant bodily injury, or a sex offense as defined in RCC XX-XXXX;
(F) Permanently deprive a parent, legal guardian, or other lawful custodian of custody of a minor; or
(G) Hold the person in a condition of involuntary servitude.

[8] The same issues outlined in this section apply to the Criminal Restraint provision found in RCC § 22A-1404, Criminal Restraint.

value in exchange for release of the complainant." The problem is that the word "pecuniary" in the Commentary is too limited. Merriam-Webster defines "pecuniary" as either "consisting of or measured in money" or "of or relating to money."[9] Therefore, following the explanation in the Commentary, a person who was held until the perpetrators received specified jewelry of sentimental value or other property would not be guilty of kidnapping. The Commentary should be modified to read, "Holding a person for ransom or reward requires demanding anything of value in exchange for release of the complainant."

[9] See https://www.merriam-webster.com/dictionary/pecuniary.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: July 13, 2018

SUBJECT: First Draft of Report # First Draft of Report No. 22. Accomplice Liability and Related Provisions

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 #22 - Accomplice Liability and Related Provisions. [1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-210. ACCOMPLICE LIABILITY

The text of RCC § 22A-210 should make it clear that an accomplice can be convicted for assisting or encouraging a person to commit an offense even if the principal does not complete all of the elements of the offense and would only be guilty of attempt. RCC § 22A-210(b), (c), and (d) all speak in terms the "commission of an offense."[2] While the phrase "commission of an

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

[2] RCC § 22A-210 states:
(a) DEFINITION OF ACCOMPLICE LIABILITY. A person is an accomplice in the commission of an offense by another when, acting with the culpability required by that offense, the person:

offense" in some sources is defined to include an attempt, in other sources it appears to require a completed offense.[3] Similarly, RCC § 22A-210(d) speaks in terms of establishing that an accomplice may be convicted of an offense even if the person claimed to have "committed the offense" has not been prosecuted or convicted, convicted of a different offense or degree of an offense, or has been acquitted. Subparagraph (d) does not specifically include attempts. A modification of the illustration on page 56 demonstrates the need for clarifying this issue. The illustration and explanation contained in the Report is modified as follows:

> a drug dealer asks his sister—who is unaware of her brother's means of employment—to deliver a package for him to a restaurant and to collect money for the package from the cashier. He credibly tells his sister that the package is filled with cooking spices; however, it is actually filled with heroin. If the sister is subsequently arrested by the police as she is about to deliver the package in transit to the restaurant, the drug dealer cannot be deemed an accomplice to the attempted distribution of narcotics by the sister since the sister cannot herself be convicted of that offense. Although she has engaged in conduct that satisfies the *objective elements* of the attempted offense, the sister nevertheless does not act with the

> (1) Purposely assists another person with the planning or commission of conduct constituting that offense; or
> (2) Purposely encourages another person to engage in specific conduct constituting that offense.

(b) PRINCIPLE OF CULPABLE MENTAL STATE ELEVATION APPLICABLE TO CIRCUMSTANCES OF TARGET OFFENSE. Notwithstanding subsection (a), to be an accomplice in the commission of an offense, the defendant must intend for any circumstances required by that offense to exist.

(c) PRINCIPLE OF CULPABLE MENTAL STATE EQUIVALENCY APPLICABLE TO RESULTS WHEN DETERMINING DEGREE OF LIABILITY. An accomplice in the commission of an offense that is divided into degrees based upon distinctions in culpability as to results is liable for any grade for which he or she possesses the required culpability.

(d) RELATIONSHIP BETWEEN ACCOMPLICE AND PRINCIPAL. An accomplice may be convicted of an offense upon proof of the commission of the offense and of his or her complicity therein, although the other person claimed to have committed the offense:

> (1) Has not been prosecuted or convicted; or
> (2) Has been convicted of a different offense or degree of an offense; or
> (3) Has been acquitted.

[3] The phrase "commission of an offense" is defined in one source as "The attempted commission of an offense, the consummation of an offense, and any immediate flight after the commission of an offense in some dictionaries, see https://www.lectlaw.com/def/c065.htm. However, another source explains, the phrase "commission of an offense" is "The act of doing or perpetrating an offense or immediate flight after doing an offense is called commission of an offense", see https://definitions.uslegal.com/c/commission-of-an-offense/.

> required *culpable mental state*, i.e., knowledge (or even negligence) as to the nature of the substance she attempted to deliver and receive cash for. Under these circumstances, the drug dealer can, however, be held criminally responsible for attempted distribution as a principal under a different theory of liability: the "innocent instrumentality rule."

As demonstrated above, there is no reason why the brother should not be guilty of attempted distribution of the narcotics. The language in RCC § 22A-210 should be modified to clarify accomplice liability for attempts.

The Commentary to RCC § 22A-210(c) makes clear that a person can have accomplice liability through omission.[4] The Commentary states, "Typically, the assistance prong will be satisfied by conduct of an affirmative nature; however, an omission to act may also provide a viable basis for accomplice liability, provided that the defendant is under a legal duty to act (and the other requirements of liability are met)." Footnote 7, on the same page, states "… For example, if A, a corrupt police officer, intentionally fails to stop a bank robbery committed by P, based upon P's promise to provide A with a portion of the proceeds, A may be deemed an accomplice to the robbery…" The Commentary should distinguish this form of liability from the related, but distinct accomplice liability of a person encouraging another person to commit an offense by omission. For example, if AA, a corrupt police officer, talks his partner A, another corrupt police officer, to intentionally fail to stop a bank robbery committed by P, based upon P's promise to provide AA with a portion of the proceeds, AA may be deemed an accomplice to the robbery. In this example, AA purposely encouraged A to engage in specific conduct constituting an offense of omission.

RCC § 22A-210(c) states that "[a]n accomplice in the commission of an offense that is divided into degrees based on distinctions in culpability as to results is liable for any grade for which he or she possesses the required culpability." As the Report notes,[5] this means an accomplice can be convicted of a grade of an offense that is either higher or lower than that committed by the principal actor where the variance is due to distinctions between the two (or more) actors' state of mind. However, the example in the Commentary, does not demonstrate this principle.[6] The example demonstrates that an accomplice could be convicted of manslaughter when the principal is convicted of murder. However, manslaughter is not a "degree" of murder, nor is murder described as "aggravated" manslaughter. The question raised by the example, is not merely whether the Commentary should have used as an example an offense that was divided into degrees, but does the principle of culpable mental state equivalences applicable to results also apply between greater and lesser included offenses that are contained in different code provisions? If it does, as the example would suggest, RCC § 22A-210(c) should be split into two subparagraphs: one where the accomplice and principal commit an offense that is divided into

[4] See page 4.
[5] See page 6.
[6] See footnote 15 on page 6.

degrees based upon distinctions in culpability and another where distinctions in culpability is but one distinction between greater and lesser included offenses.

RCC § 22A-211 LIABILITY FOR CAUSING CRIME BY AN INNOCENT OR IRRESPONSIBLE PERSON

RCC § 22A-211 (a) states that "A person is legally accountable for the conduct of another person when, acting with the culpability required by an offense, that person causes an innocent or irresponsible person to engage in conduct constituting an offense."[7] In the last sentence of the first paragraph of the Commentary it states, "Collectively, these provisions provide a comprehensive statement of the conduct requirement and culpable mental state requirement necessary to support criminal liability for causing another person to commit a crime." The problem is that the text of RCC § 22A-211 does not define the term "legally accountable," nor does it explicitly state that a person who is legally accountable for the actions of another is guilty of the offense.

RCC § 22A-211 (a) is titled, "USING ANOTHER PERSON TO COMMIT AN OFFENSE." [emphasis in original] The title is misleading. As drafted, it implies that the person acted with some intentionality in causing another person to act. As the Commentary makes clear, however, a person is legally accountable for the conduct of another – and thus guilty of an offense - even when the person does not intentionally use an innocent or irresponsible person to commit a crime. On page 61 of the Commentary it states:

> This general principle of culpable mental state equivalency has three main implications. First, the innocent instrumentality rule does not require proof of intent; rather, "a defendant may be held liable for causing the acts of an innocent agent even if he does so recklessly or negligently, so long as no greater *mens rea* is required for the underlying offense." For example, P may be held liable for reckless manslaughter if he *recklessly* leaves his car keys with X, an irresponsible agent known to have a penchant for mad driving, if X subsequently kills V on the road, provided that P *consciously disregarded a substantial risk* that such a fatal outcome could transpire, and such disregard was a gross deviation from a reasonable standard of care. [internal footnotes omitted]

In the example given in the Commentary, the person who is liable for reckless manslaughter cannot be said to having "used" the other person to commit a crime.

[7] See page 52.

MEMORANDUM

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

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

From: Laura E. Hankins

Date: September 11, 2018

Re: Comments on First Draft of Report No. 23, Disorderly Conduct and Public Nuisance

PDS has the following comments about the RCC disorderly conduct and public nuisance offenses.

1. PDS recommends that both disorderly conduct[1] and public nuisance[2] have a third element: "[and] the person knowingly fails to obey a law enforcement officer's order that the person cease engaging in the conduct."

   The public order and safety benefit of a crime such as disorderly conduct is that it can allow for law enforcement intervention at a low level of harm (or disorder), before the conduct has a chance to escalate into more serious criminal conduct or provoke a criminal response by a third party. The challenge of criminalizing low-level conduct is that it increases the opportunities for negative contacts with law enforcement particularly in communities that many view as over-policed.[3] PDS agrees with the general approach the Commission takes with respect to disorderly conduct and public nuisance but thinks ultimately the Commission's proposal still allows too much room for over-policing and over-criminalizing the lives of marginalized persons. For example, RCC § 22A-4001 requires that the "apparent danger of bodily injury … must be unlawful, such as assaultive conduct."[4] "Horseplay" and other legal group activities would not, according to the Commentary, be disorderly conduct unless the conduct created a likelihood of

[1] RCC § 22A-4001.

[2] RCC § 22A-4002.

[3] As the D.C. Council Committee on Public Safety and the Judiciary explained "[t]he disorderly conduct [offense] is clearly important to quality of life as well as the public peace" while also noting that the D.C. Office of Police Complaints' detailed 2003 report on arrests for disorderly conduct "not surprisingly" included a finding that the disorderly conduct statutes were subject to abuse by arresting officers. See Council of the District of Columbia Committee on Public Safety and the Judiciary Report on Bill 18-425, the Disorderly Conduct Amendment Act of 2010, at pages 2-3.

[4] Report #23, page 4.

immediate bodily injury to someone not participating in the legal group activity.[5] However, the offense does not actually require that the conduct be unlawful. The crime is recklessly causing another to *reasonably believe* that the conduct is unlawful. While horseplay might be lawful, if the "horseplayers" are aware of a substantial risk that someone observing them will "reasonably believe" that their (lawful) conduct is in fact unlawful, then the "horseplayers" would be guilty of committing "disorderly conduct." Layer into this the widely accepted notion that certain behavior is often viewed as being "violent" when committed by African-Americans and recognizing that African-Americans are well aware that their innocent conduct creates a "substantial risk" that it will be viewed "reasonably" (as in, a belief commonly held by a majority of persons) as unlawful and potentially injurious to others or their property[6] and it is clear that, despite its best efforts to construct clear and narrow boundaries around this offense, the Commission left the back door unlocked, if not open.

That said, PDS also strongly supports intervention and defusing of situations while they are at a low-level rather than waiting until more serious offenses are committed. Adding an element that the person must fail to obey a law enforcement order that she cease engaging in the conduct creates a better balance between the desirable goals of a disorderly conduct statute to keep the peace and the risks of police abuse and over-criminalization. It allows, actually requires, law enforcement interaction – the order to cease – which will usually be sufficient to defuse a potentially unlawful situation or to establish that the conduct is lawful.[7] Plus, it provides an additional safeguard for the individual before she is subject to arrest and prosecution.

2. PDS recommends eliminating "taking of property" as a means of committing disorderly conduct." The basic offenses of assault (unlawful bodily injury to another person) and "[criminal] damage to property" only require "recklessly" as a mental state.[8] Theft, however, requires *knowingly* taking the property of another.[9] *Recklessly* engaging in behavior that causes another to reasonably believe there is likely to be an immediate [*reckless*] bodily injury to another or that there is likely to be immediate [*reckless*] damage to property makes sense and is plausible. In contrast, disorderly conduct (taking property) would require that a person

[5] Id.

[6] See e.g., driving while Black, walking while Black, swimming while Black, selling water while Black, sleeping while Black, barbecuing while Black, waiting for the subway while Black, playing with a toy in a public park while Black, being in one's own backyard while Black, being in one's own apartment located above a police officer's apartment while Black, etc., etc., etc.

[7] If the law enforcement interaction establishes that the conduct is lawful – e.g., the people involved explain they are actually playing rugby – then the law enforcement official will have no basis on which to order the conduct to cease. The officer's interaction will have established that it would be *unreasonable* to believe there is likely to be immediate and unlawful bodily injury to another person except, exactly at the Commentary explains, in situations where the conduct creates a likelihood of immediate bodily injury to a third party, a person not engaged consensually in the lawful group activity.

[8] See RCC § 22A-1202(f); §22A-2503(a).

[9] See RCC § 22A-2101(a).

recklessly engage in conduct that causes another to *reasonably* believe there is likely to be the immediate *knowing* taking of property. Conduct that is "dangerously close" to taking property should be prosecuted as attempt theft. As currently drafted, disorderly conduct (taking of property) either overlaps with attempt theft or criminalizes conduct that is *less than* "dangerously close" to theft. Including "taking of property" as a means to commit disorderly conduct weakens the offenses of theft and attempt theft; there is no point in requiring the knowing taking of property if one can be prosecuted for recklessly making someone believe property will be (knowingly) taken. PDS is concerned, assuming there even is reckless conduct that could create a reasonable belief about a knowing result, that the conduct would necessarily be very minor and ambiguous; so minor and ambiguous that to arrest and prosecute someone for it would be arbitrary and unjust.

3. PDS recommends that both disorderly conduct and public nuisance be jury demandable, regardless of the penalty attached. Because of the First Amendment implications of both offenses as well as the tension they create between preserving public order and over-policing/police abuse, the accountability that a jury provides is critical.

4. PDS recommends rewriting the definition of "lawful public gathering" in the public nuisance offense to narrow its reach.[10] The definition does not require that the gathering itself be public, so it would seem to be unlawful to intentionally interrupt a private gathering. The breadth and vagueness of the catch-all language, "similar organized proceeding," only reinforces the sweep of this provision. Are weddings "lawful public gatherings"? Is a high school graduation ceremony a "lawful public gathering?" PDS finds this means of committing the public nuisance offense troubling but would consent to a definition that is narrow and specific to funerals, that uses the word "means" instead of "includes," and that does not include any catch-all language.

5. PDS objects to the definition of "public building" in the public nuisance offense.[11] Although according to the Commentary, subsection (c)(4) is to "clarif[y] that a public building is a building that is occupied by the District of Columbia or federal government" and therefore is not meant to "apply to efforts to dissuade customers from patronizing a privately-owned business,"[12] the definition, by focusing on the physical building and by using the very general term "government", does not address situations where privately-owned business are co-located in buildings with any D.C. or federal government agency. The Commission clarified at its August 1 public meeting that subsection (c)(4) is "intended to prohibit purposeful (and not incidental) interruptions of [D.C.] Council hearings and similar proceedings, whether they occur at [the Wilson Building] or at an offsite location." [13] PDS recommends rewriting the definition of "public building" to more clearly convey that narrower intent.

[10] See RCC § 22A-4002(c)(4).

[11] See RCC § 22A-4002(c)(5).

[12] Report # 23, page 13.

[13] Minutes of Public Meeting, D.C. Criminal Code Reform Commission, August 1, 2018, page 4.

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	September 11, 2018
Re:	Comments on First Draft of Report No. 24, Failure to Disperse and Rioting

PDS has the following comments about the RCC offenses of failure to disburse and rioting.

1. As reflected in the minutes of the CCRC meeting of August 1, 2018, PDS raised a concern about liability for failure to disperse where the individual does not know that a law enforcement officer has determined that her presence is substantially impairing the law enforcement officer's ability to stop a course of disorderly conduct. At the August 1, 2018 meeting staff clarified that a person must know that she is being ordered to disperse. Staff further noted that the person must be in the immediate vicinity of the course of disorderly conduct and that the officer's assessment about the need for the order to disburse must be objectively accurate. PDS requests that this clarification by staff be included in the commentary of RCC § 22A-4102.

2. RCC § 22A-4101 defines rioting, in part, as the commission of disorderly conduct when the defendant is "reckless" as to the fact that four or more people in the immediate vicinity are simultaneously engaging in disorderly conduct. PDS recommends that the CCRC substitute the mental state of recklessness with knowledge. Requiring that the defendant know that individuals in his immediate vicinity are engaging in disorderly conduct is appropriate given First Amendment concerns about rioting statutes. In the District, it is not uncommon for protests to involve thousands of people or even tens of thousands of people. Under these circumstances, during a mass protest, it may always be the case that a protester is aware of a substantial risk that others are engaging in disorderly conduct and that the standard of care that a reasonable person would observe is to remove himself from the protest.[1] Using a standard of recklessness would over-criminalize potentially constitutionally protected conduct. Just as the CCRC requires knowledge that a participant in the disorderly conduct is using or plans to use a weapon, the CCRC should require actual knowledge that others in the immediate vicinity are engaged in disorderly conduct.

[1] RCC § 22A-205.

3. PDS recommends eliminating "taking of property" as a means of committing rioting. Under the current RCC definition, an individual commits the offense of rioting when he commits disorderly conduct, reckless as to the participation of four or more people and when the conduct is committed with the intent to facilitate the commission of a crime involving bodily injury to another, damage to property of another, or the taking of property of another. Including taking of property within rioting has the potential of creating unnecessary overlap with the offenses of robbery and theft committed by codefendants. For example, under the current RCC definition of rioting, almost any robbery committed by four or more juveniles could also be charged as rioting. If the CCRC's inclusion of conduct "involving the taking of property of another" is intended to address crimes such as looting by multiple individuals, that conduct would already be covered by the inclusion of conduct "involving damage to the property of another." There are few instances when a group of four or more people could commit disorderly conduct and take property of another without also causing damage to property. Removing "the taking of property of another" from the definition would not cause any gaps in liability and would prevent overlap with property crimes committed by codefendants.

4. RCC § 22A-4101(3)(B) defines rioting as criminal conduct committed while "knowingly possessing a dangerous weapon." PDS recommends that this language be amended to "knowingly using or displaying a dangerous weapon." This amendment would mirror section (C) of rioting which establishes liability when the defendant "know[s] any participant in the disorderly conduct is using or plans to use a dangerous weapon."

   The possession of a dangerous weapon[2], such as false knuckles[3] or a knife with a blade over three inches in length, in a pocket, purse, or backpack while committing the offense of disorderly conduct does not increase danger to the community or elevate the fear experienced by bystanders. The possession of a dangerous weapon in a backpack would not be apparent to community members until the weapon is later recovered during a search incident to arrest. In such instances, where the weapon is not used or displayed, the possession of a weapon would be entirely ancillary to the offense of rioting.

   The possession of a dangerous weapon in a backpack, purse, or pocket would also be separately punishable as a stand-alone count of weapon possession. To decrease unnecessary overlap, the RCC should limit liability in rioting to occasions when the defendant knowing uses or displays a dangerous weapon.

[2] RCC § 22A-1001 (dangerous weapon defined).

[3] § 22A-1001(14) (prohibited weapon defined).

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	September 11, 2018
Re:	Comments on First Draft of Report No. 25, Merger

PDS has the following comments about the RCC principle of merger.

1. PDS recommends that merger, RCC § 22A-212 be restructured as a rule instead of a presumption. Presumptions are often difficult to apply and require either additional drafting language or appellate interpretation.[1] As currently framed, RCC § 22A-212, establishes rules for merger and an exception when the legislature clearly manifests the intent to allow multiple convictions. However, the use of a presumption for those rules makes them much more difficult to apply. In order to provide clarity for defendants, practitioners, and judges, and to avoid the need for appellate litigation of basic principles, the RCC should reframe the merger provision as a rule.

2. RCC § 22A-212(d)(1) establishes a rule of priority that when two offenses merge, the offense that remains shall be "the most serious offense among the offenses in question." Although footnote 27 to the Commentary explains what the most serious offense "will typically be," the phrase is still open to interpretation and argument by the parties in individual cases. Rather than leaving the matter of which offense is most serious to the parties to dispute, PDS recommends that for the purposes of clarity and certainty, the RCC define "most serious offense" as the offense with the highest statutory maximum. Further, the definition should be included in the statute, not relegated to the Commentary.

[1] *See, e.g.*, D.C. Code § 23-1322 (detention prior to trial); *Blackson v. United States*, 897 A.2d 187, 196 (D.C. 2006); *Pope v. United States*, 739 A.2d 819, 826 (D.C. 1999).

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: September 14, 2018

SUBJECT: First Draft of Report #23, Disorderly Conduct and Public Nuisance

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 #23 - Disorderly Conduct and Public Nuisance.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-4001. Disorderly Conduct.

The proposed disorderly conduct statute varies from the current law in many ways. It appears to legalize a certain type of dangerous behavior. As the Comment section notes on page 4, to be disorderly conduct under the proposal, "The apparent danger of bodily injury must be to another person; a person cannot commit disorderly conduct where she poses a risk of harm to only herself." While we do not disagree with footnote 6 that "a person who is performing a dangerous skateboarding stunt, high wire act, or magic trick in a public square" should not be guilty of this offense, we disagree that "She has not committed disorderly conduct unless it appears likely that her conduct will cause bodily injury to someone other than herself or damage to property." D.C. Code § 22-1321(a)(3) currently makes it unlawful for a person to "Direct abusive or offensive language or gestures at another person (other than a law enforcement officer while acting in his or her official capacity) in a manner likely to provoke immediate physical retaliation or violence

[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.

by that person or another person." So, under current law, a person can commit disorderly conduct where she poses a risk of harm only to herself.

RCC § 22A-4001[2] would exempt police from being the target of all disorderly conduct offenses. Current law only exempts them from being the target of "Direct abusive or offensive language or gestures at another person … in a manner likely to provoke immediate physical retaliation or violence by that person or another person." This was because the Council acknowledged the special training that police should have. It does not exempt them from being the victim of **"**Intentionally or recklessly act in such a manner as to cause another person to be in reasonable fear that a person or property in a person's immediate possession is likely to be harmed or taken" or "Incite or provoke violence where there is a likelihood that such violence will ensue" e.g. It would be disorderly conduct for a person to incite a mob to hurt a police officer by chanting, "stone the cop, kill the cop" when there were rocks nearby.

As to the current state of the law concerning the exemption of police from being the target for disorderly conduct offenses, OAG disagrees with the conclusion in the Relation to Current District Law portion of the Commentary that the proposal would merely clarify existing law. On page 7 the report says D.C. Code § 22-1321 (a)(1) and (a)(2) are "silent as to whether they cover conduct directed at law enforcement officers and no District case law addresses this issue." True, (a)(1) and (a)(2) do not specifically reference law enforcement officers, but their plain terms unequivocally cover them, just as they unequivocally reach other groups that aren't specifically mentioned (*e.g.*, tourists). Paragraph (a)(1) is satisfied by reasonable fear to "another person," which logically includes law enforcement officers. And (a)(2) refers to incitement of provocation of violence, without regard to the identity of the potential victim. It is only (a)(3), dealing with abusive or offensive language or gestures, that carves out police officers – which is no more than what the legislative history the report cites says. On page 8 of the Committee Report it states, in relevant part, the following:

> Subsection (a) proscribes breach of the peace; it prohibits conduct and language (e.g., fighting words) that is likely to provoke an outbreak of violence (e.g., a

[2] The offense portion of RCC § 22A-4001 is as follows:

(a) A person commits disorderly conduct when that person:
  (1) Recklessly engages in conduct that:
    (A) Causes another person to reasonably believe that there is likely to be immediate and unlawful:
      (i) Bodily injury to another person;
      (ii) Damage to property; or
      (iii) Taking of property; and
    (B) Is not directed at a law enforcement officer in the course of his or her official duties;
  (2) While that person is in a location that, in fact, is:
    (A) Open to the general public; or
    (B) A communal area of multi-unit housing.

> fight) … The Committee Print rejects language proposed by OAG/MPD/USAO for paragraph (3) of this subsection because it would undercut an important purpose of the language: that the crime of using abusive or offensive language must focus on the likelihood of provoking a violent reaction by persons other than a police officer to whom the words were directed, because a police officer is expected to have a greater tolerance for verbal assaults and is especially trained to resist provocation by verbal abuse that might provoke or offend the ordinary citizen. (See *Shepherd v. District of Columbia,* 929 A.2d 417,419 (D.C. 2007)). The law should have a bright line: that offensive language directed at police officers is not disorderly conduct. Further, it seems unlikely at best that the use of bad language toward a police officer will provoke immediate retaliation or violence, not by him, but by someone else (see *Comments of the OAG, MPD, and USAO* attached to this report). [emphasis added][3]

When the Council enacted the legislation it created that bright line in the part of the disorderly conduct statute that relates to "Direct abusive or offensive language or gestures at another person" and included the limitation on police officers only in that offense. RCC § 22A-4001 does not clarify the limitation concerning police officers. It expands it.[4]

RCC § 22A-4002. Public Nuisance.

RCC § 22A-4002 provides that:

(a) *Offense.* A person commits public nuisance when that person:
  (1) Purposely engages in conduct that causes an unreasonable interruption of:
    (A) a lawful public gathering;
    (B) he orderly conduct of business in a public building;
    (C) any person's lawful use of a public conveyance; or

[3] The proposal by "OAG/MPD/USAO" appeared in an attachment to a letter written to Mr. Silbert of the Council for Court Excellence. The topic heading of that section was "Abusive or offensive words – Proposed D.C. Official Code § 22-1321(a)(3)" and the recommended change only applied to that provision (which was the only provision that had a law enforcement carve out). See page 89 of the legislative history for the Disorderly Conduct Amendment Act of 2010. So, when the Council rejected our proposal, they were necessarily only talking about the proposed rewording of (a)(3) concerning law enforcement officers in the context of abusive or offensive words.

[4] Given that the Council enacted D.C. Code § 22-1321 (a)(1), (2), and (3) at the same time and the Council only exempted law enforcement officers from (a)(3), it is unclear why the Commission is even delving into the legislative history to try and glean the Council's intent. Even the Court of Appeals does not look to legislative history when the plain terms of the statute does not produce a result that is "demonstrably at odds with the intentions of its drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571(1982). "[I]n absence of persuasive evidence to the contrary, [this Court is] not empowered to look beyond the plain meaning of a statute's language in construing legislative intent." *United States v. Stokes*, 365 A.2d 615, 618 (D.C. 1976). The current disorderly conduct statute is not ambiguous on this point.

(D) any person's quiet enjoyment of his or her residence between 10:00 pm and 7:00 am;

(2) While that person is in a location that, in fact, is:

(A) Open to the general public; or

(B) A communal area of multi-unit housing.[5]

One of the ways to violate this statute would be to purposely engage in conduct that causes an unreasonable interruption of the orderly conduct of business in a public building. See paragraph (a)(1)(B). The term "public building" is defined as "a building that is occupied by the District of Columbia or federal government." See paragraph (c)(5). However, the term "occupied" is not defined. While it is clear that this offense applies to a person who disrupts the orderly conduct of public business, it is unclear which of the following locations are considered occupied by the government: a building that is owned by the public, where government offices are located, to any location where the public is invited and government business is held, or all of these locations. The focus of the prohibition, however, is in ensuring that public business can take place without undue interruption. It should not matter, therefore, where the location of the public business is held. In order to clarify and simplify this offense, we suggest that paragraph (B) be rewritten to say, "the orderly conduct of public business." The offense would then be to purposely engage in conduct that causes an unreasonable interruption of the orderly conduct of public business." The term "public business" could then be defined as "business conducted by the District of Columbia or federal government."

RCC § 22A-4002 (a)(1)(c) states that a person commits this offense when the person purposely engages in conduct that causes an unreasonable interruption of any person's lawful use of a public conveyance. It is unclear if this formulation is more narrow than current law. D.C. Code § 22-1321 (c) states, "It is unlawful for a person to engage in loud, threatening, or abusive language, or disruptive conduct with the intent and effect of impeding or disrupting the lawful use of a public conveyance by one or more other persons." [emphasis added] So, under current law a person may be guilty of this offense if they stand in front of the bus and refuse to let the

[5] Paragraph (c) lists the definitions for words and terms used in this offense. It states:

(1) The term "purposely," has the meaning specified in § 22A-206;
(2) The term "bodily injury" has the meaning specified in § 22A-1001;
(3) The term "property" has the meaning specified in § 22A-2001;
(4) The term "lawful public gathering" includes any religious service, funeral, or similar organized proceeding;
(5) The term "public building" means a building that is occupied by the District of Columbia or federal government;
(6) The term "public conveyance" means any government-operated air, land, or water vehicle used for the transportation of persons, including but not limited to any airplane, train, bus, or boat; and
(7) The phrase "open to the general public" excludes locations that require payment or permission to enter or leave at the time of the offense.

bus continue on its route. The person is clearly "disrupting the lawful use of a public conveyance." But is that person "caus[ing] an unreasonable interruption of any person's lawful use of a public conveyance"? While the bus may be stopped, is a person's use of the conveyance interrupted? The Comment does not help to explain the drafter's intent. In fact, it appears to limit the scope even further. That comment states "The accused must have the intent and effect of diverting a reasonable passenger's pathway."[6] Nowhere in the current law or in the actual language of RCC § 22A-4002 (a)(1)(C) is this offense limited to pathways.

Another way to violate this statute would be to purposely engage in conduct that causes an unreasonable interruption of any person's quiet enjoyment of his or her residence between 10:00 pm and 7:00 am. As the Comments note, this provision replaces D.C. Code § 22-1321(d). However, that provision is limited by paragraph (a) (2) which requires that the person be in a location that is, in fact, open to the general public or is a communal area of multi-unit housing when they engage in their conduct. See paragraph (a)(1)(D).[7] There is no reason for this limitation. In D.C. Code § 22-1321, the requirement that the disorderly conduct occur in a place that is open to the general public or in the communal areas of multi-unit housing only applies to the offenses that are covered by the disorderly conduct provision in RCC § 22A-4001.[8] There is no reason to extend this limitation to the parts of the disorderly conduct offense that is covered by the public nuisance provision of RCC § 22A-4001.[9]

[6] See the last sentence on page 13 of the Report.
[7] Paragraph (a)(1)(D) states, "While that person is in a location that, in fact is … Open to the general public… or … a communal area of multi-unit housing," [emphasis added]. For purposes of this analysis, we assume that the "that person" refers to the person who commits the public nuisance and not the person referred to in the immediately preceding paragraphs (i.e. "(C) any person's lawful use of a public conveyance; or (D) any person's quiet enjoyment of his or her residence…").
[8] D.C. Code § 22-1321 (a) provides that:

> In any place open to the general public, and in the communal areas of multi-unit housing, it is unlawful for a person to:
>
> **(1)** Intentionally or recklessly act in such a manner as to cause another person to be in reasonable fear that a person or property in a person's immediate possession is likely to be harmed or taken;
>
> **(2)** Incite or provoke violence where there is a likelihood that such violence will ensue; or
>
> **(3)** Direct abusive or offensive language or gestures at another person (other than a law enforcement officer while acting in his or her official capacity) in a manner likely to provoke immediate physical retaliation or violence by that person or another person. [emphasis added]

[9] As noted in the text, both the disorderly conduct and the public nuisance provisions contain the requirement the person be in a location that is open to the general public. However, the definitions of what "open to the general public" is different in these two offenses. Subparagraph (c)(4) of the disorderly conduct provision states "The phrase 'open to the general public' excludes locations that require payment or permission to enter or leave." Subparagraph (c)(7) of

The possibility of arrest and prosecution under D.C. Code § 22-1321(d) has been an effective tool in quieting people who in their own house or apartment listen to their stereos, play musical instruments, or host parties that unreasonably annoy or disturb one or more other persons in their residences. In fact, D.C. Code § 22-1321(d) has been touted as the only effective tool used to combat noise that disrupts people's ability to enjoy their homes at night.[10]

There are other instances where the limitation of the location of the person who is engaging in the conduct that causes unreasonable interruptions, under (a)(2), is irrelevant. For example, "A person commits a public nuisance when that person [p]urposely engages in conduct that causes an unreasonable interruption of … a lawful public gathering…" See (a)(1)(A). Paragraph (c) (4) defines a "lawful public gathering as "any religious service, funeral or similar organized proceeding." It does not matter whether a person who wants to disrupt a funeral service is standing on a corner that is open to the public or is standing on the roof of a private building across the street when they use a megaphone to unreasonable interrupt the public gathering.

The revised public nuisance statute also eliminates urinating and defecating in a public place as a disturbance of the public peace offense. D.C. Code § 22-1321(e). OAG supports decriminalization. However, while public urination and defecation would be better handled as a civil infraction punishable by a civil summons and a fine, the District should seek to develop a robust civil infraction enforcement system.

the public nuisance provision, on the other hand, states, "the phrase 'open to the general public' excludes locations that require payment or permission to enter or leave at the time of the offense." [emphasis added] It is unclear whether the difference was intentional and if it was why these two related offenses would vary on a basic element.

A separate issue with the definitions of "open to the general public" cited above, is that the phrase only gives a slice of a definition, by identifying a specific thing that's excluded from the definition ("excludes locations that require payment…"). Ordinarily, a definition should be exhaustive, covering the realm of what the term includes as well as excludes.

[10] The Criminal Code Reform Commission may want to listen to the hearing on Bill 22-839, the "Amplified Noise Amendment Act of 2018" which was held on July 2, 2018. Although the hearing was focused on why the noise regulations contained in the DCMR are inadequate to address various noise problems, Councilmembers and witnesses where in near agreement that D.C. Code § 22-1321 (d), as written, was the only effective tool in addressing noise issues.

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: September 14, 2018

SUBJECT: First Draft of Report #24, Failure to Disperse and Rioting

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 #24 - Failure to Disperse and Rioting.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-4102. Failure to Disperse.

The elements portion of the failure to disperse provision is as follows:

(a) *Offense.* A person commits failure to disperse when that person:
  (1) In fact:
    (A) Is in the immediate vicinity a course of disorderly conduct, as defined in § 22A-4001, being committed by five or more persons;
    (B) The course of disorderly conduct is likely to cause substantial harm to persons or property; and
    (C) The person's continued presence substantially impairs the ability of a law enforcement officer to stop the course of disorderly conduct; and
  (2) The person knowingly fails to obey a law enforcement officer's dispersal order;

[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.

(3) When the person could safely have done so.

One way that this offense can be committed is when a person "[is] in the immediate vicinity [of][2] a course of disorderly conduct…being committed by five or more persons…" See (a)(1)(A) above. On page 4, footnote 3, it states that the phrase "immediate vicinity," "as in the disorderly conduct statute, . . . refers to the area near enough for the accused to see or hear others' activities."[3] If this footnote is meant to articulate a specific definition for "immediate vicinity," that definition should be in the text (as it should be in the rioting statute).[4]

As noted above, one element of this offense may be "[t]he person's continued presence substantially impairs the ability of a law enforcement officer to stop the course of disorderly conduct…" [emphasis added] The Commentary notes, on page 4, that "Substantial impairment is more than trivial difficulty." There is a footnote to that statement that reads, "For example, the need for a law enforcement officer to walk around a peaceable demonstrator in order to reach the place where the group disorderly conduct is occurring would not alone amount to substantial impairment." The problem is that the word "substantial" is not defined in the proposal. It is a long way from "more than trivial difficulty" to "substantial." If the Commentary correctly captures the level of police impairment, then either the word "substantial" should be defined as "nontrivial" or the phrase in the Commentary should be substituted in the text of the offense.

Pursuant to paragraph (d), the "Attorney General for the District of Columbia shall prosecute violations of this section." We agree with this designation but would like to avoid needless litigation concerning the Council's authority to give prosecutorial authority to OAG. The penalty provision for the failure to disperse offense states, "Failure to disperse is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both." To avoid needless litigation over the history of this provision, whether it is a police regulation or a penal statute in the nature of police or municipal regulations, and its interplay with D.C. Code § 23-101, OAG recommends that the penalty provision be redrafted to state, "Failure to disperse is a Class [X] crime subject to a maximum term of imprisonment of [X] or a maximum fine of [X]."

In the Explanatory Note, and elsewhere in the Commentary it states, "The offense codifies in the D.C. Code longstanding authority exercised under DCMR 18-2000.2 (Failure to obey a lawful

[2] The text of paragraph (a)(1)(A) states, "Is in the immediate vicinity a course of disorderly conduct …" This may be a typo. We assume that it was supposed to read, "Is in the immediate vicinity of a course of disorderly conduct …"

[3] The footnote should reference the rioting statute (RCC § 22A-4102(a)(2)), not the disorderly conduct statute (which doesn't use the phrase).

[4] The term "immediate vicinity", as noted in the text, is used in, but not defined in the redrafted rioting offense. Footnote 26 in the Commentary does state, "The term "immediate vicinity" in the revised rioting statute refers to the area near enough for the accused to see or hear others' activities" and then says, ". See *United States v. Matthews,* 419 F.2d 1177, 1185 (1969)." The Commission should include a definition in both the failure to disperse and rioting offenses based upon this footnote.

police order) in the context of group disorderly conduct."[5] It must be noted, that the regulation that this offence is codifying only relates to vehicular or pedestrian traffic. As the elements of the offense does not include reference to vehicular or pedestrian traffic, it appears to be broader in scope then the provision that it purports to be replacing. To the extent that it does not subsume the existing regulation, the explanation should be expanded and affirmatively state that the enactment of this provision is not intended to repeal that regulation. Examples of offenses covered by the existing regulation include when officers tells a woman who is double parked to move her vehicle and she does not, asks a man to partially roll down his window so that the officer can test for a tint infraction and he does not, or when an officer sees a woman lift the security tape labeled "POLICE LINE DO NOT CROSS" and she refuses to leave the area when told to do so by a police officer.

In the explanation of subsection (a)(1)(C) in the Commentary, it states, "The actor's engagement in conduct that is protected by the First Amendment, Fourth Amendment, or District law is not a defense to failure to disperse because such rights are outweighed by the need for law enforcement to effectively address group disorderly conduct."[6] While OAG agrees with this statement, at least as far as it speaks of the First Amendment and District law, the Fourth Amendment protects against unreasonable searches and seizures, as such, it is not apparent why it is referenced here.

RCC § 22A-4101. Rioting.[7]

[5] The regulation states, "No person shall fail or refuse to comply with any lawful order or direction of any police officer, police cadet, or civilian crossing guard invested by law with authority to direct, control, or regulate traffic. This section shall apply to pedestrians and to the operators of vehicles."

[6] The Fourth Amendment to the U.S. Constitution states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[7] The offense portion of RCC § 22A-4101, rioting, is as follows:

(a) A person commits rioting when that person:
  (1) Commits disorderly conduct as defined in § 22A-4001;
  (2) Reckless as to the fact that four or more other persons in the immediate vicinity are simultaneously engaged in disorderly conduct;
  (3) And the conduct is committed:
    (A) With intent to commit or facilitate the commission of a crime involving:
      (i) Bodily injury to another person;
      (ii) Damage to property of another; or
      (iii) The taking of property of another;
    (B) While knowingly possessing a dangerous weapon; or

Paragraph (a) states that a person commits rioting when a person "(1) Commits disorderly conduct … (2) Reckless as to the fact that four or more other persons in the immediate vicinity are simultaneously engaged in disorderly conduct … (3) And the conduct is committed . . ." [emphasis added] We read this sentence to mean that "the conduct" in subparagraph (a)(3) refers to the person's conduct in (a)(1) and not the group conduct in (a)(2) notwithstanding that the reference to "group conduct" appears between these two iterations. To clarify this point we recommend that subparagraph (3) be redrafted to read "And the person's conduct is committed…"

One way that this offense can be committed is when a person commits disorderly conduct, reckless as to the fact that four or more other persons in the immediate vicinity are simultaneously engaged in disorderly conduct and the conduct is committed with intent to commit or facilitate the commission of a crime involving bodily injury to another person. [emphasis added] See (a)(3)(A)(i). As to the offense "involving bodily injury to another person", the question arises whether this other person must be someone other than the person who is committing the disorderly conduct, the four or more other persons who are also committing disorderly conduct, or both. We agree that the offense of rioting should not include situations where the person who is committing disorderly conduct, with others, hurts himself. We want to be clear, in addition, that the text was not meant to exclude situations where a person intends to commit a crime involving bodily injury to someone else who is also being disorderly. We note that the Comment would not require such a reading.[8] Take for example the situation where there is meeting of international finance ministers in the District and protests and counter-protests occur. These protestors represent different and contradictory perspectives on the direction of world finance, just as the counter-protestors do. A subset of the protestors, say anarchists become disorderly, a different subset, say a group supporting funding a repressive country's regime, also becomes disorderly, and a group of the anarchists decide to injure a few of the regime protestors. There is no reason why the offense of rioting should not apply to these anarchists.

(C) While knowing any participant in the disorderly conduct is using or plans to use a dangerous weapon.

[8] See Comment on page 10 that "'Another person' means any person who is not a participant in the rioting." So, another person may include a person who is disorderly, but not rioting.

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: September 14, 2018

SUBJECT: First Draft of Report #25, Merger

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 #25 - Merger.[1]

COMMENTS ON THE DRAFT REPORT

§ 22A-212. Merger of Related Offenses.

Section 22A-212 makes changes to District merger law as it has evolved under case law. On page 10 of the Commentary it states, "Subsections (a)-(d) of RCC § 212 replace this judicially developed approach with a comprehensive set of substantive merger policies. Many of these policies are based on current District law, and, therefore, are primarily intended to clarify the mechanics of merger analysis for the purpose of enhancing the consistency and efficiency of District law. However, a few of these policies broaden the District's current approach to merger for purposes of enhancing the proportionality of the D.C. Code."

Acknowledging that the current scope of the RCC does not include a redrafting of every District Code offence, the question not specifically addressed by the merger provision or its Commentary

[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.

is how this provision should be applied to merger questions where a defendant has been found guilty of both an RCC offense and another criminal offense that has not yet been redrafted.

While it is clear that RCC § 22A-103's provision that "Unless otherwise provided by law, a provision in this title applies to this title alone." would clearly mean that the RCC's merger provision would not apply in situations where the court is examining whether two non-RCC offenses merge, the text of 22A-103's would also seem to apply to situations where the court is considering whether a mixed RCC and non-RCC offense merge. To avoid litigation on this point, the Commission should clarify its position on this issue in a subsequent Report.

RCC § 22A-212 (a) states that there is a presumption for merger in a number of circumstances. One of these is where "(3) One offense requires a finding of fact inconsistent with the requirements for commission of the other offense…" In the Commentary, on page 6, it states, "This principle applies when the facts required to prove offenses arising from the same course of conduct are "inconsistent with each other as a matter of law."[2] OAG believes that this clarification is too central to the analysis to be left in the Commentary and that it should be moved to the text of the merger provision. It should state, "(3) One offense requires a finding of fact inconsistent with the requirements for commission of the other offense as a matter of law."

Paragraph (d) establishes a rule of priority based upon the relative seriousness of the offenses as to which offense should remain when offenses merge. In the Commentary, on page 9, the Report says, "where, among any group of merging offenses, one offense is more serious than the others, the conviction for that more serious offense is the one that should remain." The term "serious", however, is not defined in the text. Footnote 27 offers something that can be used as definition.[3] We recommend incorporating the language of this footnote into the text of the merger provision.

OAG agrees with intent of paragraph (e), final judgment of liability, that no person should be subject to a conviction until after "[t]he time for appeal has expired; or … [t]he judgment appealed from has been affirmed."[4] [emphasis added] We make one technical suggestion. As the Court of Appeals may affirm, affirm in part, or remand, we suggest that paragraph (e)(2) be amended to say, "The judgment appealed from has been decided."

[2] The Commentary cites to *McClain v. United States*, 871 A.2d 1185, 1192 (D.C. 2005) (citing *Fuller v. United States*, 407 F.2d 1199, 1223 (1967) (en banc)) for this proposition.
[3] Footnote 27 states, "The most serious offense will typically be the offense that is subject to the highest offense classification; however, if two or more offenses are both subject to the same classification, but one offense is subject to a higher statutory maximum, then that higher penalized offense is "most serious" for purposes of subsection (d)."
[4] This provision states:

> FINAL JUDGMENT OF LIABILITY. A person may be found guilty of two 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 affirmed.

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	December 20, 2018
Re:	Comments on First Draft of Report 26, Sexual Assault and Related Provisions

The Public Defender Service makes the following comments on Report #26, Sexual Assault and Related Provisions.

1. RCC § 22A-1301(9) and (11) define the phrases "person of authority in a secondary school" and "position of trust with or authority over." Rather than creating a limited and precise definition, in these two instances the RCC use the word "includes" to describe the scope of the legal terms. In other instances in this chapter and in other chapters, the RCC uses the word "means" when defining a term or statutory phrase. The use of the word "includes" falls short of Due Process requirements to provide notice of criminal offenses.[1] It also fails to correct existing ambiguity in D.C. Code § 22-3009.03 and 22-3009.04. Precise definitions in these two instances are particularly important because the terms relate to sexual offenses that are criminalized only because of the status of the complainant or the relationship between the complainant and the defendant. In the absence of the prohibited relationship between the defendant and the complainant, these interactions may be consensual and legal.
2. PDS makes several recommendations for the definition of "person of authority in a secondary school" and for other terms in RCC § 22A-1305(a) and (b).

   With respect to RCC § 22A-1301(9), person of authority in a secondary school, PDS recommends the following language.

   (9) "Person of authority in a secondary school" ~~includes~~ means any teacher, counselor, principal, or coach in a secondary school attended by the complainant or where the complainant receives services or attends regular programming.

[1] See, e.g., *McNeely v. United States*, 874 A.2d 371, 379 (D.C. 2005).

In addition to being more precise, the RCC's definition should correspond to the harm it seeks to prevent. The term "person of authority in a secondary school is used in RCC § 22A-1305, Sexual Exploitation of an Adult. RCC § 22A-1305(a)(2)(A) and RCC § 22A-1305(b)(2)(A) prohibit sexual acts or contact where the defendant is a person of authority in a secondary school and the complainant is under age 20 and "is an enrolled student in the same school system." Consent is not a defense to RCC § 22A-1305.

"Same school system" is not defined in RCC § 22A-1305. As such, it appears that it would prohibit otherwise consensual sexual contact between any 19 year old enrolled at a DCPS school and most DCPS employees. It would prohibit a consensual sexual relationship between a 19 year old student at Wilson High School and a 23 year old athletics coach at Brookland Middle School. RCC § 22A-1305 would hold the coach criminally liable, and would likely require ten years of sex offender registration although nothing about the "complainant's" status as a student in the same school system played a role in the consensual relationship. Across the District, DCPS employs more than 7,000 individuals.[2] Prohibiting consensual relationships between adults because of the defendant's status as a DCPS employee goes too far. Under circumstances where the complainant is legally capable of consent, there is no allegation of non-consent, and there is no inherently coercive environment created by the complainant's status as a student at one school and the defendant's status as an employee at another, the RCC should not criminalize the conduct.

The term "same school system" may also be under inclusive. Nearly half of the District's students attend charter schools. Each charter school organization forms its own local education agency. Under this definition a relationship between a coach at one charter school and a student at another unrelated charter school would not fall under RCC § 22A-1305 even if the two charter schools have a close relationship and the student participates in sports at both schools.[3] A definition that requires a closer connection between the student and the school employee would resolve this.

RCC §22A-1305(a) and (b) should criminalize consensual relationships between adults, or teens age 16 and older, only where the circumstances are truly coercive because of the defendant's power within the school. A definition that limits liability to relationships where the student and the defendant are assigned to the same school, not just the same school system, appropriately draws the line at preventing coercion but not being overly broad.

Within the RCC § 22A-1305, the age of consent for sexual conduct with persons of authority in secondary schools should be set at 18 instead of 20, as currently proposed. It makes sense to add protections for youth age 16 and 17 given the potential for coercion in a school setting and the potential for consent derived from the pressures of that setting. However, once a student reaches age 18, he or she should be free to engage in consensual sexual conduct with others, including individuals who may have positions of authority within the school setting. Those relationship may very well violate employee norms and in

[2] https://dcps.dc.gov/page/dcps-organization.

those instances should lead to the serious sanction of job loss, but they should not result in criminal liability. Relationships between students and school personnel can be prosecuted under RCC § 22A-1303(b), second degree sexual assault, when the power differential or other actions taken by the defendant result in the coercion of the student.[4]

3. With respect to RCC § 22A-1301(11), "position of trust with or authority over," PDS recommends the following changes.

   (11) "Position of trust with or authority over" ~~includes~~ means a relationship with respect to a complainant of:

   (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption;
   (B) A legal or de facto guardian or any person, more than 4 years older than the ~~victim~~ complainant, who resides intermittently or permanently in the same dwelling as the complainant;
   (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the complainant at the time of the act; and
   (D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution where the complainant is an active participant or member, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program where the complainant is an active participant or member, ~~including~~ meaning a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff that has regular contact with the complainant in the above settings.

   These recommendations mirror PDS's recommendations for RCC § 22A-1305. The term position of trust or authority is used in the RCC provisions that criminalize sexual abuse of a minor and in sentencing enhancements. A position of trust and authority should be more than a label based on the defendant's employment or status. The definition should capture situations where the defendant's close relationship to the complainant or minor allow for an abuse of trust or additional harm.

4. PDS makes the following recommendations for revisions to the definition of coercion at RCC § 22-1301(3).

   The RCC definition of coercion is employed primarily in second and fourth degree sexual assault, RCC § 22A-1303(b) and (d). As currently drafted the defendant must knowingly cause the complainant to submit to or engage in a sexual act or contact through some coercive conduct as defined in RCC §22-1301(3). While the requirement that the

[4] RCC § 22-22A-1301(3) defines coercion as threatening, among other things, to take or withhold action as an official, or to cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to comply.

defendant knowingly caused the sexual act or conduct through coercion provides some strength to the offense definition, the RCC definition of coercion allows seemingly minor conduct to qualify as coercion. This will require jurors to decide the causal question of the connection between the alleged coercion and the sexual act rather than more appropriately limiting the charges that may be brought under a coercion theory.

The current RCC definition includes sexual acts coerced by threats of ridicule. Ridicule should not be included within the specific definition of coercion. Without more, there is insufficient reason to believe that the threat of ridicule would cause a complainant to perform or submit to a sexual act. Where the ridicule is serious or where the defendant knows that the complainant is particularly vulnerable due to his or her background or particular circumstances, the conduct will fall within the catchall provision of coercion, RCC § 22A-1301(3)(G). Similarly, a threat to cause hatred or contempt of a deceased person should be considered coercive only when it meets the standard of RCC § 22A-1301(G) and should not be a standalone provision of coercion. A watered down definition of coercion brings the possibility of arrests and pretrial incarceration for circumstances that are not sufficiently serious to compel the submission of a reasonable person in the same circumstances.

PDS also has concerns about how the RCC addresses coercion in the context of controlled substances and prescription medication.[5] Generally speaking, this sub-definition of "coercion" needs to focus more precisely on what makes the conduct "coercive" or what makes a person feel *compelled* to submit to or engage in a sexual act or sexual contact. The conduct that makes engaging in a sexual act or sexual contact *compulsory* must be as serious as the other conduct proscribed in the definition, such as threatening to commit a criminal offense against the person.[6] According to the commentary, this sub-definition was modeled on the current definition of "coercion" in the human trafficking chapter of the D.C. Code.[7] That definition refers to controlling a person's access to "an addictive or controlled substance."[8] PDS recommends that "coercion" should be about restricting access to an addictive substance (that is also a controlled substance), not merely about restricting access to a controlled substance. What makes restricting access to a substance coercive or compelling conduct is that the substance is one to which the person is addicted. It would not be coercive to restrict a person's access to cocaine *unless the person is addicted to cocaine*. As the Commission notes, limiting a person's access to alcohol, which is an addictive substance, "is not as inherently coercive as limiting a person's access to a controlled substance, as it is relatively easy to obtain alcohol by other means."[9] PDS agrees with the point but posits that the Commission drew the wrong conclusion from it. Restricting access to alcohol is not "inherently" coercive and, unless one is addicted to it, neither is restricting a person's

[5] RCC § 22A-1301(3)(F).

[6] See RCC § 22A-1301(3)(A).

[7] Report #26, page 10.

[8] See D.C. Code § 22-1831(3)(F).

[9] Report #26, page 10, footnote 40.

access to a controlled substance. More to the point, restricting a person's access to alcohol is not coercive at all *precisely because* it is relatively easy for a person to obtain alcohol by other means. A person faced with the demand, "have sex with me or I won't give you this beer," is unlikely to feel compelled to submit to the sexual act, as the person can easily get beer elsewhere. A person faced with the demand, "have sex with me or I won't give you this heroin," is also unlikely to feel compelled to submit to the sexual act if (A) the person is not addicted to heroin and (B) the person can get heroin from another source. Thus, to be "coercive" restricting access should be about restricting access to a controlled substance to which the person is addicted and should be about more than a mere refusal to sell, exchange, or provide. Finally, PDS asserts that the coercive or compelling conduct involving addictive substances and prescription medication is the same. It is not clear what the difference would be between "limiting access to a controlled substance" and "restricting access to prescription medication" and it is certainly not clear that there should be a difference.

The term "limit access" is too broad to truly reach coercive acts. Limit access would seem to include the defendant not sharing his own controlled substances, to which the complainant has no right. It also criminalizes as second and fourth degree sexual abuse commercial sex where the currency is controlled substances. For instance, it should not be second degree sexual abuse if the defendant requires a sexual act as payment for controlled substances. The conduct of limiting access by refusing to sell drugs unless the complainant performs a sexual act should fall squarely within commercial sex and should not be second or fourth degree sexual abuse. With respect to prescription medication, it should be clear that the coercive conduct is limiting a person's access to their own prescribed medicine. A pharmacist refusing to fill a prescription unless a sexual act is performed in exchange is engaging in prostitution, not attempted sexual assault. Because there are other pharmacies, a person who is unwilling to pay that price for his or her prescribed medication, is not being compelled to engage in the sexual act. However, restricting a person's access to their own medicine would in many circumstances be coercive.

PDS recommends the statutory language below.

(3) "Coercion" means threatening that any person will do any one of, or a combination of, the following:
  (A) Engage in conduct constituting an offense against persons as defined in subtitle II of Title 22A, or a property offense as defined in subtitle III of Title 22A;
  (B) Accuse another person of a criminal offense or failure to comply with an immigration regulation;
  (C) Assert a fact about ~~another person~~ the complainant, ~~including a deceased person~~, that would tend to subject ~~that person~~ the complainant to hatred, or contempt, ~~or ridicule~~, or ~~to~~ would substantially impair that person's credit or business repute;
  (D) Take or withhold action as a~~n~~ public official, or cause a public official to take or withhold action;
  (E) Inflict a wrongful economic injury;

(F) Restrict ~~Limit~~ a person's access to a controlled substance, as defined in D.C. Code 48-901.02, to which the person is addicted and ~~controlled substance~~ or restrict a person's access to that person's prescription medication; or

(G) Cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to comply.

In addition to the drafting changes above, PDS recommends that the following language be added to the commentary: Restricting a person's access to a substance to which the person is addicted is not the same as refusing to sell or provide an addictive substance or refusing to fill a person's prescription. Nor is restricting a person's access the same as suggesting a sexual act or sexual contact as a thing of value in exchange for a controlled substance to which the person is addicted or for prescription medication. Such suggestion, and such exchange, may constitute prostitution or soliciting prostitution, but it is not, standing alone, coercion for the purposes of second and fourth degree sexual abuse.

5. PDS recommends a minor modification to RCC § 22A-1303. RCC § 22A-1303(a)(C)(i) prohibits administering an intoxicant without the claimant's effective consent "with intent to impair the complainant's ability to express unwillingness." The RCC should explicitly add: "with intent to impair the complainant's ability to express unwillingness to participate in the sexual act." The above recommendation clarifies the phrase "ability to express unwillingness" and ensures that the motive in providing the intoxicant is connected to the sexual assault.

6. RCC § 22A-1303(f) provides for penalty enhancements for sexual offenses based on the characteristics of the complainant and/or the defendant. PDS objects to the use of enhancements generally. Sexual offenses carry lengthy terms of incarceration. The Sentencing Guidelines provide wide ranges of guidelines-compliant sentences for sex offenses. Given the high statutory maxima and the wide ranges available under the Sentencing Guidelines, sentencing enhancements are not necessary to guide judicial discretion. Judges will examine the facts of each case and sentence appropriately. Defendants convicted of sexual crimes against children younger than 12 will typically receive longer sentences without the effect of any enhancement because the facts of the case will warrant a longer sentence. Sentencing enhancements do not serve a meaningful purpose in guiding judicial discretion and if they are assigned a mandatory minimum or a particular offense severity group on the Sentencing Guidelines they may inappropriately cabin judicial discretion to sentence based on the particular facts of the case.

   If the RCC retains sentencing enhancements, PDS recommends re-evaluating the purpose of RCC § 22A-1303(f)(4)(E) which provides for a penalty enhancement where "the actor recklessly disregarded that the complainant was age 65 or older and the actor was in fact, under 65 years old." If the intent is to focus on the unique vulnerabilities of the complainant, the age should be raised to over age 75. If the intent of the RCC is to punish young defendants who may take advantage of an individual who is over age 65, then the enhancement should also provide for an age gap. In that instance, RCC § 22A-1303(f)(4)(E) should read: "the actor recklessly disregarded that the complainant was age 65 or older and the actor was in fact, at least ten years younger than the complainant."

RCC § 22A-1303(C) adds a sentencing enhancement for instances where the "actor recklessly disregarded that the complainant was under 18 years of age and the actor was, in fact, 18 years of age or older and at least two years older than the complainant." PDS objects to this sentencing enhancement in particular. It does not address a particular harm and draws lines that may be entirely arbitrary. A sexual assault of a 17 year old by a 19 year old may be no different than a sexual assault of an 18 year old by a 21 year old. The age distinction drawn in the RCC in many instances will have no correlation to the particular harm of this conduct as opposed to other similar conduct. Sexual assault has devastating consequences for all and arbitrarily drawing this additional age-based line does not enhance the proportionality of punishment or meaningfully distinguish between the harms inflicted. As stated above, judges will have sufficient sentencing discretion to appropriately consider the particular harms caused and the circumstances of the defendant.

7. RCC § 22A-1306, sexually suggestive contact with a minor, prohibits instances where "with the intent to cause the sexual arousal or sexual gratification of any person knowingly… (D) [the actor] touches the actor's genitalia or that or a third person in the sight of the complaint." As written the RCC criminalizes a minor's incidental viewing of sexual activity as a result of sharing a room or a home with others. RCC § 22A-1306(a)(2)(D) would criminalize a sibling masturbating or parents engaging in consensual sex in a room shared with a minor. The unintentional result is to criminalize typical conduct that occurs in households without private space for each individual. RCC § 22A-1306(a)(2)(D) should include an intent element that is related to the minor child. PDS proposes: "[the actor] touches the actor's genitalia or that of a third person in the sight of ~~complaint~~ a minor child with the intent to gratify the actor's sexual desire with respect to the minor child or to humiliate or degrade the minor child.

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Laura E. Hankins, General Counsel
Date:	December 20, 2018
Re:	Comments on First Draft of Report No. 27, Human Trafficking and Related Statutes

PDS has the following comments about RCC human trafficking and related offenses.

1. PDS recommends making the same changes to the definition of "coercion" as the term is used in the human trafficking chapter that PDS proposed for "coercion" for the sexual assault chapter.

2. PDS objects to the term "harbor" where it is used in Trafficking in Labor or Services,[1] Trafficking in Commercial Sex,[2] Sex Trafficking of Minors,[3] and Sex Trafficking Patronage.[4] Although it is used in the current D.C. Code,[5] that use is grammatically incorrect; the Revised Criminal Code should not perpetuate the misuse of the term. A "harbor" is a place of refuge. "To harbor" means to provide shelter or sanctuary. While we may speak of "harboring a fugitive" or "harboring a criminal," that is not an incorrect use of the term. Harboring a fugitive means to provide shelter for a fugitive. From the fugitive's perspective, the shelter is a "place of refuge;" it is simply that society does not want fugitives or criminals to have a place of refuge. In contrast, society likely supports persons and organizations that provide places of refuge to victims of trafficking.[6] PDS recommends replacing "harbor" with the term "house."

[1] RCC § 22A-1605(a)(1).

[2] RCC § 22A-1606(a)(1).

[3] RCC § 22A-1607(a)(1).

[4] RCC § 22A-1610(c)(2).

[5] For example, it is used at D.C. Code § 22-1833, Trafficking in labor or commercial sex acts, and at D.C. Code § 22-2704, Abducting or enticing a child from his or her home for purposes of prostitution, harboring such a child.

[6] See e.g., "Apple wins Stop Slavery Award, touts new initiative to hire human trafficking victims at retail stores," https://appleinsider.com/articles/18/11/14/apple-wins-stop-slavery-award-touts-new-initiative-to-hire-human-trafficking-victims-at-retail-stores.

3. PDS recommends changing the offense titles so the title better conveys the relative seriousness of the conduct. Forced labor or services and forced commercial sex make liable the person or the accomplice who, by means of coercion or debt bondage, causes another to engage in labor or services or in commercial sex. Whether or not the forced labor or services or forced commercial sex is part of a larger criminal enterprise, this conduct is at the core of the offense and is the most serious. The public perception of "trafficking" is that it is particularly serious, a form of modern-day slavery. Labeling the core offense as "forced commercial sex" and the supporting conduct as "trafficking" is precisely backwards. Thus, PDS recommends that "Forced Labor or Services" should be retitled to "Labor or Services Trafficking" and "Forced Commercial Sex" should be retitled to "Commercial Sex Trafficking." Further, "Trafficking in Labor or Services," "Trafficking in Commercial Sex," Sex Trafficking of Minors" should be retitled to "Assisting Labor or Services Trafficking," "Assisting Commercial Sex Trafficking," and "Assisting Sex Trafficking of Minors" respectively.

4. PDS recommends rewriting RCC § 22A-1605, Assisting Labor or Services Trafficking (formerly Trafficking in Labor or Services), and RCC § 22A-1606, Assisting Commercial Sex Trafficking (formerly Trafficking in Commercial Sex). The offenses criminalize conduct performed in aid of forced labor or services or forced commercial sex. As the Advisory Board discussed extensively with the Commission at the December 19, 2018 public meeting, there is a great danger that the offense will be written too broadly and criminalize persons who contribute minimally to the crime and have no vested interest in the success or outcome of the crime. Examples we discussed include the cab driver who drives someone he knows is a "trafficking victim" to the grocery store; the cab driver who one time drives someone she knows is being trafficked to a brothel; a pizza delivery person with a standing order to deliver pizza to a place the person knows houses trafficking victims; a hotel maid who cleans the room knowing it was a place where commercial sex trafficking took place. PDS strongly argues for a narrow offense and has a number of drafting recommendations. First, PDS agrees with the suggestion made during our Advisory Board discussion that the greatest concern is with persons who assist trafficking by housing, hoteling, [7] transporting, recruiting, and enticing. PDS therefore recommends narrowing the offense to criminalize only that conduct. Second, the offenses, including the penalties, and the commentary should make clear the seriousness of the offense and the culpability of the actors relative to each other. As stated above at PDS comment (3), labor or services trafficking or commercial sex trafficking, that is actually causing a person to engage in labor, services, or commercial sex by means of coercion or debt bondage, is the most serious conduct. A person who engages in conduct, such as transporting a person, *with the purpose* of assisting in the commission of the trafficking is liable as an accomplice and may be punished accordingly. Less serious, but still culpable, is an actor who knowingly recruits, entices, houses, hotels, or transports a person *with the intent* that the person be caused to engage in labor, services or commercial sex by means of coercion or debt bondage. "With intent" requires purpose or knowledge so it allows for a conviction based on a lower mental state than accomplice liability would require. But it solves the problem discussed at the December 19, 2018 Advisory Board meeting that the assisting offenses as currently drafted allow for criminal liability for an actor

[7] Though not commonly used as a verb, the Oxford English Dictionary confirms that "hotel" can be a verb.

who transports a person and who is aware of a substantial risk (or even knows) that the person is being trafficked, but the transportation does not aid the commission of the trafficking.

PDS recommends rewriting the offense elements of Assisting Labor Services Trafficking and Assisting Commercial Sex Trafficking as follows:

(1) Knowingly recruits, entices, ~~harbors,~~ houses, hotels, or transports~~, provides, obtains, or maintains by any means,~~ another person;

(2) With intent that the person be caused to provide [labor or services][commercial sex];

(3) By means of coercion or debt bondage.

For the same reasons, PDS recommends rewriting the offense elements of RCC § 22A-1607, Assisting Sex Trafficking of Minors, as follows:

(1) Knowingly recruits, entices, ~~harbors,~~ houses, hotels, or transports, ~~provides, obtains, or maintains by any means,~~ another person;

(2) With intent that the person be caused to engage in a commercial sex act;

(3) With recklessness as to the complainant being under the age of 18.

5. With respect to the RCC offenses of Commercial Sex Trafficking (formerly Forced Commercial Sex), Assisting Commercial Sex Trafficking (formerly Trafficking in Commercial Sex), and Assisting Sex Trafficking of Minors (formerly Sex Trafficking of Minors), PDS recommends clarifying that the provision or promise of something of value necessary to make the sex act "commercial" must be provided or promised by someone other than the actor who is "forcing" the commercial sex by coercion or debt bondage. This is necessary to distinguish those offenses from sexual assault. To understand how the offenses could currently overlap, imagine the following scenario: Actor restricts complainant's access to complainant's insulin by hiding it. Actor says, "I'll give you your insulin back if you have sex with me." If complainant complies, that would be second degree sexual assault by coercion.[8] PDS is concerned that, as currently drafted, the RCC forced commercial sex statute could be interpreted to also criminalize that conduct because the actor would be causing the complainant, by means of coercion, to engage in a sexual act that was made "commercial" by being in exchange for the insulin, a thing of value. The difference between sexual assault and forced commercial sex is that it is a third person who is giving something of value in exchange for the sexual act or sexual contact and that thing of value is different from that which is being used to coerce the complainant's compliance. PDS recommends rewriting Forced Commercial Sex as follows:

[8] See RCC § 22A-1303(b)(2)(A).

~~A person~~ An actor or business commits the offense of commercial sex trafficking ~~forced commercial sex~~ when that ~~person~~ actor or business:

(1) Knowingly causes a person to engage in a commercial sex act with another person;

(2) By means of coercion or debt bondage.

Assisting Commercial Sex Trafficking and Assisting Sex Trafficking of Minors should be rewritten similarly. For the same reason, Sex Trafficking Patronage should be modified to distinguish it from sexual assault. First Degree Sex Trafficking Patronage should be written as follows:

~~A person~~ An actor commits the offense of first degree sex trafficking patronage when that ~~person~~ actor:

(1) Knowingly engages in a commercial sex act;

(2) When coercion or debt bondage was used by another person or a business to cause the person to submit to or engage in the commercial sex act;

(3) With recklessness that the complainant is under 18 years of age.

Second and third degree sex trafficking patronage should be rewritten similarly.

6. With respect to RCC § 22A-1608, Benefitting from Human Trafficking, the RCC Commentary states that the offense "criminalizes knowingly obtaining any benefit or property by participating, other than through the use of physical force, coercion or deception, in an association of two or more persons…"[9] PDS questions where in the offense elements it is clear that the participation must be "other than through the use of physical force, coercion or deception." PDS recommends rewriting the offense to state more clearly the exclusion of the use of physical force, coercion or deception.

7. PDS recommends rewriting RCC § 22A-1608, Benefitting from Human Trafficking, to allow for greater differentiation between offender culpability. The only distinction between the two degrees of benefitting is whether the group, in which the actor participates, is engaged in forced commercial sex (first degree) or forced labor or services (second degree). Thus, the person who is a "kingpin" in a group and who gains significant benefits from their participation is treated the same as the person whose participation in the group is sufficiently marginal that they are only disregarding a substantial risk that the group participates in the forced commercial sex or labor or services. PDS recommends increasing the mental state for first and second degree to knowing that the group has engaged in conduct constituting forced commercial sex (first degree) or forced

[9] Report #27, page 49. The report also says "Subsection (a)(2) [of RCC § 22A-1608] specifies that the accused must have obtained the property or financial benefit through participation other than through the use of physical force, coercion, or deception in a group of two or more persons." *Id*.

labor or services (second degree). PDS further proposes creating a third degree benefitting from human trafficking offense that encompasses both forced commercial sex and forced labor or services and that has the mental state of "recklessness" with respect to the forced conduct in which the group engages.

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Laura E. Hankins, General Counsel
Date:	December 20, 2018
Re:	Comments on First Draft of Report No. 28, Stalking

PDS has the following comments about the RCC offense of stalking.

1. PDS objects to the negligence mental state in the proposed stalking offense.[1] As currently proposed, a person commits stalking if the person purposely engages in a pattern of conduct directed at an individual and does so either (A) with intent to cause the individual to fear for his or her safety or with intent to cause the individual to suffer significant emotional distress or (B) negligently causing the individual to fear for his or her safety or to suffer significant emotional distress. Particularly because the purpose of the person's conduct (necessary to establish it as a pattern) need not be nefarious – for example, "a person might persistently follow someone with the goal of winning their affection"[2] – a negligence mental state standard is too low. Increasing the mental state to "recklessly," as PDS recommends, makes the second way of committing the offense on par with the first way. That a person's conduct is done with an awareness of a substantial risk that her conduct is causing the individual to fear for his safety is of similar seriousness as a person's conduct being done with the intent to cause such fear (whether or not it actually does). Allowing a conviction based only on proof that the person, who may otherwise have a benign or beneficent purpose, *should have been* aware that her conduct was causing the individual to fear for his safety would allow a conviction based on conduct that is of significantly lower culpability than the intentional conduct, yet the offense does not define them as different degrees.

2. PDS recommends increasing the separate occasions of conduct required to establish a pattern from two to three.[3] As the commentary explains, stalking concerns "longer-term apprehension," in contrast to breach of the peace statutes like disorderly conduct, rioting, and public nuisance

[1] See RCC § 22A-1801(a)(2)(B).

[2] Report #28, page 5, footnote 2.

[3] See RCC §22A-1801(d)(3).

which create "momentary fear of an immediate harm."[4] Requiring three occasions to establish a "pattern of conduct" does more to assure that the harm being punished is "longer-term apprehension" and better distinguishes between conduct that constitutes stalking and conduct that would constitute a breach of the peace.

3. PDS recommends rewriting the definition of "financial injury" to limit "attorney's fees" at sub-subsection (F) to only those attorney's fees "incurred for representation or assistance related to" the other forms of financial injury listed at (A) through (E). This is consistent with the objection and proposal PDS made on the definition of "financial injury" in its November 3, 2017 comments on Report #8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions.

4. PDS appreciates the effort to protect the conduct of attorneys and private investigators acting within the reasonable scope of their official duties from prosecution pursuant to the revised stalking statute.[5] The list of excluded professionals is inadequate, however, to cover investigators employed by the Public Defender Service or by private attorneys appointed to represent indigent defendants pursuant to the Criminal Justice Act. PDS and CJA investigators are not "licensed private investigators." In addition, PDS and law school programs rely on college and law student interns to perform investigative tasks. PDS strongly urges rewriting the excluded professions list as follows: "(A) The person is a journalist, law enforcement officer, licensed private investigator, attorney, person acting as an agent of an attorney, process server, *pro se* litigant, or compliance investigator..."

5. PDS agrees with the explanation of "physically following" that is in the commentary.[6] PDS recommends including the term in the definitions subsection of the statute and using the explanation from the commentary. Specifically, PDS recommends adding to subsection (d) the following: "The term 'physically following' means to maintain close proximity to a person as they move from one location to another."

6. PDS suggests deleting footnote 10.[7] The Do Not Call Registry is not a good example of a government entity that might be the indirect source of notice to the actor to cease communications with the complainant. The Do Not Call Registry is for telemarketing calls only; it does not restrict calls from individuals.[8]

7. PDS recommends that the commentary clarify that the actor must know that the notice to cease communication is from the individual, even if the notice is indirect. The commentary should be clear that if the actor does not know that the person delivering the message to cease communicating with the individual is authorized to deliver such message on the individual's

[4] Report #28, page 10, footnote 40.

[5] See RCC § 22A-1801(e)(3).

[6] Report #28, pages 5-6.

[7] Report #28, page 6.

[8] Incidentally, the Registry does not restrict calls from charities or debt collectors either.

behalf, then the message does not qualify as the "notice" required by the offense. For example, the former paramour receives a message from the new paramour to stop calling and texting the individual will not satisfy the requirement that the actor (former paramour) "knowingly received notice from the individual" unless the actor knows that the new paramour is authorized to deliver the message to cease communications.

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: December 21, 2018

SUBJECT: First Draft of Report #26, Sexual Assault and Related Provisions

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 #26 - Sexual Assault and Related Provisions.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-1301 (2), definition of bodily injury.

RCC § 22A-1301 (2) states that bodily injury "means significant physical pain, illness, or any impairment of physical condition." It is unclear from the text and the Commentary if the word "significant" is meant to modify only physical pain or whether it is meant to modify illness as well. Because of the wording of the definition of "bodily injury" in D.C. Code § 22-3001 (2), OAG assumes that the drafter's meant that bodily injury "means illness, significant physical pain, or any impairment of physical condition." OAG makes this assumption because the phrase "bodily injury", in DC Code § 22-3001(2), is defined as and "… injury involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain." Note that there are no modifiers that apply to the words "disease" or "sickness" in the current law. However, if the drafter's meant the word "significant" to modify both words, then the definition should be

[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.

rewritten to say that it "means significant physical pain, significant illness, or any impairment of physical condition." The Commentary should then explain why it made that choice.

RCC § 22A-1301 (8), definition of effective consent, and, RCC § 22A-1301 (3), definition of coercion.

As written, an actor who threatens a complainant that they will expose or publicize a fact, whether true or false, that will subject the complainant to embarrassment cannot be charged with a sexual assault if the complainant acquiesces. In order to determine if a person has given "effective consent" in this context, we need to determine if the person was coerced. RCC § 22A-1301 (8) states that effective consent "means consent obtained by means other than physical force, coercion, or deception." RCC § 22A-1301 (3) defines coercion. One way that a person may be coerced is if the actor threatens the complainant that they will "assert a fact about another person, … that would tend to subject that person to hatred, contempt, or ridicule, or to impair that person's credit or repute…"[2] The word "embarrassment" is notably missing from that list. However, the Council, as recently as December 4, 2018 recognized that persons may submit to unwanted sex rather than have something embarrassing made public when it passed the Sexual Blackmail Elimination and Immigrant Protection Amendment Act of 2018. In the legislation, a person commits the offense of blackmail if they threaten to "[e]xpose a secret or publicize an asserted fact, whether true or false, tending to subject another person to hatred, contempt, ridicule, embarrassment, or other injury to reputation… or distribute a photograph, video, or audio recording, whether authentic or inauthentic, tending to subject another person to hatred, contempt, ridicule, embarrassment or other injury to reputation…" [emphasis added][3]

The definition of "coercion" in paragraph (G) includes "Cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to comply." For clarity, this phrase should explicitly

[2] The full definition of coercion is much broader. RCC § 22A-1301 (3) states that coercion "means threatening that any person will do any one of, or a combination of, the following:
(A) Engage in conduct constituting an offense against persons as defined in subtitle II of Title 22A, or a property offense as defined in subtitle III of Title 22A;
(B) Accuse another person of a criminal offense or failure to comply with an immigration law or regulation;
(C) Assert a fact about another person, including a deceased person, that would tend to subject that person to hatred, contempt, or ridicule, or to impair that person's credit or repute;
(D) Take or withhold action as an official, or cause an official to take or withhold action;
(E) Inflict a wrongful economic injury;
(F) Limit a person's access to a controlled substance as defined in D.C. Code 48-901.02 or restrict a person's access to prescription medication; or
(G) Cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and the same circumstances to comply."

[3] See lines 24 through 32 of the engrossed original of the Sexual Blackmail Elimination and Immigrant Protection Amendment Act of 2018 and the accompanying committee report. http://lims.dccouncil.us/Legislation/B22-0472?FromSearchResults=true

refer to another person. In other words, the phrase "same background and in the same circumstances" should have an object to which it refers. We suggest that the paragraph be rewritten to say, "Cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply"

RCC § 22A-1303, Sexual assault.

RCC § 22A-1303, and many of the other related provisions, ascribes the mental state of "knowingly" to many of the elements of the offense. As noted on page 58 of the Report, a consequence of using this mental state is that there will be a change in District law such that a person would be able to use self-induced intoxication as a defense.[4] While understanding why the Commission chose to use the mental state of knowingly in these offenses, a person should not be able to decide to rape, or otherwise sexually abuse, someone; consume massive amounts of alcohol to get up the nerve to do it; consummate the rape; and then be able to argue, whether true or not, that at the time of the rape he lacked the mental state necessary to be convicted of the offense. If the Commission is going to use this mental state, then the Commission should create an exception that accounts for this situation. This exception would be similar to what the Commission is already proposing in § 22A-208 (c) concerning willful blindness.[5]

[4] The relevant portion of this discussion is found on pages 58 and 59 of the Report. There it states:

> Second, as applied to first degree and third degree of the revised sexual assault statute, the general culpability principles for self-induced intoxication in RCC § 22A-209 allow an actor to claim that he or she did not act "knowingly" or "with intent" due to his or her self-induced intoxication. The current first degree and third degree sexual abuse statutes do not specify any culpable mental states. DCCA case law has determined that first degree sexual abuse is a "general intent" crime for purposes of an intoxication defense, and similarly logic would appear to apply to third degree sexual abuse. This case law precludes ~~preclude~~ an actor from receiving a jury instruction on whether intoxication prevented the actor from forming the necessary culpable mental state requirement for the crime. This DCCA case law would also likely mean that an actor would be precluded from directly raising—though not necessarily presenting evidence in support of—the claim that, due to his or her self-induced intoxicated state, the actor did not possess any knowledge or intent required for any element of first degree or third degree sexual abuse. In contrast, under the revised sexual assault statute, an actor would both have a basis for, and would be able to raise and present relevant and admissible evidence in support of, a claim that voluntary intoxication prevented the actor from forming the knowledge or intent required to prove the offense. Likewise, where appropriate, the actor would be entitled to an instruction which clarifies that a not guilty verdict is necessary if the actor's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of knowledge or intent at issue the revised sexual assault statute. [internal footnotes omitted] [strikeout added for clarity]

[5] RCC § 22A-208 (c) states "IMPUTATION OF KNOWLEDGE FOR DELIBERATE IGNORANCE. When a culpable mental state of knowledge applies to a circumstance in an offense, the required culpable mental state is established if … The person was reckless as to whether the circumstance existed;

RCC § 22A-1303 (a)(2) makes it a first degree sexual assault when a person causes someone to submit to a sexual act "… (A) By using a weapon or physical force that overcomes, restrains, or causes bodily injury to the complainant." It is unclear whether the drafters meant for the phrase "force that overcomes, restrains, or causes bodily injury to the complainant" to modify "physical force" or also modifies the use of "a weapon." OAG believes that when a person uses a weapon to cause a victim to engage in a sexual act it should be a first degree sexual assault, without having to prove the effect of the use of the weapon on the complainant; it should be assumed. For the sake of clarity, paragraph (A) should be redrafted.[6]

RCC § 22A-1303 (a)(2)(C)(ii) makes it a first degree sexual assault when a person causes someone to submit to a sexual act by drugging the complainant when the substance in fact renders the complainant "…(ii) Substantially incapable, mentally or physically, of appraising the nature of the sexual act; or (iii) Substantially incapable, mentally or physically, of communicating unwillingness to engage in the sexual act." There are two issues with the way that this is phrased. First, it is unclear in subparagraph (ii) what the word "physically" adds. In other words, after a person has been drugged, what is the difference between a person being substantially incapable "mentally" of appraising the nature of the sexual act and a person being substantially incapable "physically" of appraising the nature of the sexual act? The second issue is that these two statements do not reach the situation where a victim is drugged, can still appraise the nature of the sexual act and can communicate that he or she is unwilling to engage in a sexual act, but is physically unable to move anything but their mouth. The provision should clarify that first degree sexual assault covers a person who has sex with a victim after administering a drug that physically incapacitates the victim, though allowing the victim to think and speak.

RCC § 22A-1305, Sexual Exploitation of an Adult.

In paragraph (a)(2)(C) the subparagraph criminalizes sexual acts between a complainant and "member of the clergy" under specified circumstances. The phrase "member of the clergy" is not defined. To improve clarity and avoid needless prosecutions and litigation the Commission should define this term. The Commission could base its definition of "member of the clergy" on the list of clergy that appears in D.C. Code § 22-3020.52. This is the Code provision that requires "any person" to report information concerning child victims of sexual abuse but exempts "a priest, clergyman, rabbi, or other duly appointed, licensed, ordained, or consecrated minister of a given religion in the District of Columbia, or a duly accredited practitioner of Christian Science in the District of Columbia" when those persons are involved in a confession or penitential communication.

and …The person avoided confirming or failed to investigate whether the circumstance existed with the purpose of avoiding criminal liability."

[6] The Commission could redraft subparagraph (A) so that if follows the basic structure of subparagraph (B). It would look as follows:

"(A) By using:

(i) A weapon; or

(ii) Physical force that overcomes, restrains, or causes bodily injury to the complainant…"

RCC § 22A-1307, Enticing a minor.

One way that a person can commit the offense of enticing a minor is to knowingly persuade or entice, or attempt to persuade or entice, "the complainant to go to another location in order to engage in or submit to a sexual act or conduct." RCC § 22A-1307(a)(1)(B). As written, it is unclear if the phrase "in order to" refers to the actor's motivations or is part of what the actor must communicate to the complainant. The Commentary should clarify that "in order" refers to the actor's motivation for the communication to get the complainant to go to another location, not that the actor has to communicate to the complainant that a sexual act or contact is the reason for going to another place.

Pursuant to RCC § 22A-1307 (a)(2) a person can commit this offense when "The actor, in fact, is at least 18 years of age and at least four years older than the complainant, and … (C) The complainant, in fact, is a law enforcement officer who purports to be a person under 16 years of age, and the actor recklessly disregards that complainant purports to be a person under 16 years of age." There is a problem, however, with how this subparagraph is structured. Paragraph (C) is still subject to the overarching lead in language, so this law-enforcement language still doesn't apply unless the actor is 4 years older than the complainant. If the intent is to include any situation where an actor tries to entice a law enforcement officer who purports to be under 16 the provision should be restructured. For example, the Commission could redraft this provision to read:

> (2)(A) The actor, in fact, is at least 18 years of age and at least four years older than the complainant, and:
>
> (1) The actor recklessly disregards that the complainant is under 16 years of age; or
>
> (2) The actor recklessly disregards that the complainant is under 18 years of age and the actor is in a position of trust with or authority over the complainant; or
>
> (B)(1) The actor, in fact, is at least 18 years of age,
>
> (2) The complainant, in fact, is a law enforcement officer who purports to be a person under 16 years of age; and
>
> (3) The actor recklessly disregards that complainant purports to be a person under 16 years of age.

RCC § 22A-1308, Arranging for sexual conduct of a minor.

While in general, OAG does not object to RCC § 22A-1308, the limitation on this offense is that "The actor and any third person, in fact are at least 18 years of age and at least four years older than the complainant" conflicts with the requirement that the actor recklessly disregards that the "complainant purports to be a person under 16 years of age, while, in fact, the complainant [is] a law enforcement officer."

The relevant part of the provision is as follows:

"(a) Arranging for Sexual Conduct with a Minor. An actor commits the offense of arranging for sexual conduct with a minor when that actor:
(1) Knowingly arranges for a sexual act or sexual contact between:
(A) The actor and the complainant; or
(B) A third person and the complainant; and
(2) The actor and any third person, in fact, are at least 18 years of age and at least four years older than the complainant; and
(3) The actor recklessly disregards that:
(A) The complainant is under 16 years of age;
(B) The complainant is under 18 years of age, and the actor knows that he or she or the third person is in a position of trust with or authority over the complainant; or
(C) The complainant purports to be a person under 16 years of age, while, in fact, the complainant a law enforcement officer.

The following example demonstrates the problem. Say the Actor is 20 years old and the complainant is an undercover police officer pretending to be 14 years of age. Notwithstanding that there is a mental state in subparagraph (3)(c) that requires that "The actor recklessly disregards that… The complainant purports to be a person under 16 years of age, while, in fact, the complainant [is] a law enforcement officer…", arguably we never get to that mental state. That's because the mental state concerning the law enforcement officer is never reached because we can't jump the hurdle, in paragraph (a)(2) that "The actor and any third person, in fact, are at least 18 years of age and at least four years older than the complainant…"

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: December 21, 2018

SUBJECT: First Draft of Report #27, Human Trafficking and Related Statutes

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 First Draft of Report #27 - Human Trafficking and Related Statutes.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-1601 (2)(D), definition of Coercion.

RCC § 22A-1601 (2)(D) states that the definition of the word "coercion" includes when a person "Take[s] or withhold[s] action as an official…" The word "official" is not defined in the text nor is it specifically addressed in the Commentary. OAG assumes that the word was chosen to refer to government action and not to the official action of a corporation or other organization. It is unclear, however, whether the term should be read broadly as "takes or withholds government action" or more narrowly as "takes or withholds District government action." Because all government action is "official, we recommend that the definition be rewritten to refer to "government action" rather than "official action." We believe that this will aid clarity.

RCC § 22A-1602, Limitations on liability and sentencing for RCC Chapter 16 offenses.

[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.

Paragraph (b) lists the "Exceptions to Liability." It states:

> Any parent, legal guardian, or other person who has assumed the obligations of a parent who requires his or her child under the age of 18 to perform common household chores under threat of typical parental discipline shall not be liable for such conduct under sections 22A-1603, 22A-1605, and 22A-1609 of this Chapter, provided that the threatened discipline did not include:
>
> (1) Burning, biting, or cutting;
> (2) Striking with a closed fist;
> (3) Shaking, kicking, or throwing; or
> (4) Interfering with breathing.

There are a few problems with this formulation. As drafted, the paragraph implies that burning, biting, or cutting, etc. are typical forms of parental discipline.[2] Second, the term "typical" is not defined. Surely it should not mean that merely because a number of people do something harmful that it would qualify as an exception for liability. For example, just because it may be "typical" in some places for parents to neglect their child, see D.C. Code § 16-2301(9), those neglectful actions should not be an exception to liability when they are used as parental discipline. Finally, subparagraphs (1)-(4) are stated as an exclusive list. There are, however, other harms, including neglect, that a parent may typically inflict on a child that should also be excluded.[3]

RCC § 22A-1603, Forced labor or services.

Paragraph (b) establishes the penalties for the offense of forced labor or services. Though businesses can be convicted of this offense, the penalty structure is the same as for offenses that can only be charged against a person. As businesses cannot be subject to incarceration and as their collective motivation for this offense is financial, there should be a separate fine penalty structure for businesses that is substantial enough to act as a deterrent.

Paragraph (c) provides for a penalty enhancement when it is proven that "The complainant was held or provides services for more than 180 days." This sentence should be redrafted to make it clear that the enhancement should apply when the combined period of time that a person is held

[2] The paragraph can be read to say "Any parent… who requires his … child … to perform common household chores under threat of typical parental discipline shall not be liable for such conduct provided that the threatened discipline did not include… [b]urning, biting, or cutting…;" [emphasis added]

[3] Similarly, in RCC § 22A-1603 (e) the drafters use the word "ordinary." It is unclear what that term means in the context of that paragraph.

and forced to provide services – together – total more than 180 days.[4] The same comment applies to the penalty enhancement for RCC § 22A-1603 Forced commercial sex.

RCC § 22A-1607, Sex trafficking of minors.

It is unclear how the penalty provision in paragraph (b) should be read with the offense penalty enhancements in paragraph (c).[5] For example, in determining the penalty for a repeat offender who holds the complainant for more than 180days, do you apply the penalty enhancement in RCC §§ 22A-805 and then go to up one class or do you go up one class and then apply the enhancement in RCC §§ 22A-805?[6]

RCC § 22A-1608, Benefiting from human trafficking.

RCC § 22A-1608 (a)(2) states that the offense of first degree benefiting from human trafficking includes, as an element, "By participation in a group of two or more persons." It is unclear if whether this element is met when a business of two people are engaged in human trafficking. In other words, because its two people that participate is this element met? Or, because it is one business, albeit with two people, is this element not met?[7]

The Commentary to RCC § 22A-1608 (a)(2) states, "Subsection (a)(2) specifies that the accused must have obtained the property or financial benefit through participation other than through the use of physical force, coercion, or deception in a group of two or more persons." Subsection (a)(2) does not contain this limitation. See text in previous paragraph.

RCC § 22A-1609, Misuse of documents in furtherance of human trafficking.

RCC § 22A-1609(a)(2) includes as an element of the offense that the person or business acted "With intent to prevent or restrict, or attempt to prevent or restrict, without lawful authority, the person's liberty to move or travel in order to maintain the labor, services, or performance of a commercial sex act by that person." [emphasis added] OAG recommends deleting the phrase "without lawful authority." The inclusion of the "without lawful authority" clause assumes that there are situations that it would be justified to, "With intent to prevent or restrict, or attempt to prevent or restrict the person's liberty to move or travel in order to maintain the labor, services,

[4] For example, the enhancement should apply to someone who holds a person in their basement for 90 days "while training them" and then forces them to provide services for the next 91 days.
[5] Paragraph (b) states, "Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808 and the offense penalty enhancement in subsection (c) of this section, trafficking in commercial sex is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both." Paragraph (c) states, "The penalty classification for this offense may be increased in severity by one class when, in addition to the elements of the offense, the complainant was held or provides commercial sex acts for more than 180 days."
[6] This may be a global issue that applies to all penalty provisions where there are both general enhancements and offense specific enhancements.
[7] The same questions apply to element (b)(2) in the offense of second degree benefiting from human trafficking.

or performance of a commercial sex act by that person." We submit that that would never be the case. The Commentary does not explain why the phrase "without lawful authority" is necessary.

RCC § 22A-1609, Forfeiture.

It is unclear whether the forfeiture clause in RCC § 22A-1609 follows the holding in *One 1995 Toyota Pick-Up Truck v. District of Columbia*, 718 A.2d 558 (DC 1998). In that case, the government sought forfeiture of a vehicle valued at $15,500 that was owned by a person who was arrested for solicitation of a prostitute. The Court held that "the Constitution prevents the utilization of civil forfeiture as a penalty for the commission of an offense where the value of the property forfeited stands in gross disproportion to the gravity of the offense. Such a disproportion exists in the case at bar and the attempted forfeiture therefore violates the Excessive Fines Clause of the Eighth Amendment."

RCC § 22A-1613. Civil Action.

RCC § 22A-1613 permits victims of offenses prohibited by § 22A-1603, § 22A-1604, § 22A-1605, § 22A-1606, § 22A-1607, § 22A-1608, or § 22A-1609 may bring a civil action in the Superior Court. The provision should explicitly state that the defendant in the civil action must be a person who can be charged as a perpetrator of one of those offenses.

RCC § 22A-1613 (b) contains the following provision. "(b) Any statute of limitation imposed for the filing of a civil suit under this section shall not begin to run until the plaintiff knew, or reasonably should have known, of any act constituting a violation of § 22A-1603, § 22A-1604, § 22A-1605, § 22A-1606, § 22A-1607, § 22A-1608, or § 22A-1609 or until a minor plaintiff has reached the age of majority, whichever is later." OAG believes that a person who was a minor should have an opportunity to sue on their own behalf. As written, just as the minor was able to sue, because they reached the age of majority, they would be precluded from suing because they reached the age of majority. Instead, OAG suggests that the Commission adopt the language used in the engrossed original of B22-0021, the Sexual Abuse Statute of Limitations Amendment Act of 2018. That bill provides, "for the recovery of damages arising out of sexual abuse that occurred while the victim was less than 35 years of age— the date the victim attains the age of 40, or 5 years from 40 when the victim knew, or reasonably should have known, of any act constituting sexual abuse, whichever is later;""

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: December 21, 2018

SUBJECT: First Draft of Report #28, Stalking

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 #28 - Stalking.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22A-1801, Stalking.

RCC § 22A-1801(d)(4) contains the following definition, "The term "financial injury" means the reasonable monetary costs, debts, or obligations incurred as a result of the stalking by the specific individual, a member of the specific individual's household, a person whose safety is threatened by the stalking, or a person who is financially responsible for the specific individual and includes:" [emphasis added] As written, the term "specific individual" refers to the person who is doing the staking. However, the lead in language to the stalking offense contains the sentence "Purposely engages in a pattern of conduct directed at a specific individual that consists of any combination of the following…" [emphasis added] See RCC § 22A-1801(a)(1). Using the term "specific individual" to refer to both the perpetrator and victim would be confusing. However, given the context, OAG believes that what The Commission meant in RCC § 22A-1801(d)(4) is, "as a result of the stalking of the specific individual."

[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.

RCC § 22A-1801(d)(8) states that the term "significant emotional distress" means "substantial, ongoing mental suffering that may, but does not necessarily, require medical or other professional treatment or counseling." On page 10 of the Commentary it clarifies the government's obligation by stating, "The government is not required to prove that the victim sought or needed professional treatment or counseling." OAG believes that that for the sake of clarity and to avoid needless litigation. The sentence in the Commentary should be in the text of the substantive provision in RCC § 22A-1801(d)(8).

RCC § 22A-1801(e) contains the exclusions from liability. Subparagraph (e)(3) states:

> (e) A person shall not be subject to prosecution under this section for conduct, if:
> (A) The person is a journalist, law enforcement officer, licensed private investigator, attorney, process server, pro se litigant, or compliance investigator; and
> (B) Is acting within the reasonable scope of his or her official duties.

While it may be intuitive to understand what the official duties of a law enforcement officer, licensed private investigator, process server, and compliance investigator is within the context of this offense, it is unclear what the official duties of a pro se litigant is. Since a pro se litigant does not appear to have "official duties" (or "professional obligations," to borrow the phrase used on page 12 of the report) in the ordinary meaning of that phrase, OAG believes that the subparagraph needs to be redrafted. In addition, there are questions as to whether an attorney or journalist necessarily has "official duties" as opposed to professional obligations. Therefore, OAG recommends that this provision be redrafted as follows:

> (A) The person is a law enforcement officer, licensed private investigator, or compliance investigator and is acting within the reasonable scope of his or her official duties; or
> (B) The person is a journalist, attorney, or pro se litigant and is acting within the reasonable scope of that role.

RCC § 22A-1801(f) provides for the parental discipline affirmative defense. This defense is available to "A parent, legal guardian, or other person who has assumed the obligations of a parent engaged in conduct constituting stalking of the person's minor child…" However, there are situations when this defense should not be given to a parent or legal guardian. For example, a parent or legal guardian may abuse their child and loose visitation rights or be subject to court orders limiting the person's contact with the child. The actions of these people in violating the provisions of RCC § 22A-1801 (a) may actually constitute stalking and, as such, these people should be subject to this offense.[2] RCC § 22A-1801(f) should be redrafted to ensure that

[2] RCC § 22A-1801(a) provides that a person commits stalking when that person:

"(1) Purposely engages in a pattern of conduct directed at a specific individual that consists of any combination of the following:

(A) Physically following or physically monitoring;

(B) Communicating to the individual, by use of a telephone, mail, delivery service, electronic message, in person, or any other means, after knowingly having

parents, legal guardians, or other people who have assumed the obligations of a parent can only avail themselves of this offense when they are exercising legitimate parental supervision and not when their rights are limited or nonexistent.

received notice from the individual, directly or indirectly, to cease such communication; or

(C) In fact: committing a threat as defined in § 22A-1204, a predicate property offense, a comparable offense in another jurisdiction, or an attempt to commit any of these offenses…"

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: December 21, 2018

SUBJECT: First Draft of Report #30, Withdrawal Defense & Exceptions to Legal Accountability and General Inchoate Liability

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 #30 - Withdrawal Defense & Exceptions to Legal Accountability and General Inchoate Liability.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 213, Withdrawal defense to legal accountability

RCC § 213 states that it as affirmative defense to a prosecution when

> a defendant terminates his or her efforts to promote or facilitate commission of an offense before it has been committed, and either:
> (1) Wholly deprives his or her prior efforts of their effectiveness;
> (2) Gives timely warning to the appropriate law enforcement authorities; or
> (3) Otherwise makes proper efforts to prevent the commission of the offense.

[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.

The RCC does not define the phrase "proper efforts." The Commentary does note, "This catchall "proper efforts" alternative allows for the possibility that other forms of conduct beyond those proscribed paragraphs (1) and (2) will provide the basis for a withdrawal defense. It is a flexible standard, which accounts for the varying ways in which a participant in a criminal scheme might engage in conduct reasonably calculated towards disrupting it. This standard should be evaluated in light of the totality of the circumstances." [internal footnotes omitted] Neither the RCC nor the Commentary, however, explain the parameters of this defense. For example, it is unclear if the phrase "proper efforts" is meant to be broader, narrower, or the same as "reasonable efforts." The RCC should give more guidance on the applicability of this defense.

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Laura E. Hankins, General Counsel
Date:	March 1, 2019
Re:	Comments on First Draft of Report No. 31, Escape from Institution or Officer

PDS has the following comments about the RCC offense of Escape from Institution or Officer.

1. PDS recommends defining the term "custody" in subsection (c) of the statute. The commentary, citing *Davis v. United States*,[1] explains that "'[c]ustody' requires a completed arrest; there must be actual physical restraint or submission of the person to arrest."[2] Because of the range of interactions that law enforcement can have with persons on the street that fall short of custody, it is important for the statute to be as clear as possible about when leaving the presence of law enforcement crosses the line to becoming criminal "escape." Specifically, PDS recommends the following definition:

   > Lawful custody exists where a law enforcement officer has completed an arrest, substantially physically restrained a person, or where the person has submitted to a lawful arrest.

   This definition is supported by *Davis* and by *Mack v. United States*.[3] While completed arrest is not necessary for custody, fleeting or minor physical contact between an arresting officer and the individual does not qualify as custody for the purposes of escape. For example, in *Davis*, a law enforcement officer walked behind the defendant, grabbed the back of his pants and his belt and then unsnapped the handcuff case on his utility belt in order to handcuff the defendant. The defendant turned around, shoved the officer and took off running. On these facts, the Court of Appeals held that the officer did not have "sufficient physical control over appellant for him to be 'in custody' at the time of the purported escape."[4] Rather, custody for the escape statute requires some manifestation of physical restraint. In *Mack v. United States*, grabbing the

[1] 166 A.3d 944 (D.C. 2017).

[2] Report #31, page 4.

[3] 772 A.2d 813 (D.C. 2001).

[4] *Davis*, 166 A.3d at 949.

defendant, picking him up, and throwing him to the ground showed sufficient physical restraint. In *Mack*[5], the Court of Appeals announced its intention to follow the "physical restraint legal principle" from a line of cases from other jurisdictions that stand for the proposition that custody exists where there a person's liberty of movement is successfully restricted or restrained."[6] That liberty has been substantially, albeit briefly, restrained should be reflected in the definition.

2. PDS recommends that the offense be rewritten to clarify that a person escapes the "custody" of a law enforcement officer and escapes the "confinement" of a correctional facility. Given the definition of "custody," at least in the commentary and, if PDS's first recommendation is accepted, in the RCC statutory definitions, it does not make sense for the second element to be framed in terms of "custody", to wit "failing to return to custody," or "failing to report to custody." Even with respect to "leaving custody," the term only makes sense in the context of leaving the custody of law enforcement, because correctional facilities do not "physically restrain" persons "pursuant to a [lawful] arrest."

3. PDS recommends restructuring the penalties to better reflect the relative seriousness of the criminal conduct. RCC § 22E-3401(b) currently proposes to grade "leaving custody" as first-degree escape and "failing to return to custody" and "failing to report to custody" as second-degree escape. Leaving the custody of a law enforcement officer is not as serious as leaving the confinement of a correctional facility such as the DC Jail. Therefore, PDS recommends grading the latter as first-degree and grading the former, along with failing to return and failing to report, as second-degree.

4. PDS opposes mandating consecutive sentencing for this offense. PDS supports maximizing judicial discretion with respect to sentencing to allow the sentence (punishment) to fit the specific offense and specific offender. The conduct of a person who escapes from the DC Jail where he is confined to serve a sentence is more serious than the conduct of a person who is on probation and escapes from the lawful custody of a law enforcement officer on the street.[7] As drafted, RCC § 22E-3401 would mandate consecutive sentencing in both instances. Whether either or neither scenario would warrant consecutive sentencing should depend on a number of

[5] *Mack*, 772 A.2d at 817.

[6] *Medford v. State*, 21 S.W.3d 668, 669 (Tex. App. 2000), cited by *Mack*, 772 A.2d at 817.

[7] Report #31 does not explain what it means to "serve a sentence" and therefore leaves open the possibility that a person who was "sentenced" to probation would be considered to be "serving a sentence" when he encounters a police officer on the street. *Veney v. United States*, 738 A.2d 1185 (D.C. 1999), cited in footnote 58 at page 9 of Report #31, does not answer the question. In that case, Mr. Veney "while being detained by police …slipped out of the police station." *Id*. at 1190. As the Court noted, "Even if the term 'prisoner' is read broadly to include all persons detained by the police [as the government argued], the statute still requires, as a second element, an original sentence." *Id*. at 1199. Because at the time Mr. Veney was in police custody, he had not been "tried and convicted," the Court concluded that he was not "under an original sentence, or any sentence as far as the record shows" and therefore the mandatory consecutive sentencing provision did not apply. *Id*.

factors, but the unquestionable difference in severity of the two scenarios argues strongly in favor of judicial discretion at sentencing.

Accordingly, PDS recommends rewriting subsections (a) and (b) of RCC § 22E-3401 as follows:

(a) *Escape from Institution or Officer*. A person commits escape from institution or officer when that person:
  (1) In fact:
    (A) Is subject to a court order that authorizes the person's confinement in a correctional facility; or
    (B) Is in the lawful custody of a law enforcement officer of the District of Columbia or of the United States; and
  (2) Knowingly, without the effective consent of the correctional facility or law enforcement officer:
    (A) Leaves confinement ~~custody~~;
    (B) Fails to return to confinement ~~custody~~; ~~or~~
    (C) Fails to report to confinement ~~custody~~; or
    (D) Leaves custody.

(b) *Gradations and Penalties*.
  (1) *First Degree.* A person commits first degree escape from institution or officer when that person violates subsection (a)(2)(A). First degree escape from institution or officer is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *Second Degree.* A person commits second degree escape from institution or officer when that person violates subsection (a)(2)(B), ~~or~~ (C) or (D). Second degree escape from institution or officer is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  ~~(3) *Consecutive Sentencing*. If the person is serving a sentence at the time escape from institution or officer is committed, the sentence for escape from institution or officer shall run consecutive to the sentence that is being served at the time of the escape from institution or officer.~~

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	March 1, 2019
Re:	Comments on First Draft of Report 32, Tampering with a Detection Device

The Public Defender Service makes the following comments on Report #32, Tampering with a Detection Device.

1. Pursuant to RCC § 22E-3402(a)(2)(B) a person commits tampering with a detection device when she or he "alters, masks, or interferes with the operation of the detection device or allows an unauthorized person to do so." The terms alter and mask appear to be redundant of "interfere with the operation of the detection device." The commentary provides that "alter" means to change the device's functionality, not its appearance, and that "mask" means changing the device's detectability, not its appearance.[1] Under those definitions, masking and altering are means of interfering with the operation of the device. The operation of the device, since its purpose is to monitor the individual wearing it, necessarily includes detection and function. However, by including mask and alter in the statute, but placing the definitions for those terms only in the commentary, the terms appear to criminalize something other than interference with the operation of the device. An individual looking at the statute could come to the conclusion that altering includes decorating or vandalizing the device and that masking means covering from view. For simplicity and clarity, PDS recommends that the RCC remove mask and alter from the statutory language. Clarity in the statutory language itself rather than the commentary would be particularly helpful in this instance as it is easy to imagine that this statute would be read by the court or supervision officers to individuals who are required to wear detection devices.

[1] Report #32, page 4.

2. The commentary for RCC § 22E-3402 states that "'interfere' includes failing to charge the power for the device or allowing the device to lose the power required to operate."[2] For clarity and to assist any reader, PDS recommends that the commentary specifically mention the applicable *mens rea* in the failure to charge language. Failure to charge is a common infraction for individuals wearing detection devices in part because the charging requirements are onerous for individuals without secure housing. Under current practice, the failure to charge often results in an admonishment from the court rather than a new criminal charge. PDS does not believe the Commission intends to change that practice and does not expect that RCC § 22E-3402 as written necessarily would. However, the RCC should recognize that practitioners may sometimes only quickly read the commentary before advising individuals about pleas or the strength of the government's case. Therefore, for the sake of clarity and out of an abundance of caution, PDS recommends that the commentary state that failing to charge a detection device falls within the scope of interference only when it is done with the conscious desire to cause the device to fail.[3]

   PDS recommends adding the following language to the commentary:

   "Interfere" includes failing to charge the power for the device or allowing the device to lose the power required to operate <u>when done purposely, meaning with the conscious desire to interfere with the operation of the device</u>.

3. RCC § 22E-3402(a)(1) should specify that the defendant is required to wear a detection device as a result of an order issued in relation to a D.C. Code offense or by a judge in D.C. Superior Court. The offense should not reach violation of court orders imposed by other jurisdictions, where the District has no role in ensuring the fulfillment of due process protections for defendants or control over the underlying statutes that allowed for the placement of a detection device.

4. PDS suggests the modifications below.

RCC § 22E-3402. <u>Tampering with a Detection Device.</u>

(a) *Tampering with a Detection Device*. A person commits tampering with a detection device when that person:
   (1) Knows he or she is required to wear a detection device <u>pursuant to a D.C. Code offense or order issued by a judge of the Superior Court of the District of Columbia</u> while:
      (A) Subject to a protection order;
      (B) On pretrial release;
      (C) On presentence or predisposition release;

[2] Report #31, page 4.

[3] See RCC § 22A-206(a).

(D) Incarcerated or committed to the Department of Youth Rehabilitation Services; or

(E) On supervised release, probation, or parole; and

(2) Purposely:

(A) Removes the detection device or allows an unauthorized person to do so;

(B) ~~Alters, masks, or i~~Interferes with the operation of the detection device or allows an unauthorized person to do so.

(b) *Penalties*. Tampering with a detection device is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Definitions.* In this section:

(1) The terms "knows" and "purposely" have the meaning specified in § 22E-206; and

(2) The term "detection device" means any wearable equipment with electronic monitoring capability, global positioning system, or radio frequency identification technology; and

(3) The term "protection order" means an order issued pursuant to D.C. Code § 16-1005(c).

MEMORANDUM

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

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

From: Public Defender Service for the District of Columbia

Date: March 1, 2019

Re: Comments on First Draft of Report 33, Correctional Facility Contraband

The Public Defender Service makes the following comments on Report #33, Correctional Facility Contraband.

1. RCC § 22E-3403(c)(5) includes halfway houses within the definition of "correctional facility." PDS objects to this expansion of the definition of correctional facility and requests that halfway houses be removed from the definition. Many of the concerns about possession of contraband inside of a jail or secure juvenile facility are not applicable to halfway houses. For instance, the possession of handcuff keys, hacksaws, and tools for picking locks and bypassing doors are not a realistic concern in halfway houses where individuals already have a degree of freedom and access to the outside. RCC § 22E-3403(c)(6)(K) prohibits the possession of a correctional officer's uniform, law enforcement uniform, medical staff clothing and any other uniform. It is certainly common for individuals in halfway houses to work at jobs that require uniforms. Those individuals should be able to keep their uniforms at the location where they may be housed for months. RCC § 22E-3403(c)(6)(C) prohibits the possession of flammable liquid – meaning a lighter. A person who lawfully smokes cigarettes while outside of the halfway house should not be subject to a separate criminal offense for returning to the halfway house at the end of a day of work with a lighter.

   Further, the possession of controlled substances inside a halfway house is not dissimilar from possession of controlled substances in the community. There is little difference between a halfway house resident who possesses a controlled substance across the street from the halfway house and a halfway house resident who possesses a controlled substance inside the halfway house for personal use. Since individuals at halfway houses typically have regular and unsupervised access to the community, there are not the same concerns about a coercive or violent drug trade taking root inside a halfway house as in the setting of complete confinement. Rather than expanding the criminal offense of correctional facility contraband to include halfway houses, under the RCC, possession or distribution of

unlawful items in a halfway house should be prosecuted under the general statutes applicable to all individuals. Possession of items listed in RCC § 22E-3403 and other rule-violating behaviors while in a halfway house will still be punished, either as a criminal offense that applies equally in the community or by remand to the D.C. Jail for failure to comply with halfway house rules.

2. PDS recommends the following changes to RCC § 22E-3403 (d), exclusions from liability, to ensure that the medical exclusion covers each instance that lawyers, investigators, social workers, experts and other professionals carry otherwise prohibited items to secure facilities for their health and safety.

(d) Exclusions from Liability.

(1) Nothing in this section shall be construed to prohibit conduct permitted by the U.S. Constitution.

(2) A person does not commit correctional facility contraband when the item:

(A) Is a portable electronic communication device used by an attorney during the course of a legal visit; or

(B) Is a controlled substance, <u>syringe, needle, or other medical device that is prescribed to the person and for which there is a medical necessity to access immediately or constantly</u>.

PDS recommends adding explanatory language to the commentary that section (d)(2)(B) applies to medicines and medical devices necessary to treat chronic, persistent, or acute medical conditions that would require constant or immediate medical response such as diabetes, severe allergies, or seizures.

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: March 1, 2019

SUBJECT: First Draft of Report #31, Escape from Institution or Officer

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 #31 - Escape from Institution or Officer.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22E-3401. Escape from Institution or Officer.

OAG suggests that the RCC § 22E-3401 be amended to specifically state that a person commits the offense of Escape from Institution or Officer when that person, in fact, leaves, a correctional facility without effective consent when that person "Is committed to the Department of Youth Rehabilitation Services and is placed in a correctional facility."

RCC § 22E-3401 (a) provides that:

> (a) *Escape from Institution or Officer*. A person commits escape from institution or officer when that person:
> (1) In fact:
> (A) Is subject to a court order that authorizes the person's confinement in a correctional facility; or

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

(B) Is in the lawful custody of a law enforcement officer of the District of Columbia or of the United States; and

(2) Knowingly, without the effective consent of the correctional facility or law enforcement officer:

(A) Leaves custody;

(B) Fails to return to custody; or

(C) Fails to report to custody.

According to the Commentary, this offense replaces D.C. Code § 22-2601, Escape from institution or officer, and D.C. Code § 10-509.01a. Unlike D.C. Code § 22-2601,[2] RCC § 22E-3401 does not specifically state that it is an offense to escape from, "An institution or facility, whether located in the District of Columbia or elsewhere, in which a person committed to the Department of Youth Rehabilitation Services is placed."[3] Unlike in when a person is detained in adult cases or in pre-adjudicated juvenile cases, a juvenile who is committed to the Department of Youth Rehabilitation Services (DYRS) is not detained, "subject to a court order" nor is a DYRS staffer or contractor necessarily a "law enforcement officer of the District of Columbia." While in a disposition hearing, a judge may commit a juvenile to DYRS, the judge does not have the authority to order that the respondent be confined. The confinement decision for juveniles is vested solely in DYRS.[4]

The Criminal Code Amendment Act of 2010 amended D.C. Code § 22-2601 to add to that offense the situation where a youth escaped from, "An institution or facility, whether located in the District of Columbia or elsewhere, in which a person committed to the Department of Youth Rehabilitation Services is placed." On page 14 of the Committee Report, the Council explained, in relevant part, that this language:

[2] D.C. Code § 22-2601, Escape from institution or officer, states:

(a) No person shall escape or attempt to escape from:

(1) Any penal or correctional institution or facility in which that person is confined pursuant to an order issued by a court of the District of Columbia;

(2) The lawful custody of an officer or employee of the District of Columbia or of the United States: or

(3) An institution or facility, whether located in the District of Columbia or elsewhere, in which a person committed to the Department of Youth Rehabilitation Services is placed.

(b) Any person who violates subsection (a) of this section shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 5 years, or both, said sentence to begin, if the person is an escaped prisoner, upon the expiration of the original sentence or disposition for the offense for which he or she was confined, committed, or in custody at the time of his or her escape.

[3] OAG understands that the Commission meant for this offense to cover escapes from DYRS placements and it acknowledges that the Commentary states that the "word 'authorizing' makes clear that an order permitting a custodial agency to choose a secured or unsecured residential placement is sufficient."

[4] See generally, D.C. Code § 16-2320 (c)(2), *In Re P.S.*, 821 A.2d 905 (D.C. 2003), and In re J.M.W., 411 A.2d 345, 348 (D.C. 1980).

> Amends D.C. Code § 22-2601 (escape) to include persons committed to the Department of Youth Rehabilitation Services (DYRS). This amendment will close a loophole. Under current law, it is illegal for a youth to escape or attempt to escape from a DYRS facility pre-disposition because he or she is confined pursuant to a court order. It is also illegal for a youth to escape while in transit because he or she will be in the lawful custody of an officer of the District of Columbia or the United States. It is not illegal, however, for the same youth to escape or attempt escape from a DYRS facility after he or she has been adjudicated delinquent because, first, a court order committing a youth to DYRS is not a court order to confine that person in an institution or facility. DYRS makes the decision whether to place the youth in an institution or facility. Second, a youth committed to DYRS who is placed in a contract facility is not necessarily "in the lawful custody of an officer or employee of the District of Columbia or the United States."

Given the history of the amendments to this offense and the Council's rational for them, the Commission's mandate to use language in the recommendations that are clear and plain [5], and to avoid needless litigation, OAG suggests that RCC § 22E-3401 (a) (1) be amended to add a paragraph (C) which states, "Is committed to the Department of Youth Rehabilitation Services and is placed in a correctional facility."

OAG recommends that the definition of "correction facility" be amended to clarify that it includes DYRS congregate care facilities for purposes of the proposed escape statute. RCC § 22E-3401 (c) defines the term "correction facility." It states that the term means:

> (A) Any building or building grounds located in the District of Columbia operated by the Department of Corrections for the secure confinement of persons charged with or convicted of a criminal offense;
> (B) Any building or building grounds located in the District of Columbia used for the confinement of persons participating in a work release program; or
> (C) Any building or building grounds, whether located in the District of Columbia or elsewhere, operated by the Department of Youth Rehabilitation Services for the secure confinement of persons committed to the Department of Youth Rehabilitation Services.

> Subparagraphs (A) and (C) use the term "secure confinement." Subparagraph (B) does not. The Commentary states that subparagraph (B) is meant to apply only to adult facilities, such as halfway houses.[6] The juvenile version of a halfway house is called a shelter house, when a delinquent youth is placed there pre-adjudication, and a group home, when a youth is placed there post-adjudication. Youth are also placed in congregate care, halfway house like settings, in some residential placements. All of these congregate care facilities are staff

[5] See D.C. Code § 3-152 (a)(1) which states that the comprehensive criminal code reform recommendations "use clear and plain language."
[6] See page 6 of the commentary.

secure. Under current law, youth who leave a shelter house or group home placements without consent have committed an escape.[7]

OAG recommends that RCC § 22E-3401 (c)(4)(C) be amended so that the definition of "correctional facility" explicitly includes DYRS congregate care facilities.[8] One way that the Commission could do this is to amend this definition to read as follows, "(C) Any building or building grounds, whether located in the District of Columbia or elsewhere, operated by the Department of Youth Rehabilitation Services for the hardware secure or staff secure confinement of persons committed to the Department of Youth Rehabilitation Services."

[7] Youth who leave shelter houses, or a shelter care placement, without consent violate court orders. Therefore, they are guilty of escaping from a "penal or correctional institution or facility in which that person is confined pursuant to an order issued by a court of the District of Columbia." See D.C. Code § 22-2601(a)(1). Committed youth who leave group homes, or other congregate care facilities, without consent are also guilty of escape because they left "An institution or facility, whether located in the District of Columbia or elsewhere, in which a person committed to the Department of Youth Rehabilitation Services is placed." See D.C. Code § 22-2601(a)(3).

[8] OAG is not suggesting that a youth who leaves any DYRS placement be guilty of escape. Just as the Commentary notes that for adults "the definition [of a correctional facility] excludes unsecured facilities such as inpatient drug treatment programs and independent living programs…", for youth, the definition should exclude family placements, foster care placements, and independent living programs.

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: March 1, 2019

SUBJECT: First Draft of Report #32 - Tampering with a Detection Device

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 #32 - Tampering with a Detection Device.[1]

COMMENTS ON THE DRAFT REPORT

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

RCC § 22E-3402 (a)(1) specifies that for criminal liability to attach the person must know that he or she is required to wear a detection device while:

(A) Subject to a protection order;
(B) On pretrial release;
(C) On presentence or predisposition release;
(D) Incarcerated or committed to the Department of Youth Rehabilitation Services; or
(E) On supervised release, probation, or parole

Persons who are in the juvenile justice system may be required to wear a detection device while awaiting trial and placed in a shelter house or shelter care facility. These people are not on

[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.

pretrial or predisposition release, nor are they incarcerated or committed to the Department of Youth Rehabilitation. RCC § 22E-3402 (a)(1) should be amended to make it clear that it applies to people who are required to wear detention devices while placed in a shelter house or in shelter care facility.

There is a separate issue with the phrasing RCC § 22E-3402 (a)(1)(D). It states, "Incarcerated or committed to the Department of Youth Rehabilitation Services." While OAG believes that the Commission meant that the word "incarcerated" pertain to adults in the criminal justice system and "committed" pertain to persons in the juvenile justice system, the phrasing is ambiguous. As drafted, it is not clear whether the phrase "to the Department of Youth Rehabilitation Services" modifies just the word "committed" or whether it modifies the word "incarcerated" also. To ensure that this phrase is correctly interpreted, OAG suggests that this subparagraph be changed to read, "committed to the Department of Youth Rehabilitation Services or incarcerated."

RCC § 22E-3402 (a) states that a person commits tampering with a detection device when that person is required to wear a detection device, in specified circumstances, and the person, "(2) Purposely… (B) Alters, masks, or interferes with the operation of the detection device or allows an unauthorized person to do so."

Although the Commentary suggests what the terms "alter," "mask," and "unauthorized person" are intended to mean, those definitions need to be included in the statute because they are not apparent from the current language nor from the words' dictionary definitions. On page 4 of the Report, in the Commentary, it states:

> Subsection (a)(2)(B) prohibits altering the operation of the device, masking the operation of the device, interfering with the operation of the device, and allowing an unauthorized person to do so. "Alter" means changing the device's functionality, not its appearance. "Mask" means changing the device's detectability, not its appearance. "Interfere" includes failing to charge the power for the device or allowing the device to lose the power required to operate. An unauthorized person is a person other than someone that the court or parole commission authorized to alter, mask, or interfere with the device.

Just as RCC § 22E-3402 (c) states the definitions for the terms "knows", "purposely", "detection device", and "protection order", all terms used in this offense, so that the reader can easily understand the scope of the provision, subparagraph (c) should also list the definitions for "mask", "interfere", and "unauthorized person." These are terms that go to the heart of the offense.

There is a separate issue as to the definition of an "unauthorized person." As noted above the Commentary limits this phrase to "a person other than someone that the court or parole commission authorized to alter, mask, or interfere with the device." [emphasis added] However, RCC § 22E-3402 (a)(1)(D) also brings under the scope of this offense the unauthorized

tampering of a detection device that a person is required to wear by the Department of Youth Rehabilitation Services. The definition of an unauthorized person should be amended to include that agency.

As noted above, RCC § 22E-3402 (a) states that a person commits tampering with a detection device when that person is required to wear a detection device, in specified circumstances, and the person, "(2) Purposely… (B) Alters, masks, or interferes with the operation of the detection device or allows an unauthorized person to do so." It is unclear from the text of the offense whether the phrase "with the operation of" only modifies the word "interferes" or whether it modifies the words "alters" and "mask" as well. In other words, subparagraph (B) can either be read to mean, "Interferes with the operation, alters, or masks the detection device" or "alters the operation of the detention device, masks the operation of the detention device, or interferes with the operation of the detention device."[2] The provision should be redrafted to make clear which interpretation is correct.[3]

[2] In pointing out the ambiguity in the way the offense language is written, OAG acknowledges that in the Commentary, as noted on the previous page of this memo, it states "Subsection (a)(2)(B) prohibits altering the operation of the device, masking the operation of the device, interfering with the operation of the device, and allowing an unauthorized person to do so." That language should appear in the text of the offense.

[3] D.C. Code § 22-1211, the current tampering with a detection device provision, does not explicitly tether "masking" or "interfering" to the operation of the device. Section 22-1211(a) states:

> (A) Intentionally remove or alter the device, or to intentionally interfere with or mask or attempt to interfere with or mask the operation of the device;
>
> (B) Intentionally allow any unauthorized person to remove or alter the device, or to intentionally interfere with or mask or attempt to interfere with or mask the operation of the device; or
>
> (C) Intentionally fail to charge the power for the device or otherwise maintain the device's battery charge or power.

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: March 1, 2019

SUBJECT: First Draft of Report #33, Correctional Facility Contraband

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 #33 - Correctional Facility Contraband.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22E-3403. Correctional Facility Contraband

RCC § 22E-3403 provides that a person commits correctional facility contraband when they knowingly bring a prohibited item into a correctional facility without the effective consent of a specified individual. Subparagraph (c) (6) RCC § 22E-3403 (6) defines "Class A contraband" and RCC § 22E-3403 (c) (7) defines Class B contraband. The term "correctional facility" is defined in RCC § 22E-3403 (c)(5).

"Class A Contraband" means:

(A) A dangerous weapon or imitation dangerous weapon;
(B) Ammunition or an ammunition clip;
(C) Flammable liquid or explosive powder;

[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.

(D) A knife, screwdriver, ice pick, box cutter, needle, or any other tool capable of cutting, slicing, stabbing, or puncturing a person;
(E) A shank or homemade knife;
(F) Tear gas, pepper spray, or other substance capable of causing temporary blindness or incapacitation;
(G) A tool created or specifically adapted for picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door;
(H) Handcuffs, security restraints, handcuff keys, or any other object designed or intended to lock, unlock, or release handcuffs or security restraints;
(I) A hacksaw, hacksaw blade, wire cutter, file, or any other object or tool capable of cutting through metal, concrete, or plastic;
(J) Rope; or
(K) A correctional officer's uniform, law enforcement officer's uniform, medical staff clothing, or any other uniform.

"Class B contraband" means:

(A) Any controlled substance listed or described in [Chapter 9 of Title 48 [§ 48-901.01 et seq.] or any controlled substance scheduled by the Mayor pursuant to § 48-902.01];
(B) Any alcoholic liquor or beverage;
(C) A hypodermic needle or syringe or other item that can be used for the administration of a controlled substance; or
(D) A portable electronic communication device or accessories thereto.

The term "correctional facility" is defined in RCC § 22E-3403 (c) (5). It states that "correctional facility" means:

(A) Any building or building grounds located in the District of Columbia operated by the Department of Corrections for the secure confinement of persons charged with or convicted of a criminal offense;
(B) Any building or building grounds located in the District of Columbia used for the confinement of persons participating in a work release program; or
(C) Any building or building grounds, whether located in the District of Columbia or elsewhere, operated by the Department of Youth Rehabilitation Services for the secure confinement of persons committed to the Department of Youth Rehabilitation Services.

Subparagraphs (A) and (C) use the term "secure confinement." Subparagraph (B) does not. The Commentary states "With the exception of halfway houses, the definition [of correctional facility] excludes unsecured facilities such as inpatient drug treatment programs and independent living programs."[2] The juvenile version of a halfway house is called a shelter house, when a delinquent youth is placed there pre-adjudication, and a group home, when a youth is placed there post-adjudication. Youth are also placed in congregate care, halfway house like settings, in some residential placements. All of these congregate care facilities are staff secure. Just as it

[2] See page 7 of the Commentary.

dangerous for adults to bring Class A contraband (e.g. dangerous weapons, explosive powder, and shanks) and Class B contraband (controlled substances and hypodermic needles) into halfway houses, it is dangerous for persons charged as juveniles to bring those items into DYRS congregate care facilities.[3]

One way that the Commission could amend the Correctional Facility Contraband offense, to include DYRS congregate care facilities, is to amend RCC § 22E-3403 (c) (5) (C) to read, "Any building or building grounds, whether located in the District of Columbia or elsewhere, operated by the Department of Youth Rehabilitation Services for the hardware secure or staff secure confinement of persons placed by the Department of Youth Rehabilitation Services."[4]

As mentioned above, the definition of Class B contraband includes "(D) A portable electronic communication device or accessories thereto."[5] The definition of "accessories" mentioned in the Commentary, drawn from an earlier Council committee report, should be incorporated into the definitions section of the proposed statutory language if it's intended to be controlling. OAG suggests that subparagraph (D) be redrafted to say, "A portable electronic communication device, chargers, batteries, or other accessories thereto."

RCC § 22E-3403 (e) establishes the facility's authority to detain a person. OAG has two suggestions on how to amend this provision. RCC § 22E-3403 (e) states:

> *Detainment Authority*. If there is probable cause to suspect a person of possession of contraband, the warden or director of a correctional facility may detain the person for not more than 2 hours, pending surrender to a police officer with the Metropolitan Police Department.

Page 6 of the report says subsection (e) of the proposed statute "limits the correctional facility's authority to detain a person on suspicion <u>of bringing contraband</u> to a period of two hours." [emphasis added] However, subsection (e) does not refer to suspicion of bringing contraband into a facility, the offense described in subsection (a)(1). It refers to suspicion of possessing contraband by someone confined to a correctional facility, something prohibited only in (a)(2). There is no reason, however, to limit the amount of time someone can be detained, for possessing contraband in violation of (a)(2) because that person is already "someone confined to a correctional facility." OAG suggests that the text of RCC § 22E-3403 (e) be amended so that it covers persons who bring

[3]OAG is not suggesting that youth who bring contraband into all Department of Youth Rehabilitation Services (DYRS) be guilty of this offense. Just as the Commentary notes that for adults "[the definition of a correctional facility] excludes unsecured facilities such as inpatient drug treatment programs and independent living programs…", for youth, the definition should exclude family placements, foster care placements, and independent living programs.

[4] The Commentary should then make it clear that the phrase "placed by the Department of Youth Rehabilitation Services" includes situations where DYRS places the person in a facility pre-adjudication, pursuant to a court order, as well as after commitment to that agency.

[5] See RCC § 22E-3403 (c)(7)(D).

contraband into the facility (and, therefore, is consistent with the explanation in the Commentary).

The detainment authority in RCC § 22E-3403 (e) specifically states that the head of the facility "may detain the person… pending surrender to a police officer with the Metropolitan Police Department" (MPD). For the following reasons, OAG suggests that this provision be amended to say "law enforcement" rather than MPD.

D.C. Code § 10-509.01 authorizes the Mayor to designate any employee of the District of Columbia to act in a law enforcement capacity at the property which includes the current site of New Beginnings, in Laurel, Maryland.[6] In addition, for a period of time ending in 2002, the Department of Human Services, Youth Services Administration (the predecessor to the District's Department of Youth Rehabilitation Services) had an MOU with U.S. Park Police (USPP), pursuant to authority granted to it by the Mayor, obligating USPP to enforce the laws and regulations at the Oak Hill Youth Facility (now the site of New Beginnings). There is no reason why RCC § 22E-3403 (e) should limit the Mayor's authority to designate which law enforcement agency has responsibility for investigating and arresting people at this location.

OAG recommends that, pursuant to the two suggestions noted above, the Commission redraft this provision to state

> Detainment Authority. If there is probable cause to suspect a person who is not confined to the facility of possessing or bringing contraband into the facility, the warden or director of a correctional facility may detain the person for not more than 2 hours, pending surrender to a law enforcement officer.

[6] This authority was granted to the Mayor by Congress in 1956. See 70 Stat. 488, ch. 508, § 1.

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: March 1, 2019

SUBJECT: First Draft of Report #34, De Minimis Defense

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 #34 - De Minimis Defense.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 215. DE MINIMIS DEFENSE.

RCC § 215 provides for an affirmative defense to all misdemeanor and certain felony offenses. Currently, District law does not provide for a "defense for those actors whose conduct and accompanying state of mind are insufficiently blameworthy to warrant the condemnation of a criminal conviction." See the Commentary on page 8. This provision states:

> (a) De Minimis Defense Defined. It is an affirmative defense to any misdemeanor or a Class 6, 7 or 8 felony that the person's conduct and accompanying state of mind are insufficiently blameworthy to warrant the condemnation of a criminal conviction under the circumstances.
>
> (b) Relevant Factors. In determining whether subsection (a) is satisfied, the factfinder shall consider, among other appropriate factors:

[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.

(1) The triviality of the harm caused or threatened by the person's conduct;

(2) The extent to which the person was unaware that his or her conduct would cause or threaten that harm;

(3) The extent to which the person's conduct furthered or was intended to further legitimate societal objectives; and

(4) The extent to which any individual or situational factors for which the person is not responsible hindered the person's ability to conform his or her conduct to the requirements of law.

(c) Burden of Proof. The defendant has the burden of proof and must prove all requirements of this affirmative defense by a preponderance of the evidence.

While OAG appreciates the value of some protection from convictions based upon de minimis behavior, we are not entirely clear how this defense is supposed to work and want to make sure that it is not used improperly as a way to argue for and obtain jury nullification. In particular, at least three aspects of this defense seem unclear:

(1) Are the expressly identified factors the factfinder must consider to be treated as pure questions of fact, or are any of them partially questions of law (e.g., whether a particular societal objective is "legitimate")?

(2) When a de minimis defense is raised, how does a judge decide what evidence can be excluded, given that the factfinder can consider seemingly anything that the factfinder thinks goes to blameworthiness? Can the judge make some decision on what constitutes relevant evidence of blameworthiness notwithstanding this expansive factfinder discretion – and if so, based on what?

(3) Suppose a de minimis defense is raised and then rejected by the jury. Assuming the jury instructions were proper, could the jury's rejection of that defense be challenged – and if so, what criteria would a reviewing court deploy?

These questions are especially significant because the proposal here – notably broader than many of the laws the Report cites from other jurisdictions – is very different from the court's power to govern its proceedings in the interest of judicial economy, a comparison the report repeatedly seeks to make. The proposal goes to the fundamental question of whether someone really deserves to be convicted of a crime.

OAG is particularly concerned about how this affirmative defense will operate as it only prosecutes adult misdemeanor offenses and some of these offenses are fine only or carry the penalty of fine or jail time. We are concerned that this provision will encourage jury

nullification of appropriate prosecutions, which is not encouraged in the District.[2] To put this another way, any de minimis defense provision has to be crafted in such a way that it is clear to the trier of fact that there must be something special concerning the individual circumstances of a defendant's actions when he or she commits an offense and not that the offense itself only criminalizes behavior that the trier of fact may believe is in and of itself, de minimis. It is up to the legislature to determine what behavior is criminal; the trier of fact should not be able to second guess that determination. OAG will continue to work with the Commission to try and craft an appropriate provision.

OAG does have one suggestion, however, at this point. To ensure that this defense is appropriately applied, RCC § 215 should include a requirement that in bench trials the judge must issue a written opinion stating his or her reasoning in determining that the requirements of this defense is met.

[2] As the Court stated in *Reale v. United States*, 573 A.2d 13 (D.C. 1990), at 15, "The common-law doctrine of jury nullification permits jurors to acquit a defendant on the basis of their own notion of justice, even if they believe he or she is guilty as a matter of law. *Watts v. United States*, 362 A.2d 706, 710 (D.C. 1976). While we cannot reverse such an acquittal, see *Fong Foo v. United States*, 369 U.S. 141, 7 L. Ed. 2d 629, 82 S. Ct. 671 (1962), we do not encourage jurors to engage in such practice. Thus, we have upheld convictions in cases where, as here, the trial court instructs the jury that it is obligated to find the defendant guilty if the government meets all the elements of the charged offense. *Watts*, supra, 362 A.2d at 710-11."

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: March 1, 2019

SUBJECT: Second Draft of Report #9, Recommendations for Theft and Damage to Property 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 Commission's Second Draft of Report #9, Recommendations for Theft and Damage to Property Offenses. OAG reviewed this document and makes the recommendations noted below.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22E-2101, Theft

In the Commentary, on page 6, it says, "…non-violent pickpocketing or taking property from the immediate actual possession of another person is no longer subject to a penalty enhancement for the presence or use of a dangerous weapon or for the status of the complainant." [emphasis added] The Commentary does not explain how the "use of a dangerous weapon" can be classified as non-violent. On page 7 of the Commentary, however, it states, "In addition, any actual use or display of a dangerous weapon during the taking would constitute robbery under the RCC." OAG suggests that for the sake of clarity, these two comments be joined as follows, "…non-violent pickpocketing or taking property from the immediate actual possession of

[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.

another person is no longer subject to a penalty enhancement for the presence or use of a dangerous weapon, as the use or display of the weapon during the taking would constitute robbery under the RCC." The Commentary would then have a separate sentence explaining how the provision deals with the status of the complainant.

MEMORANDUM

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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: April 29, 2019

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

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #36 - Cumulative Update to RCC Chapters 3, 7 and the Special Part.[2]

COMMENTS ON THE DRAFT REPORT

RCC § 214. MERGER OF RELATED DEFENSE.[3]

[1] This Memorandum covers a review of the statutory language and commentary on Subtitle I (General Part) provisions in Chapters 2 (specifically, Merger of Related Offenses) and 3 of the report. The Memorandum concerning the statutory language and commentary on the remaining sections are due on July 8, 2019.

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

[3] OAG recommends a slight rewording of RCC § 214(e)(2). While OAG appreciates that the Commission accepted its suggestion to amend the provision to read, "The judgment appealed from has been decided", see App. D2, OAG believes that there is a better formulation of this concept. An appellate court does not technically decide a judgment; it decides an appeal. Given the lead-in language in section (e), OAG suggests that this phrase be tweaked to read, "The appeal of the conviction has been decided."

RCC § 214 provides the merger rules. Paragraph (d) provides for the "Rule of Priority." It states:

> When two or more convictions for different offenses arising from the same course of conduct merge, the offense that remains shall be: (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.

The proposed language in subsection (d)(1) does not say whether "statutory maximum" refers to maximum prison sentence or maximum fine. This may not be a concern if the two consistently correlate (as when the Council follows the Fine Proportionality Act[4]), but may create a problem in any context where one offense has a higher maximum fine (especially with any punitive fine multipliers) but a lower maximum prison sentence than another. To address this issue, OAG has two suggestions. First that in subsection (d)(1) the term "statutory maximum" be amended to read "statutory maximum sentence." To address the issue regarding how judges should merge offenses where there is a higher maximum penalty, but a lower maximum fine in one offense and a lower maximum penalty but a much higher maximum fine in the other offense, OAG suggests that the Commission amend section (b) to broaden its application. Section (b) now states:

> *General Merger Rules Inapplicable Where Legislative Intent Is Clear*. The merger rules set forth in subsection (a) are inapplicable whenever the legislature clearly expresses an intent to authorize multiple convictions for different offenses arising from the same course of conduct.

OAG suggests that the language be amended to read:

> *General Merger Rules Inapplicable Where Legislative Intent Is Clear.* The merger rules set forth in subsections (a) and (d) are inapplicable whenever the legislature clearly expresses an intent to authorize multiple convictions for different offenses arising from the same course of conduct or establish a different rule of priority.

Subsection (d)(2) establishes a rule for judges to follow when the charges have the same statutory maximum penalty. OAG generally agrees that, if the offenses have the same statutory maximum penalty, the judge should be able to sentence the person to any offense that the court deems appropriate. However, for some offenses the Council has enacted mandatory minimum sentences. While subsection (d)(1) would require that a judge not sentence a person for a mandatory minimum sentence when that conviction merges with an offense that has a higher overall maximum penalty, (d)(2) would seem to permit a judge to ignore a mandatory minimum sentence when that offense merges with an offense that has the same statutory maximum penalty. To address this issue, OAG suggests that subsection (d)(2) be amended to state:

[4] See the "Criminal Fine Proportionality Amendment Act of 2012", codified at D.C. Code §§ 22-3571.01 and 22-3571.02.

> (2) If the offenses have the same statutory maximum penalty, the offense with a mandatory minimum sentence. If there is no mandatory minimum sentence, whichever offense the court deems appropriate.[5]

RCC § 22E-301. CRIMINAL ATTEMPT.

RCC § 301 (e) contains the "Other Definitions" cross reference section. OAG has raised with the Commission its concerns with the "Other Definitions" sections that appear in some offense definitions and how a litigator or court should interpret a word or phrase that has been defined in the RCC but which has been left out of the "Other Definitions" cross reference in the provision that is being interpreted. OAG maintains that these cross-references should be struck where ever they appear. Section 301 (e) illustrates why. This section cross-applies already-applicable definitions of "intent" and "result element," but it doesn't cross-apply the definition of "conduct" even though this section uses that word. Nor does it cross-apply any definition related to "culpability," even though the report specifically notes that the RCC 201 definition of "culpability" (or, more accurately, "culpability requirement") matters insofar as culpability folds in voluntariness and other considerations as well as a culpable mental state. If the Commission is not going to accept OAG's suggestion to delete all "Other Definitions" cross references, then OAG suggests that the Commission add a section to Subtitle I, Chapter 1 that states that the "Other Definitions" cross references are meant to aid the public's understanding of the code and that no legal significance should be placed on the inclusion or exclusion of a cross reference in a particular provision.

RCC § 22E-303. CRIMINAL CONSPIRACY.

RCC § 303 (a) is entitled "Definition of Conspiracy." It now states:

> (a) *Definition of Conspiracy*. A person is guilty of a conspiracy to commit an offense when, acting with the culpability required by that offense, the person and at least one other person:
>
> (1) Purposely *agree* to engage in or aid the planning or commission of conduct which, if carried out, will constitute that offense or an attempt to commit that offense; and
>
> (2) One of the parties to the *conspiracy* engages in an overt act in furtherance of the *conspiracy*. [emphasis added]

OAG is concerned about the clarity of this section. As written, RCC § 303 (a) is circular in that it that uses the term "conspiracy", in two places in subsection (a)(2), in the "Definition of Conspiracy." It thus assumes a prior understanding of the term being defined. While the current version of RCC § 303 (a)(2), states, "One of the parties to the conspiracy engages in an overt act in furtherance of the conspiracy" The previous version of RCC § 303 (a)(2), stated, "One of the parties to the agreement engages in an overt act in furtherance of the agreement." The reference to an "agreement" in the former version not only did not suffer from being a circular definition, but,

[5] In its suggestion OAG proposed changing the phrase," any offense that the court deems appropriate" to "whichever offense the court deems appropriate" This was suggested for stylistic reasons.

because subsection (a)(1) refers to the person and at least one other person "Purposely agree[ing]…", the use of the word "agreement" in (a)(2), flowed more clearly from (a)(1). OAG, therefore, recommends that the Commission use the previous version of RCC § 303 (a)(2).

RCC § 303 (b)(1) says conspirators must "[i]ntend to cause any result element required by that offense." However, one does not cause a result element; one causes a result. OAG recommends that the phrase be redrafted to read, "[i]ntend to cause any result required by that offense."[6]

[6] The previous version of RCC § 303 (b)(1) stated, "intend to bring about and results." OAG agrees that current version's addition of the phrase "required by that offense" is warranted.

Memorandum

Jessie K. Liu
United States Attorney
District of Columbia

Subject: Comments to D.C. Criminal Code Reform Commission for First Draft of Report #36, Cumulative Update to RCC Chapter 2 (§ 22E-214) and Chapter 3	Date: May 20, 2019
To: Richard Schmechel, Executive Director, D.C. Criminal Code Reform Commission	From: U.S. Attorney's Office for the District of Columbia

The U.S. Attorney's Office for the District of Columbia (USAO) and other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the CCRC's First Draft of Report #36, Cumulative Update to RCC Chapter 2 (§ 22E-214) and Chapter 3. USAO reviewed this document and makes the recommendations noted below.[1]

Comments on the Draft Report

I. RCC § 22E-214—Merger of Related Offenses

1. USAO recommends the removal of subsection (a)(4).

Subsection 22E-214(a)(4) currently provides: "One offense reasonably accounts for the other offense given the harm or wrong, culpability, and penalty proscribed by each."

Subsection (a)(4) seems to be a catchall designed to permit (or require) judges to merge offenses whenever it seems fair to them to do so under the circumstances. But such an open-ended provision is vague and subjective, and thus contrary to the RCC's overarching goal of stating the law clearly (*see* Commentary at 34 ("the District's law of merger . . . suffers from a marked lack of clarity and consistency")), rather than relying upon common law (*see* Commentary at 6 (citing authorities favorably referring to the process of determining when this provision applies as "developing a common law of offense interrelationships")). This subsection would likely exacerbate, rather than remedy, the historically "uneven treatment" of merger issues that § 214 seeks to address (Commentary at 1 n.1). And the provision's ambiguity would likely confer a windfall upon defendants, who would surely invoke the Rule of Lenity in seeking its broad application.

[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.

The RCC (Commentary at 6 n.21) justifies (a)(4) by reference to similar practices in other jurisdictions, but then assures the reader that (a)(4) "is likely narrower" than those approaches, "all of which appear to rest upon consideration of the specific facts presented at trial." Accordingly, those practices do not support (a)(4) at all, in that they are based on a rationale that the RCC disavows. This difference, as well the fact that, unlike (a)(1)–(3), (a)(4) "goes beyond" current D.C. case law (Commentary at 35), creates even more uncertainty as to (a)(4)'s application. Although the Commentary (at 7 n.24) offers examples, it seems overbroad to confer general discretion upon (or perhaps require) trial judges to merge whatever offenses they deem "reasonably account[]" for each other. If the goal is to require merger for certain combinations of offenses even where they would not merge under the *Blockburger* elements test, it would be more direct, and avoid needless uncertainty, to simply identify those mergers in the substantive offense statutes themselves. For example, as to the carjacking example at Commentary 6 n. 24, it would be far clearer to say in the carjacking statute that carjacking merges with aggravated theft when based on the same course of conduct, rather than enact a general provision that would engender decades of piecemeal litigation to develop a "common law" of merger regarding (1) when offenses "reasonably account" for each other, and (2) what can and cannot be considered, and to what degree, in making that determination.

2. <u>USAO recommends that, in subsection (e)(2), the words "has been decided" be replaced with the words "becomes final."</u>

   With USAO's changes, § 22E-214(e) would provide:

   "(e) *Final Judgment of Liability.* A person may be found guilty of two 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 becomes final."

Replacing "has been decided" with "becomes final" would more accurately define what we believe is the RCC's intended time when the appeal has ended. First, the "judgment" is by the trial court, and is the subject (not the result) of the appeal, so it already "has been decided." And as to the direct appeal, "has been decided" is unclear as to, e.g., whether it refers to when (1) the DCCA issues its opinion; (2) when the time for seeking further review has ended; (3) when any further review has ended, or (4) when the mandate issues. Presumably, subsection (e) is meant to allow multiple convictions to stand while the direct appeal plays out to its conclusion. "Becomes final" would convey that the intended deadline is the end of the direct appeal.

II. <u>RCC § 22E-301—Criminal Attempt</u>

1. <u>USAO recommends that, in subsection (a)(1), the word "Planning" be replaced by the words "With the intent," and that subsection (a)(2) be removed.</u>

   With USAO's changes, § 22E-301(a) would provide:

   "(a) *Definition of Attempt*. A person is guilty of an attempt to commit an offense when:

(1) With the intent to engage in conduct constituting that offense;
(2) The person engages in conduct that: . . .”

There are three reasons that USAO believes this change is appropriate.

First, a person’s “plan” or “planning” is not required by the controlling case law on attempt. *See, e.g.*, *Hailstock v. United States*, 85 A.3d 1277, 1281 (D.C. 2014) (elements of attempt are that defendant (1) intended to commit the crime and (2) committed an overt act towards completion of the crime that (3) came within dangerous proximity or completing the crime); *Nkop v. United States*, 945 A.2d 617, 620 (D.C. 2008) (same); *Corbin v. United States*, 120 A.3d 588, 602 n.20 (D.C. 2015) (elements of attempt are that defendant (1) intended to commit the crime, (2) did some act towards its commission, and (3) failed to consummate its commission); *Frye v. United States*, 926 A.2d 1085, 1095 (D.C. 2005) (same); *Stepney v. United States*, 443 A.2d 555, 557 (D.C. 1982) (same); *Marganella v. United States*, 268 A.2d 803, 804 (D.C. 1970) (same). Notably, while the Committee Report states that the “planning requirement is the foundation of attempt liability,” the CCRC’s explanation for including a separate “planning” element does not include any citation to case law, asserting that it is “largely implicit in the other elements of a criminal attempt.” *See* First Draft of Report #36 (hereinafter “Report”) at 48 and n.2, n.4. Indeed, the Model Penal Code includes the concept of planning in a far different context: “(c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct *planned to culminate in his commission of the crime*.”). *See* Model Penal Code Section 5.01. Requiring the *defendant* to have “planned” before taking action is very different than the Model Penal Code’s inclusion of the concept and should be removed. Rather, the focus should be on the defendant’s “intent” to engage in conduct constituting that offense.

Second, inclusion of a separate element requiring the *defendant* to have engaged in “planning” implies that the person must have thought through or contemplated his or her actions before acting. The online Merriam-Webster dictionary defines “plan” as “to arrange the parts of,” “to devise or project the realization or achievement of,” or “to have in mind.” *See* https://www.merriam-webster.com/dictionary/plan. With regard to the first two definitions, the word “planning” appears to imply something akin to the current “premeditation” and “deliberation” requirement of first-degree murder. *See Porter v. United States*, 826 A.2d 398, 405 (D.C. 2003) (noting premeditation requires proof that the defendant gave thought before acting to the idea of taking a human life and reached a definite decision to kill). Given that an attempted crime does not always require proof of premeditation or deliberation, inclusion of an extra element that that *defendant* must have “planned” to engage in conduct constituting the completed crime represents a substantial change to the current law governing attempt, and improperly implies that some sort of design or devising of the means to accomplish the criminal objective is required.[2]

[2] The CCRC notes that the planning requirement is different from the culpability requirement because an actor could be committed to a course of conduct that would cause a prohibited result without being culpable at all. Report at 48 n.4. However, the explanation the CCRC gives is that of a demolition operator who is demolishing a building that may or may not have a person inside of it. In this example, it appears that the important element is the culpability of the demolition worker in terms of the result elements of the offense of murder as opposed to whether he is committed to his course of conduct. The CCRC acknowledges this, noting the demolition operator’s liability for attempted murder is determined by whether he or she knows a person lives in the building. How committed he or she is to the course of conduct appears superfluous and already included in the other culpability requirements.

Third, the proposed provision in (a)(2) adds an additional culpability requirement that does not exist in current law. If the "intent" language recommended by USAO is adopted, there is no need to have an additional mens rea requirement by requiring that the person "have the culpability required by that offense."

2. USAO recommends that, in subsection (a)(3), the words "completing" and "completion" be replaced with the words "committing" and "commission."

With USAO's changes, § 22E-301(a)(3) would provide:

"(3) The person engages in conduct that:
(A)
(i) Comes dangerously close to committing that offense; or
(ii) Would have come dangerously close to committing that offense if the situation was as the person perceived it; and
(B) Is reasonably adapted to commission of that offense."

Subsection 22E-301(a)(3) refers to conduct that comes "dangerously close to completing" an offense and is "reasonably adapted to completion" of an offense. The USAO recommends, for clarity, that the words "completing" and "completion" be changed back to "committing" and "commission." This change makes the language less confusing for offenses such as robbery, that continue until the "taking away" or "asportation" of the stolen property is complete. The current comments to the jury instructions for Attempt also reflect this view that "committing" is clearer in this context than "completing." *See* Criminal Jury Instructions for the District of Columbia, No. 7.101 cmt. (5th ed. Rev. 2018) ("In addition, the Committee changed 'completing the crime' to 'committing the crime.' The Committee thought 'dangerously close to completing the crime' could be confusing to a jury if the offense, such as robbery, requires multiple steps to complete, such as taking and asportation.").

3. USAO recommends removing subsection (b).

For many of the same reasons as discussed with respect to subsection (a), subsection (b) is both confusing and adds an additional culpability requirement that does not exist in current law. This language is duplicative of the intent language included in subsection (a)(1), which under USAO's proposal, requires that the defendant act "With the intent to engage in conduct constituting that offense." This intent language is an accurate statement of the law, and USAO believes that it is most appropriate to codify the existing attempt law than to add in this additional language.

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

USAO opposes repealing the "assault with intent" ("AWI") class of crimes, contrary to the CCRC's suggestion. The CCRC states in the commentary to the Assault provision that, "liability for the conduct criminalized by the current AWI [assault with intent to commit] offenses is provided through application of the general attempt statute in RCC § 22E-301 to the completed

offenses." Commentary to Assault Provisions at 69. The attempt statute, however, does not provide liability for all of the situations in which AWI liability attaches, and AWI liability is a frequent theory of liability where attempt liability would not exist. For example, if a person were to attack someone while saying they wanted to have sex with them, they could be found guilty of assault with intent to commit sexual assault. If no clothing were removed or there were no other steps taken in furtherance of the sexual assault, the defendant may not have come "dangerously close" to committing the crime of sexual assault, but his conduct would merit criminalization as AWI sexual assault. Without the possibility of AWI liability, this crime could only be prosecuted as a simple assault and threat, which does not represent the full nature of the conduct. Further, under current law, AWI an offense is sometimes punished more severely than an attempt to commit that same offense.

5. USAO cannot comment on the changes to punishment absent further information.

USAO agrees with the general principle that punishment for attempts be proportionate to the punishment for the underlying crimes. Without further information on the punishments of the various offenses, USAO cannot currently take a position on this section.

Finally, USAO notes that crimes that include attempt in their definition continue not to allow for the existence of a separate attempt crime, and that USAO can take no position at this time as to the implications of that without knowing which crimes will continue to include attempt in their definition. *See* Report at 58-59, 59 n.33 (noting some crimes such as prison escape and forcible gang participation include attempts in their statutory language).

III. RCC § 22E-302—Solicitation

1. USAO recommends that, in subsection (a), the words "acting with the culpability required by that offense" be removed.

With USAO's changes, § 22E-302(a) would provide:

"(a) *Definition of Solicitation*. A person is guilty of solicitation to commit an offense when the person . . ."

The proposed provision adds an additional culpability requirement that does not exist in current law. The current jury instructions for Solicitation of a Crime of Violence provide the following elements: "(1) [Defendant] solicited [another person] to commit the [crime of violence]; and (2) [Defendant] did so voluntarily, on purpose, and not by mistake or accident. 'Solicit' means to request, command, or attempt to persuade. It is not necessary that the [crime of violence] actually occur in order to find the [defendant] guilty of solicitation." *See* Criminal Jury Instructions for the District of Columbia, No. 4.500 (5th ed. Rev. 2018). Adding this additional element is both confusing and not an accurate statement of the current law. Further, applying this additional requirement to various offenses could lead to problematic results. For example, if a defendant were charged with solicitation to commit first-degree murder, first-degree murder requires premeditation and deliberation. The government need not prove premeditation *to solicit the murder* for the defendant to be guilty of solicitation to commit first-degree murder. Rather, the solicitation

itself could be used to help prove that the murder was committed with premeditation and deliberation.

2. USAO recommends that, in subsection (a)(1), the word "specific" be removed.

   With USAO's changes, § 22E-302(a)(1) would provide:

   "(1) Purposely commands, requests, or tries to persuade another person to engage in or aid the planning or commission of conduct, which, if carried out, will constitute that offense or an attempt to commit that offense . . ."

As used here, the word "specific" implies that the defendant must specify how the offense will be carried out to be found guilty of solicitation. For example, if a defendant instructed another person to murder a complainant, the defendant need not tell the other person whether it should specifically be by firearm, by knife, or by another specified means to be found guilty of solicitation of murder. Rather, it is and should be sufficient to be liable for solicitation that the defendant instructs another person to carry out any conduct that would result in a murder.

3. USAO recommends removing subsection (b).

For many of the same reasons as discussed with respect to subsection (a), subsection (b) is both confusing and adds an additional culpability requirement that does not exist in current law. Because the conduct solicited must, in fact, constitute a completed or attempted offense, there is a level of intent implied into the solicitation itself, rendering this language superfluous.

4. USAO recommends that, in subsection (c), the word "plans" be replaced by the word "intends."

   With USAO's changes, § 22E-302(c) would provide:

   "(c) *Uncommunicated Solicitation.* It is immaterial under subsection (a) that the intended recipient of the defendant's command, request, or efforts at persuasion fails to receive the message provided that the defendant does everything he or she intends to do to transmit the message to the intended recipient."

USAO believes that the word "plans" suffers from the problems set forth above in the Attempt comments, and that "intent" is a better descriptor of the required mental state.

5. USAO cannot comment on the changes to punishment absent further information.

USAO agrees with the general principle that punishment for solicitation be proportionate to the punishment for the underlying crimes. Without further information on the punishments of the various offenses, USAO cannot currently take a position on this section.

6. USAO recommends that, throughout these provisions, the word "defendant" be changed to the word "actor."

The change of the word "defendant" to "actor" is not meant to be substantive, and is meant to align the language in these sections with the language used throughout the RCC.

IV. RCC § 22E-303—Criminal Conspiracy

1. USAO recommends that, in subsection (a), the words "acting with the culpability required by that offense" be removed.

   With USAO's changes, §22E-303(a) would provide:

   "(a) *Definition of Conspiracy*. A person is guilty of solicitation to commit an offense when the person and at least one other person . . ."

As discussed above in the Solicitation section, the proposed provision adds an additional culpability requirement that does not exist in current law. The focus of conspirator liability is on the culpability involved in the *agreement* to commit the offense, not necessarily the culpability to commit the offense itself. Further, the requisite *mens rea* for Conspiracy is set forth in (a)(1), which requires "purpose." To provide an additional *mens rea* requirement by referring to the culpability required by the underlying offense makes the statute more confusing. The current jury instructions for Conspiracy provide a summary of the elements of Conspiracy: "For any defendant to be convicted of the crime of conspiracy, the government must prove two [three] things beyond a reasonable doubt: first, that [during (the charged time period)] there was an agreement to [describe object of conspiracy]; [and] second, that [name of defendant] intentionally joined in that agreement; [and third, that one of the people involved in the conspiracy did one of the overt acts charged]." *See* Criminal Jury Instructions for the District of Columbia, No. 7.102 (5th ed. Rev. 2018). This definition is consistent with the case law. *See, e.g.*, *Long v. United States*, 169 A.3d 369, 377 (D.C. 2017) ("Criminal conspiracy has three elements that the government must prove: "1) an agreement between two or more people to commit a criminal offense; 2) knowing and voluntary participation in the agreement by the defendant with the intent to commit a criminal objective; and 3) commission in furtherance of the conspiracy of at least one overt act by a co-conspirator during the conspiracy."). Further, applying this additional requirement to various offenses can lead to problematic results. For example, similar to the example above for Solicitation, if a defendant were charged with conspiracy to commit first-degree murder, first-degree murder requires premeditation and deliberation. The government need not prove premeditation *to engage in the agreement* for the defendant to be guilty of conspiracy to commit first-degree murder. Rather, the existence of the agreement could be used to help prove that the murder was committed with premeditation and deliberation. Moreover, a conspiracy is frequently charged with more than one object (for example, both obstruction of justice and murder). Given that those offenses have different *mens rea* requirements, it would be confusing as to what the words "acting with the culpability by that offense" would require the government to prove.

2. USAO recommends removing subsection (b).

For many of the same reasons as discussed above with respect to subsection (a), subsection (b) is both confusing and adds an additional culpability requirement that does not exist in current

law. To be guilty of a conspiracy, the defendant and another person need not necessarily intend to cause any result elements or intend for any circumstance elements required by that offense; rather, they must simply intend to enter into the agreement to commit the charged offense. It is implicit that, by intending to enter into an agreement to commit the charged offense, they desire the offense to take place, but this subsection makes the conspiracy language more confusing than if the Conspiracy section were to simply track the legal elements set forth above.

3. USAO recommends that, in the heading of subsection (d), the words "object of conspiracy is" be changed to the words "object of conspiracy is to engage in conduct."

   With USAO's changes, § 22E-303(d) would provide:

   "(d) *Jurisdiction When Object of Conspiracy is to Engage in Conduct Located Outside the District of Columbia.* When the object of a conspiracy formed within the District of Columbia is to engage in conduct outside the District of Columbia . . . ."

This change is not intended to be substantive, but to clarify the language used in this heading. The proposed edit also aligns the language of the heading of the subsection with the language in the subsection.

4. USAO cannot comment on the changes to punishment absent further information.

USAO agrees with the general principle that punishment for conspiracy be proportionate to the punishment for the underlying crimes. Without further information on the punishments of the various offenses, USAO cannot currently take a position on this section.

V. RCC § 22E-304—Exceptions to General Inchoate Liability

1. USAO recommends that, in subsection (a)(1), the word "victim" be changed to the words "intended victim."

   With USAO's changes, § 22E-303(a)(1) would provide:

   "(1) The person is an intended victim of the target offense . . ."

USAO agrees with the general principle that certain victims should not be deemed guilty of conspiracy or solicitation. For example, a child should not be deemed guilty of child sexual abuse, even if that child was a willing participant in the conduct that led to the adult's criminal liability. However, there are instances where individuals who could be considered a victim should be deemed guilty of conspiracy or solicitation. For example, if Person A and Person B conspired to shoot Person C, and Person B was shot in the process and sustained injuries, Person B should not be freed from liability for conspiracy under the principle that he could be considered a "victim," where Person C was the only intended victim. Likewise, if Person D paid Person E to kill Person F, and Person D sustained injuries while Person E was shooting Person F, Person D should not be freed from liability for solicitation under the principle that he could be considered a "victim,"

where Person F was the only intended victim. USAO believes that eliminating liability only for an "intended victim" would remedy these situations and clarify the law.

2. USAO recommends that, in subsection (a)(2), the words, "The offense, as defined by statute, is of such a nature as to necessarily require the participation of two people for its commission." replace the words, "The person's criminal objective is inevitably incident to commission of the target offense as defined by statute."

   With USAO's changes, § 22E-304(a)(2) would provide:

   "(2) The offense, as defined by statute, is of such a nature as to necessarily require the participation of two people for its commission."

USAO believes that the current wording of (a)(2) is confusing, so is providing an alternate proposal. This is intended to be a clarification, not a substantive modification. USAO also believes that this is a more accurate statement of Wharton's Rule, as set forth in the comments to the current jury instructions. *See* Criminal Jury Instructions for the District of Columbia Comments, No. 7.102 (5th ed. Rev. 2018) ("Under Wharton's Rule, an agreement by two people to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two people for its commission.").

VI. RCC § 22E-305—Renunciation Defense to Attempt, Conspiracy, and Solicitation

1. USAO recommends removing § 22E-305 in its entirety.

USAO believes that this section does not accurately reflect the state of the law. Completion of the target offense is never required for the offenses of attempt, conspiracy, and solicitation. If the target offense is not completed, the defendant should not be held directly liable or liable under a theory of accomplice liability for the *completed act*. However the fact that the offense was not completed does not affect his already completed culpability for attempt, conspiracy, and solicitation. For example, if a defendant solicits another person to commit murder, and then, just before the murder, the defendant instructs the other person not to commit the murder, the defendant should still be liable for solicitation to commit murder. He should *not* be guilty of the underlying charge of murder, which he could have been directly charged with had the murder been completed, but his renunciation of the underlying offense does not affect the solicitation, which had already been completed.

If the CCRC is inclined to codify a defense in this section, USAO recommends that the RCC codify a withdrawal defense. Under the withdrawal defense, however, a defendant cannot rely on a withdrawal defense to attempt to escape liability for participation in a conspiracy once an overt act has been committed. See *United States v. Sarault*, 840 F.2d 1479, 1487 (9th Cir. 1988), *United States v. Herron*, 825 F.2d 50, 59 (5th Cir. 1987) (withdrawal after entering into the agreement and the commission of at least one overt act does not prevent conspiracy conviction); *United States v. Gornto*, 792 F.2d 1028, 1033 (11th Cir 1986) (withdrawal from conspiracy is impossible once an overt act is committed because the crime is then complete).

Memorandum

Jessie K. Liu
United States Attorney
District of Columbia

Subject: Comments to D.C. Criminal Code Reform Commission for First Draft of Report #35, Cumulative Update to Sections 201-213 of the RCC	Date: May 20, 2019
To: Richard Schmechel, Executive Director, D.C. Criminal Code Reform Commission	From: U.S. Attorney's Office for the District of Columbia

The U.S. Attorney's Office for the District of Columbia (USAO) and other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the CCRC's First Draft of Report #35, Cumulative Update to Sections 201-213 of the RCC. USAO reviewed this document and makes the recommendations noted below.[1]

Comments on the Draft Report

I. RCC § 22E-204—Causation Requirement

1. USAO recommends that, in subsection (c), the words "not too unforeseeable" be replaced with the words "reasonably foreseeable," and the words "not too dependent upon another's volitional conduct, to have a just bearing on the person's liability" be removed.

   With USAO's changes, § 22E-204(c) would provide:

   "(c) *Legal Cause Defined.* A person's conduct is the legal cause of a result if the result is ~~not too unforeseeable~~reasonably foreseeable in its manner of occurrence~~, and not too dependent upon another's volitional conduct, to have a just bearing on the person's liability~~."

As the RCC commentary acknowledges (at 20), "It is well established in the District that 'a criminal defendant proximately causes, and thus can be held criminally accountable for, all harms that are reasonably foreseeable consequences of his or her actions.' Reasonable foreseeability is thus at the heart of legal causation under District law[.]" The RCC asserts (at 21) that "[n]otwithstanding the centrality of the phrase 'reasonably foreseeable' in the District's law of causation, however, it is far from clear what it actually means." But the RCC's alternative phrase, "not too unforeseeable," merely uses an unfortunate double-negative to "codify[] the requirement of reasonable foreseeability" (Draft 35 at 21). It seems needlessly indirect to define

[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.

a legal requirement by what it is not, particularly where the substitute phrase does not clarify the underlying concept. To the contrary, in a statute, a "double-negative adds frustrating complexity to [a term's] description." *Bogdanov v. Avnet, Inc.*, No. 10-CV-543-SM, 2011 WL 4625698, at *5 (D.N.H. Sept. 30, 2011). Nor would it be clear what is "too" unforeseeable. There is no case law using "not too unforeseeable," while there is abundant case law applying "reasonable foreseeability."

To the extent that "reasonable foreseeability" cases contain a "diversity and complexity of statements regarding the nature of reasonable foreseeability," (Report 35 at 21), it seems unlikely that "not too unforeseeable" will fare any better. And if (as seems likely) that same case law explaining "reasonable foreseeability" is to be referenced in interpreting the term "not too unforeseeable," then there seems to be even less justification for using "not too unforeseeable" in the first place. In our view, doing so would confuse rather than clarify, and thus would run counter to the RCC's stated purpose (at 21) that, when viewed collectively, the RCC provision and its commentary "articulate the unnecessarily legalistic and complicated DCCA case law on reasonable foreseeability in a more accessible and transparent way."

The RCC's inclusion of a separate requirement that a result be "not too dependent upon another's volitional conduct, to have a just bearing on the person's liability" suffers from the same imprecision and practical opacity as "not too unforeseeable" discussed above, and compounds that vagueness by requiring the factfinder to separately assess what amounts to a "just" "bearing" on liability. Nor is it necessary, as the "reasonable foreseeability" requirement already incorporates the idea that, depending on the circumstances of a particular case, the volitional acts of others might (or might not) break the causal link between act and result. *Compare Matter of J.N.*, 406 A.2d 1275, 1287–88 (D.C. 1979) (Newman, J., dissenting) (noting that under the reasonable foreseeability standard, "as a general rule voluntary infliction of harm by a second actor usually suffices to break the chain of legal cause," but also noting that some circumstances justify imposing liability, citing case under which "[t]he underlying rationale . . . is that the intentional wrongdoer should bear the risk of the victim's death because the aforementioned [voluntary] intervening acts [of others] are considered foreseeable and natural consequences of his wrongful act.")

Memorandum

Jessie K. Liu
United States Attorney
District of Columbia

Subject: Revised Comments to D.C. Criminal Code Reform Commission for First Draft of Report #36, Cumulative Update to RCC Chapter 2 (§ 22E-214) and Chapter 3	Date: June 19, 2019

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

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

The U.S. Attorney's Office for the District of Columbia (USAO) and other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the CCRC's First Draft of Report #36, Cumulative Update to RCC Chapter 2 (§ 22E-214) and Chapter 3. USAO reviewed this document and makes the recommendation noted below.[1]

Revised Comment on the Draft Report

I. RCC § 22E-301—Criminal Attempt

1. USAO is no longer recommending that subsection (a)(2) be removed, but continues to rely on all of its previous recommendations.

Consistent with the discussion at the CCRC Advisory Group meeting on June 5, 2019, subsection (a)(2) is an appropriate statutory provision, as it provides a level of *mens rea* for an attempted offense.

[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.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: July 8, 2019

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

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #36 - Cumulative Update to RCC Chapters 3, 7 and the Special Part.[2]

COMMENTS ON THE DRAFT REPORT

RCC 22E-701. DEFINITIONS

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

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

[1] This Memorandum completes the review of the statutory language and commentary on Subtitle I (General Part) provisions in Chapters 4 and 7 of the report, and Subtitles II-V (Special Part). Comments on the statutory language and commentary on Subtitle I (General Part) provisions in RCC § 214 and Chapter 3 of the report was submitted on May 13, 2019.
[2] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.
[3] While the definitions are "numbered" in Appendix A, they are not numbered in the pdf file that contains both the Report and the Commentaries. For ease of communication, this memo will use the numbering system from the Appendix.

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

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

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

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

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

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

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

> contracting, procurement, administration of grants or subsidies, developing policies, land use planning, inspecting, licensing, regulating, or auditing, or act in areas of responsibility that may create a conflict of interest or appearance of a conflict of interest; and
>
> (J) An employee of the Council paid at a rate equal to or above the midpoint rate of pay for Excepted Service 9.

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

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

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

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

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

> "Sexual act" means:

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

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

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

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

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

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

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

RCC 22E-1101. MURDER

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

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

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

RCC 22E-1202. ASSAULT

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

RCC 22E-1203. MENACING

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

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

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

RCC 22E-1206. STALKING

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

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

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

RCC 22E-1301. SEXUAL ASSAULT

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

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

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

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

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

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

RCC 22E-1302. SEXUAL ABUSE OF A MINOR

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

RCC 22E-1303. SEXUAL EXPLOITATION OF AN ADULT

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

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

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

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

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

RCC § 22E-1304 (a) states:

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

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

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

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

RCC 22E-1305. ENTICING A MINOR

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

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

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

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

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

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

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

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

RCC § 22E-1401. KIDNAPPING[15]

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

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

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

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

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

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

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

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

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

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

RCC § 22E-1601. FORCED LABOR OR SERVICES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RCC § 22E-2101. THEFT

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

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

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

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

RCC § 22E-2104. SHOPLIFTING

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

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

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

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

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

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

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

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

RCC § 22E-2202. PAYMENT CARD FRAUD

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

RCC § 22E-2205. IDENTITY THEFT

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

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

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

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

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

RCC § 22E-2207 (c) states:

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

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

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

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

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

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

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

RCC § 22E-2501. ARSON[24]

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

RCC § 22E-2502. RECKLESS BURNING[25]

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

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

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

Paragraph (a) states:

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

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

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

RCC § 22E-2503. CRIMINAL DAMAGE TO PROPERTY

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

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

RCC § 22E-2601. TRESPASS

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

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

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

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

RCC § 22E-2701. BURGLARY

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

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

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

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

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

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

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

RCC § 22E-3403. CORRECTIONAL FACILITY CONTRABAND

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

RCC § 22E-4201. DISORDERLY CONDUCT

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

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

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

RCC § 22E-4202. PUBLIC NUISANCE

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

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

RCC § 22E-4203. BLOCKING A PUBLIC WAY

RCC § 22E-4203(a) states:

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

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

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

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

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

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

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

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

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

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

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Laura E. Hankins, General Counsel
Date:	July 8, 2019
Re:	Comments on First Draft of Report No. 36, Cumulative update to RCC Chapters 3, 7 and the Special Part

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Memorandum

Jessie K. Liu
United States Attorney
District of Columbia

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

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

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

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

Comments on the Draft Report

I. General Comments.

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

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

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

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

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

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

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

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

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

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

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

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

II. Chapter 4. Justification Defenses.

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

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

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

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

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

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

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

   With USAO's changes, this section would provide:

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Chapter 7. Definitions.

A. RCC § 22E-701. Definitions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

    With USAO's changes, this subsection would provide:

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

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

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

    With USAO's changes, this subsection would provide:

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

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

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

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

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

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

    With USAO's changes, this subsection would provide:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. Chapter 11. Homicide.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. RCC § 22E-1201. Robbery.

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

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

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

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

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

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

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

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

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

   With USAO's changes, this subsection would provide:

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

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

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

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

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

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

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

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

With USAO's changes, this subsection would provide:

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

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

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

With USAO's changes, this subsection would provide:

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

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

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

B. RCC § 22E-1202. Assault.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. RCC § 22E-1203. Menacing.

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

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

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

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

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

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

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

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

D. RCC § 22E-1204. Criminal Threats.

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

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

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

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

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

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

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

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

. . .

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

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

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

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

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

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

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

F. RCC § 22E-1206. Stalking.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VII. Chapter 13. Sexual Assault and Related Provisions.

A. General Comments.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. RCC § 22E-1301. Sexual Assault.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

   "(E) After rendering the complainant unconscious."

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

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

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

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

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

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

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

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

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

"(e) *Defenses.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"(4) At the time of the offense:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(C) The complainant:

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

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

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

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

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

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

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

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

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

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

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

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

"(2) Either:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

USAO recommends that the subsections be rewritten to provide:

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

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

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

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

2. USAO recommends removing subsection (c).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. RCC § 22E-1401. Kidnapping.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Subsections (a)(1), (b)(1), and (c)(1) require a relationship between the defendant and complainant. This is a change from current law, and is not warranted. Under D.C. Code § 22-1101, the current Cruelty to Children offense, there is no requirement of a relationship between the parties. USAO relies on this statute both in situations where there is a relationship between the parties and when there is not, and both applications of the statute are appropriate. For example, if a stranger walks up to a child and tips over the child's strollers, or a neighbor hits a

child, this behavior is equally culpable as when a person with a relationship with the child engages in the same behavior.

Further, due to this change, USAO recommends that the RCC include elsewhere in the statute the requirement that the complainant be, in fact, under 18 years of age.

2. In the alternative, USAO recommends removing the words "under civil law" from subsections (a)(1), (b)(1), and (c)(1).

   With USAO's changes, subsections (a)(1), (b)(1), and (c)(1) would provide:

   "(1) Reckless as to the fact that he or she has a responsibility ~~under civil law~~ for the health, welfare, or supervision of the complainant who is under 18 years of age;"

For reasons articulated above, the words "under civil law" are confusing and needlessly require a reliance on civil law to understand criminal law.

3. USAO recommends, in subsection (c)(2)(A), including the words "assault, per RCC § 22E-1202; or kidnapping, per RCC § 22E-1401," and eliminating the words "first degree" from "first degree offensive physical contact."

   With USAO's changes, subsection (c)(2)(A) would provide:

   "(A) In fact, commits: assault, per RCC § 22E-1202; stalking, per RCC § 22E-1206; menacing, per RCC § 22E-1203; criminal threats, per RCC § 22E-1204; kidnapping, per RCC § 22E-1401; criminal restraint, per RCC § 22E-1404; or ~~first degree~~ offensive physical contact, per RCC § 22E-1205~~(a)~~ against the complainant;"

Although assault is implicitly included in this definition in subsection (c)(2)(C), it should be expressly included in subsection (c)(2)(A) as well to eliminate confusion. Further, given that criminal restraint is included in this list, kidnapping should be as well. Moreover, it is appropriate to include liability for both First Degree and Second Degree Offensive Physical Contact in this statute. As discussed more extensively in the Assault comments, a primary distinction between Assault and Second Degree Offensive Physical Contact could be a factual question as to whether the complainant suffered "bodily injury." Particularly in the case of a child, who could be non-verbal, barely verbal, or reluctant to talk, cases prosecuted under this section may frequently involve third-party witnesses, rather than the testimony of the complainant. A third-party witness may not be able to either ascertain or testify beyond a reasonable doubt that a child was in "physical pain" as a result of the defendant's actions, so even what appears to be a clear assault on a child may only be prosecutable as a second degree offensive physical contact. For this reason, USAO believes that it is appropriate to include second degree offensive physical contact in this definition as well.

4. USAO recommends, in subsection (c)(2)(B), changing the word "Purposely" to "Knowingly" and removing the words "by confining."

   With USAO's changes, subsection (c)(2)(B) would provide:

   "(B) ~~Purposely~~ Knowingly causes significant emotional distress to ~~by confining~~ the complainant."

The appropriate standard is "knowingly," as "purposefully" creates a level of *mens rea* that is too high. Under the current child cruelty statute, the only *mens rea* requirements are intentionally, knowledge, or recklessness. D.C. Code § 22-1101(a), (b).

Further, it is unclear why confining the complainant is the only way to cause significant emotional distress under this statute. USAO believes that any time a defendant knowingly causes significant emotional distress to a child, whether by confinement or otherwise, that should constitute Criminal Abuse of a Minor.

5. USAO recommends, in subsection (c)(2)(C), adding the words, "or engages in conduct that creates a grave risk of causing bodily injury to the complainant."

   With USAO's changes, subsection (c)(2)(C) would provide:

   "(C) Recklessly causes bodily injury to the complainant, or engages in conduct that creates a grave risk of causing bodily injury to the complainant;"

This conduct is encompassed in the current Second Degree Child Cruelty statute at D.C. Code § 22-1101(b)(1) and should be included here. Consistent with current law, there should not be a requirement of an injury to satisfy this statute. The Commentary states that this could be prosecuted as an attempt, or as Criminal Neglect of a Minor (Commentary at 291), but with USAO's changes suggested above that would eliminate the need for a significant relationship in the Criminal Abuse of a Minor statute, these statutes justifiably no longer have the same overlap. Further, creating a "grave risk" of causing bodily injury is a different standard than coming "dangerously close" to causing bodily injury, so the attempt statute will not encompass every situation that would be covered under the current law.

B. RCC § 22E-1502. Criminal Neglect of a Minor.

1. USAO recommends removing the words "under civil law" from subsections (a)(1), (b)(1), and (c)(1).

   With USAO's changes, subsections (a)(1), (b)(1), and (c)(1) would provide:

   "(1) Reckless as to the fact that he or she has a responsibility ~~under civil law~~ for the health, welfare, or supervision of the complainant who is under 18 years of age;"

For reasons articulated above, the words "under civil law" are confusing and needlessly require a reliance on civil law to understand criminal law.

C. RCC § 22E-1503. Criminal Abuse of a Vulnerable Adult or Elderly Person.

1. USAO recommends removing subsections (a)(1), (b)(1), and (c)(1).

Subsections (a)(1), (b)(1), and (c)(1) require a relationship between the defendant and complainant. This is a change from current law, and is not warranted. Under D.C. Code § 22-933, the current Criminal Abuse of a Vulnerable Adult or Elderly Person offense, there is no requirement of a relationship between the parties. USAO relies on this statute both in situations where there is a relationship between the parties and when there is not, and both applications of the statute are appropriate. Alternatively, the relationship could be included as an enhancement to this provision.

Further, due to this change, USAO recommends that the RCC include elsewhere in the statute the requirement that the complainant be, in fact, a vulnerable adult or elderly person.

2. In the alternative, USAO recommends removing the words "under civil law" from subsections (a)(1), (b)(1), and (c)(1).

With USAO's changes, subsections (a)(1), (b)(1), and (c)(1) would provide:

> "(1) Reckless as to the fact that he or she has a responsibility ~~under civil law~~ for the health, welfare, or supervision of the complainant who is a vulnerable adult or elderly person;"

For reasons articulated above, the words "under civil law" are confusing and needlessly require a reliance on civil law to understand criminal law.

3. USAO recommends, in subsection (c)(2)(A), including the words "assault, per RCC § 22E-1202; or kidnapping, per RCC § 22E-1401," and eliminating the words "first degree" from "first degree offensive physical contact."

With USAO's changes, subsection (c)(2)(A) would provide:

> "(A) In fact, commits: assault, per RCC § 22E-1202; stalking, per RCC § 22E-1206; menacing, per RCC § 22E-1203; criminal threats, per RCC § 22E-1204; kidnapping, per RCC § 22E-1401; criminal restraint, per RCC § 22E-1404; or ~~first degree~~ offensive physical contact, per RCC § 22E-1205~~(a)~~ against the complainant;"

Although assault is implicitly included in this definition in subsection (c)(2)(C), it should be expressly included in subsection (c)(2)(A) as well to eliminate confusion. Further, given that criminal restraint is included in this list, kidnapping should be as well. Moreover, for similar reasons as those discussed above in the Criminal Abuse of a Minor provision, it is important to have a provision for second degree offensive physical contact. Like young children, some elderly

or vulnerable adults may not be able to articulate whether or not they felt any "physical pain," and the government's case will have to rely on the testimony of third-party witnesses. Even if it is likely that the complainant suffered bodily injury, the government may not be able to prove it beyond a reasonable doubt, so USAO believes that it is appropriate to include this option for liability as well.

4. USAO recommends, in subsection (c)(2)(B), changing the word "Purposely" to "Knowingly" and removing the words "by confining."

   With USAO's changes, subsection (c)(2)(B) would provide:

   "(B) ~~Purposely~~ Knowingly causes significant emotional distress to ~~by confining~~ the complainant."

The appropriate standard is "knowingly," as "purposefully" creates a level of *mens rea* that is too high. Under the current abuse of a vulnerable adult, the only *mens rea* requirements are intentionally or knowledge. D.C. Code § 22-933.

Further, it is unclear why confining the complainant is the only way to cause significant emotional distress under this statute. USAO believes that any time a defendant knowingly causes significant emotional distress to a vulnerable adult or elderly person, whether by confinement or otherwise, that should constitute Criminal Abuse of a Vulnerable Adult or Elderly Person.

5. USAO recommends, in subsection (c)(2)(C), adding the words, "or engages in conduct that creates a grave risk of causing bodily injury to the complainant."

   With USAO's changes, subsection (c)(2)(C) would provide:

   "(C) Recklessly causes bodily injury to the complainant, or engages in conduct that creates a grave risk of causing bodily injury to the complainant;"

This language is consistent with USAO's proposed changes to the Criminal Abuse of a Minor statute, as discussed above. Moreover, the current statute includes "threaten[ing] to inflict physical pain or injury," D.C. Code § 22-933(1), which means that no infliction of bodily injury is required. Thus, USAO's proposed changes are consistent with current law.

D. RCC § 22E-1503. Criminal Neglect of a Vulnerable Adult or Elderly Person.

1. USAO recommends removing the words "under civil law" from subsections (a)(1), (b)(1), and (c)(1).

   With USAO's changes, subsections (a)(1), (b)(1), and (c)(1) would provide:

   "(1) Reckless as to the fact that he or she has a responsibility ~~under civil law~~ for the health, welfare, or supervision of the complainant who is under 18 years of age;"

For reasons articulated above, the words "under civil law" are confusing and needlessly require a reliance on civil law to understand criminal law.

X. Chapter 16. Human Trafficking.

A. RCC § 22E-1601. Forced Labor or Services; RCC § 22E-1602. Forced Commercial Sex.

1. USAO recommends that the RCC define "debt bondage" and "labor" in Chapter 7.

In § 22E-1601, the words "debt bondage" and "labor" are used, but their meaning is vague and open to substantial interpretation. "Debt bondage" and "labor" are not defined in RCC § 22E-701. "Services" is defined in RCC § 22E-701, but is partially defined as "Labor, whether professional or nonprofessional." Without the definition of "labor," it is hard to assess how "services" broadens or narrows "labor." USAO believes that defining those terms would clarify this section. USAO recommends that the RCC incorporate the definitions of those terms set forth in D.C. Code § 22-1831.

2. USAO recommends changing subsection (c)(1) to require strict liability instead of recklessness.

With USAO's changes, subsection (c)(1) would provide:

"~~The actor was reckless as to the fact that t~~The complainant was, in fact, under 18 years of age;"

USAO relies on the rationale set forth above in the General Comments to Chapter 13.

3. USAO recommends, in subsection (c)(2), adding a comma after the words "provide services in RCC § 22E-1601, and adding a comma after the words "provide commercial sex acts" in RCC § 22E-1602.

With USAO's changes, subsection (c)(2) of RCC § 22E-1601 would provide:

"(2) The actor held the complainant, or caused the complainant to provide services, for a total of more than 180 days."

With USAO's changes, subsection (c)(2) of RCC § 22E-160 would provide:

"(2) The actor held the complainant, or caused the complainant to provide commercial sex acts, for more than 180 days."

Adding this comma clarifies that the enhancement applies either if the actor holds the complainant for more than 180 days, or causes the complainant to provide services for more than 180 days. Without the comma, it appears that only the second clause has the 180 days

requirement. USAO also recommends making this change throughout Chapter 16 to ensure consistency.

B. RCC § 22E-1603. Trafficking in Labor or Services.

1. USAO recommends adding the words "advertises, patronizes, or solicits" to subsection (a)(1).

   With USAO's changes, subsection (a)(1) would provide:

   "(1) Knowingly recruits, entices, houses, transports, provides, obtains, ~~or~~ maintains, advertises, patronizes, or solicits by any means, a person;"

These changes track federal human trafficking law, as codified in 18 U.S.C. § 1591(a)(1). These additions would include, for example, a job posting or similar situations that would arguably not be encompassed in the statute otherwise.

2. USAO recommends changing subsection (c)(1) to require strict liability instead of recklessness.

   With USAO's changes, subsection (c)(1) would provide:

   "~~The actor was reckless as to the fact that t~~The complainant was, in fact, under 18 years of age;"

   USAO relies on the rationale set forth above in the General Comments to Chapter 13.

C. RCC § 22E-1604. Trafficking in Commercial Sex.

1. USAO recommends adding the words "advertises, patronizes, or solicits" to subsection (a)(1).

   With USAO's changes, subsection (a)(1) would provide:

   "(1) Knowingly recruits, entices, houses, transports, provides, obtains, ~~or~~ maintains, advertises, patronizes, or solicits by any means, the complainant;"

   This change has the same rationale as the change suggested above.

2. USAO recommends changing subsection (c)(1) to require strict liability instead of recklessness.

   With USAO's changes, subsection (c)(1) would provide:

   "~~The actor was reckless as to the fact that t~~The complainant was, in fact, under 18 years of age;"

USAO relies on the rationale set forth above in the General Comments to Chapter 13.

3. USAO recommends, in subsection (c), changing the words "Before applying" to "In addition to."

With USAO's changes, subsection (c) would provide:

"(c) *Offense Penalty Enhancements.* ~~Before applying~~ In addition to any general penalty enhancements . . ."

USAO believes that this change is not substantive, but is intended to conform with the language of the other penalty enhancements in Chapter 16.

D. RCC § 22E-1605. Sex Trafficking of Minors

1. USAO recommends changing the heading of § 22E-1605 from "Sex Trafficking of Minors" to "Sex Trafficking of a Minor," and, in subsection (a), changing the word "minors" to the words "a minor."

With USAO's changes, § 22E-1605 would provide:

"**RCC § 22E-1605. Sex Trafficking of ~~Minors~~ a Minor.**
(a) *Offense.* An actor commits sex trafficking of ~~minors~~ a minor when that actor:"

This change is not intended to be substantive. This change clarifies that, to be liable for this offense, an actor must only traffic one minor, rather than multiple minors. This change is also consistent with the other headings in the RCC, including in Chapter 13, that discuss "a minor" instead of "minors."

2. USAO recommends adding the words "advertises, patronizes, or solicits" to subsection (a)(1).

With USAO's changes, subsection (a)(1) would provide:

"(1) Knowingly recruits, entices, houses, transports, provides, obtains, ~~or~~ maintains, advertises, patronizes, or solicits by any means, the complainant;"

This change has the same rationale as the change suggested above.

3. USAO recommends changing subsection (c)(1) to require strict liability instead of recklessness.

With USAO's changes, subsection (c)(1) would provide:

"~~With recklessness as to the fact that t~~The complainant was, in fact, under 18 years of age;"

USAO relies on the rationale set forth above in the General Comments to Chapter 13. Although under current law there is a requirement of recklessness as to whether the complainant is under 18, *see* D.C. Code § 22-1834(a), the government need not prove this recklessness if the defendant had a "reasonable opportunity to observe" the complainant, D.C. Code § 22-1834(b).

4. USAO recommends, in subsection (a)(2), omitting the words "with another person."

As set forth above, USAO is recommending including "masturbation" in the definition of "commercial sex act" in RCC § 22E-701. Because masturbation does not require "another person's" involvement, this phrase is unnecessary and could lead to confusion in this context.

E. RCC § 22E-1608. Commercial Sex with a Trafficked Person.

1. USAO recommends changing subsections (a)(3) and (b)(2)(B) to require strict liability instead of recklessness.

With USAO's changes, subsections (a)(3) and (b)(2)(B) would provide:

"~~With recklessness as to the fact that t~~The complainant was, in fact, under 18 years of age ~~or, in fact, the complainant was under 12 years of age~~."

USAO relies on the rationale set forth above in the General Comments to Chapter 13.

F. RCC § 22E-1612. Limitations on Liabilities and Sentencing for Chapter 16 Offenses.

1. USAO recommends removing RCC § 22E-1612 in its entirety.

The RCC does not allow prosecution of prior trafficking victims as accomplices or co-conspirators to trafficking. This is a change from current law, and limits the ability to prosecute individuals who were previously trafficked but are currently perpetrating trafficking. Even someone who was trafficked for a short time can become an essential part of the criminal enterprise. But for that prior victim's involvement in the enterprise—now as an accomplice rather than as a victim—the primary trafficker would not be able to recruit new victims and continue to build a trafficking network. It is frequently the case that these accomplices are used as recruiting tools, or as enforcers in the enterprise who enforce the victims' compliance and allow the primary trafficker to appear sympathetic to these victims.

XI. Chapter 21. Theft.

A. RCC § 22E-2101. Theft

1. USAO recommends decreasing the number of gradations of theft.

§ 22E-2101 currently provides for five gradations of theft, separated primarily by dollar value of the property at issue. USAO believes, however, that too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing. Of note, some other property provisions within the RCC include only two or three gradations (see RCC § 22E-2203 (two gradations of check fraud); RCC § 22E-2204 (three gradations of forgery)).

2. USAO recommends removing subsection (b)(4)(B).

Subsection (b)(4)(B) provides: "The property is a motor vehicle, and has a value of $25,000 or more." Subsection (b)(4)(A) provides: "The property has a value of $25,000 or more." Because all motor vehicles with a value of $25,000 or more under (b)(4)(B) will necessarily also have a value of $25,000 or more under (b)(4)(A), subsection (b)(4)(B) is a superfluous provision.

3. Contingent upon the CCRC accepting USAO's recommendations in the Robbery statute, USAO recommends deleting subsection (c)(4)(C).

With USAO's changes, § 22E-2101(c) would provide:

"(c) Third Degree. A person commits third degree theft when that person:
(1) Knowingly takes, obtains, transfers, or exercises control over the property of another;
(2) Without the consent of an owner;
(3) With intent to deprive that owner of the property; and
(4) In fact:
(A)The property has a value of $2,500 or more; or
(B) The property is a motor vehicle~~; or~~
~~(C) The property is taken from a complainant who:~~
~~(i) Holds or carries the property on his or her person; or~~
~~(ii) Has the ability and desire to exercise control over the property and it is within his or her immediate physical control~~."

Unlike the other provisions of § 22E-2101, subsection (c)(4)(C) refers to the taking of property from a complainant's person or his or her immediate physical control. As such, the proposed third degree theft statute is akin to robbery, and USAO believes that this conduct should be included in the Robbery statute instead of the Theft statute. This distinction is important, given that a robbery accounts for the violation not only of property but also of one's person. Indeed, although the Commentary on RCC § 22E-2101 (Theft) does not directly address the inclusion of subsection (c)(4)(C), the Commentary on RCC § 22E-1201 (Robbery) acknowledges that so-called "pick-pocketing" can morph into robbery in at least some

circumstances (see Commentary at 193-94 & nn.1144-46). Therefore, contingent upon the CCRC adopting USAO's recommendation that the RCC Robbery statute track current law, USAO recommends removing this provision from the Theft statute. This theory of theft would accordingly be subsumed into Robbery.

B. RCC § 22E-2103. Unauthorized Use of a Motor Vehicle.

1. USAO recommends, in subsection (a)(1), changing the word "operates motor vehicle" to the words "operates or uses a motor vehicle, or causes to a motor vehicle to be operated or used."

   With USAO's changes, subsection (a)(1) would provide:

   "(1) Knowingly operates or uses a motor vehicle, or causes a motor vehicle to be operated or used;"

USAO believes that, consistent with current law under D.C. Code § 22-3215(b), it is appropriate to include the word "use" in addition to "operate." Indeed, the title of the statute, "Unauthorized *Use* of a Motor Vehicle" (emphasis added), includes this term. Further, USAO believes that, consistent with D.C. Code § 22-3215(b), it is also appropriate to retain liability for someone who "causes" a motor vehicle to be operated or used.

2. USAO recommends that § 22E-2103, like the current statute, include a provision penalizing the use of a stolen vehicle in the commission of a crime of violence.

   With USAO's changes, § 22E-2103 would add the following language:

   "(a) A person convicted of unauthorized use of a motor vehicle under this section who took, used, or operated the motor vehicle, or caused the motor vehicle to be taken, used, or operated, during the course of or to facilitate a crime of violence, shall be:
   (i) Fined not more than $[X], imprisoned for not more than [X] years, or both, consecutive to the penalty imposed for the crime of violence; and
   (ii) If serious bodily injury results, imprisoned for not less than [X] years, consecutive to the penalty imposed for the crime of violence."

This language is consistent with the current law in D.C. Code § 22-3215(d)(2)(A). Appendix J recognizes that at least some states prohibit the use of a motor vehicle during the commission of a felony. *See* RCC App. J at 367 & n.2020. USAO believes that including such a provision is important because the use of a vehicle in fleeing (or attempting to flee) from the scene of a crime is inherently dangerous, and increases the risk that innocent bystanders will be harmed on top of any harm caused by the crime of violence itself.

XII. Chapter 22. Fraud.

A. RCC § 22E-2201. Fraud.

1. USAO recommends decreasing the number of gradations of fraud.

§ 22E-2201 currently provides for five gradations of fraud, separated by dollar value of the property at issue, or the number of hours of services/labor. USAO believes, however, that too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing. Of note, some other property provisions within the RCC include only two or three gradations (see RCC § 22E-2203 (two gradations of check fraud); RCC § 22E-2204 (three gradations of forgery)).

2. USAO recommends replacing "that" with "an" in subparagraph 3 of each gradation of fraud.

With USAO's changes, each subsection of the fraud statute would read:

"*[X] Degree*. A person commits [X] degree fraud when that person:
(1) Knowingly takes, obtains, transfers, or exercises control over property of another;
(2) With the consent of an owner obtained by deception;
(3) With intent to deprive ~~that~~ an owner of the property . . . ."[7]

As currently drafted, § 22E-2201 creates criminal liability for fraud only where a person has obtained property with the consent of *an owner* with the intent to deprive *that owner* of the property. Accordingly, the current language might fail to account for fraud on legal persons (e.g., businesses or corporations) or fraud perpetrated with respect to jointly owned property. Consider, for example, a jointly owned vehicle where one owner resides in the District of Columbia and frequently uses the vehicle, and another does not reside in the District of Columbia and never uses the vehicle. A defendant who obtains control over the vehicle by deceiving the non-DC owner does not necessarily deprive the non-DC owner of the use of the vehicle, because the vehicle is not being used by the non-DC owner. However, the defendant would effectively deprive the DC owner of use of the vehicle. USAO's proposed language addresses this gap.

B. RCC § 22E-2202. Payment Card Fraud.

1. USAO recommends decreasing the number of gradations of payment card fraud.

Section 22E-2202 currently provides for five gradations of payment card fraud, separated by dollar value of the property at issue. USAO believes that too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing. Indeed, Appendix J acknowledges that only five jurisdictions nationwide have five gradations of payment card fraud. RCC App. J at 378-79. Of note, some other property provisions within the

[7] Of note, the current draft of RCC § 22E-2208(e)(1) (Financial Exploitation of a Vulnerable Adult or Elderly Person) follows the same form as the form that USAO proposes here.

RCC include only two or three gradations (see RCC § 22E-2203 (two gradations of check fraud); RCC § 22E-2204 (three gradations of forgery)).

C. RCC § 22E-2203. Check Fraud.

1. USAO recommends that, in line with the majority of other jurisdictions and in addition to the conduct set forth in the revised check fraud statute, § 22E-2203 provide that a person commits check fraud when that person "draws" a check or "delivers" a check.

   With USAO's changes, § 22E-2203(a) would provide:

   "(a) *First Degree.* A person commits first degree check fraud when that person:
   (1) Knowingly:
   (A) obtains or pays for property by using a check; or
   (B) draws or delivers a check . . . ."
   . . . .

   (b) *Second Degree.* A person commits second degree check fraud when that person:
   (1) Knowingly:
   (A) obtains or pays for property by using a check; or
   (B) draws or delivers a check . . . ."

Appendix J acknowledges that "requiring for check fraud that the accused actually pays for or obtains property of another, appears to be a minority practice in other jurisdictions. RCC App. J at 380. Rather, it is sufficient in a majority of jurisdictions for a person to "issue" or "pass" a check (*id.*). Although the Commentary suggests that liability for *attempted* check fraud *might* cover conduct like drawing or delivering a check (Commentary at 58-59), USAO is concerned that eliminating clearly specified criminal liability for drawing or delivering checks will create a gap in the enforcement of financial crimes.

Moreover, including liability for drawing and delivering checks will bring the check fraud statute in line with the proposed forgery statute, RCC § 22E-2204. Under RCC § 22E-2204(c)(1)(C), one form of conduct that constitutes forgery is "transmitting or otherwise using" a forged document. But the statute requires only that the person "transmitting or otherwise using" the forged document *intends* to obtain property; no actual exchange of property need occur (*see* RCC § 22E-2204(c)(2)). Similarly, RCC § 22E-2205—the identity theft statute—does not require that a person actually obtain property to be criminally liable for identity theft. Rather, a person need only to *intend* to (among other possibilities) obtain property.

2. USAO recommends that, in line with the majority of jurisdictions, the $2,500 threshold be decreased to $1,000.

   With USAO's changes, § 22E-2203(a)(3) would provide:

   "(3) The amount of loss to the check holder is, in fact, ~~$2,500~~ $1,000 or more."

As acknowledged in Appendix J, "the minimum value threshold for felony check fraud is $1,000 *or less*." RCC App. J at 381 (emphasis added). Accordingly, USAO sees no reason to depart from the national trend. Doing so would result in a drastic difference in criminal liability between check fraud committed in the District of Columbia and other jurisdictions—including the neighboring jurisdictions of Maryland and Virginia (see Va. Code § 18.2-181 (setting $500 threshold for felony check fraud); Md. Code § 8-106 (same)).

D. RCC § 22E-2205. Identity Theft.

1. USAO recommends decreasing the number of gradations of payment card fraud.

§ 22E-2205 currently provides for five gradations of identity theft, separated by dollar value of the property at issue. USAO believes that too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing. Of note, some other property provisions within the RCC include only two or three gradations (see RCC § 22E-2203 (two gradations of check fraud); RCC § 22E-2204 (three gradations of forgery)).

2. USAO recommends that subsection (e)(3) include subparagraph (D)-(F) that reads, "(D) identify himself or herself at the time of his or her arrest; (E) facilitate or conceal his or her commission of a crime; or (F) avoid detection, apprehension, or prosecution for a crime"

With USAO's changes, § 22E-2205(e)(3) would provide:

"(3) With intent to use the personal identifying information to:
(A) Obtain property of another by deception;
(B) Avoid payment due for any property, fines, or fees by deception;
(C) Give, sell, or transfer . . . . ;
(D) Identify himself of herself at the time of his or her arrest;
(E) Facilitate or conceal his or her commission of a crime; or
(F) Avoid detection, apprehension, or prosecution for a crime."

USAO believes that the current wording of (e)(3) is under-inclusive, in that it focuses only on the financial harms potentially caused by identify theft, without accounting for other nefarious reasons for misappropriating another person's identity. Although the Commentary (at 71) suggests that the conduct in proposed subparagraphs (D)-(F) is criminalized under obstruction of justice and false statements offenses, none of these takes into account the harm caused to the person whose personal identifying information has been misappropriated. For example, where a defendant identifies himself as John Doe at the time of arrest, then John Doe's information will almost certainly enter police paperwork, court dockets, national databases, and the like. This will have an effect on the real "John Doe," who might suffer continuing harms during background checks for employment or housing. While RCC § 22E-2206 (Identity Theft Civil Provisions) provides some civil remedies for persons who are victims of identity theft, the provision reaches only "District of Columbia public records," which will not reach, for example, records that have already entered national databases, or private company records.

E. RCC § 22E-2206. Identity Theft Civil Provisions.

1. USAO recommends replacing each occurrence of "§ 22E-2206" with "§ 22E-2205".

Section 22E-2206 as currently drafted is self-referential; it appears that the references to 2206 are typographical errors, and should be updated to read "2205" (the immediately preceding provision dealing with criminal liability for identity theft).

F. RCC § 22E-2208. Financial Exploitation of a Vulnerable Adult or Elderly Person.

1. USAO recommends decreasing the number of gradations of Financial Exploitation of a Vulnerable Adult.

§ 22E-2208 currently provides for five gradations of Financial Exploitation of a Vulnerable Adult or Elderly Person ("FEVA"), separated by dollar value of the property at issue. The reliance on dollar value is of particular concern where the criminal conduct at issue is directed at individuals who are elderly or otherwise vulnerable. Indeed, by distinguishing the severity of the offense by the amount of property at issue, this proposed statute penalizes defendants less severely when they take advantage of elderly or vulnerable adults who are not wealthy. The focus should be on the fact that a defendant has taken advantage of someone who is potentially less able to fend for himself or herself – not on how much money the defendant managed to steal.

Moreover, as Appendix J acknowledges, "increasing the number of penalty gradations is not supported by national legal trends. Of the jurisdictions with analogous FEVA offenses, *a majority use either two or one penalty grades*." RCC App. J at 389-90 (emphasis added). Given the lack of support at the national level for including more than two gradations, as well as the practical effect of penalizing FEVA on the basis of the financial harm, USAO objects to including five gradations for this offense.

Finally, as a general matter, USAO believes that too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing. Of note, some other property provisions within the RCC include only two or three gradations (see RCC § 22E-2203 (two gradations of check fraud); RCC § 22E-2204 (three gradations of forgery)[8]).

2. USAO recommends striking "theft, extortion, forgery, fraud, or identity theft" from RCC § 22E-2208(e)(2) and inserting the following language: "arson, check fraud, criminal damage to property, criminal graffiti, extortion, fraud, forgery, identity theft, payment card fraud, possession of stolen property, reckless burning, shoplifting, theft, trafficking of stolen property, unauthorized use of a motor vehicle, or unauthorized use of property."

With USAO's changes, § 22E-2208(e)(2) would provide:

"(e)(2) Commits arson, check fraud, criminal damage to property, criminal graffiti, extortion, fraud, forgery, identity theft, payment card fraud, possession of stolen property,

[8] Indeed, forgery is cross-referenced in § 22E-2208(e)(2).

reckless burning, shoplifting, theft, trafficking of stolen property, unauthorized use of a motor vehicle, or unauthorized use of property with recklessness that the complainant is a vulnerable adult or elderly person."

§ 22E-2208(e)(2) currently incorporates by reference only a small subset of property-related offenses; that is, offenses where there is some sort of financial loss to the complainant. The Commentary offers no justification for limiting FEVA to the current subset of crimes and excluding crimes that clearly are related (for example, the current FEVA includes fraud, but excludes payment card fraud and check fraud). USAO believes that its proposal provides consistency.

XIII. Chapter 23. Extortion.

A. RCC § 22E-2301. Extortion.

1. USAO recommends decreasing the number of gradations of extortion.

§ 22E-2301 currently provides for five gradations of extortion, separated by dollar value of the property at issue. USAO believes that too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing. Of note, some other property provisions within the RCC include only two or three gradations (*see* RCC § 22E-2203 (two gradations of check fraud); RCC § 22E-2204 (three gradations of forgery)).

2. USAO recommends replacing "that" with "an" in subparagraph 4 of each gradation of extortion.

With USAO's changes, each subsection of the extortion statute would read:

"(a) *[X] Degree*. A person commits [X] degree extortion when that person:
(1) Knowingly takes, obtains, transfers, or exercises control over property of another;
(2) With the consent of an owner;
(3) The consent being obtained by coercive threat;
(4) Win intent to deprive an ~~that~~ owner of the property; . . . ."[9]

As currently drafted, § 22E-2301 creates criminal liability for extortion only where a person has obtained property with the consent of *an owner* with the intent to deprive *that owner* of the property. Accordingly, the current language might fail to account for, among other things, extortion of an employee of a legal person (*e.g.*, businesses or corporations). Consider, for example, an employee of a business who has access to, but does not own, certain monies. A defendant who threatens a person by saying, "give me access to Company X's credit card, or I'll tell Company X that you did Y" will not be liable for extortion under the current formulation of § 22E-2301. USAO's proposed language addresses this gap.

[9] Of note, the current draft of RCC § 22E-2208(e)(1) (Financial Exploitation of a Vulnerable Adult or Elderly Person) follows the same format that USAO proposes here.

3 USAO recommends further considering the Extortion statute at the same time as the Blackmail statute.

Subsection (1) of each degree of Extortion limits the charge to exercising control "over the property of another." USAO cannot fully comment on this provision without seeing the proposed Blackmail statute, § 22E-1403, which has not yet been drafted. It is important that there is a statute that includes causing another to do or refrain from doing an act, which is not currently encompassed by Extortion, but may be encompassed by the future Blackmail statute.

XIV. Chapter 24. Stolen Property.

A. RCC § 22E-2401. Possession of Stolen Property.

1. USAO recommends decreasing the number of gradations of Possession of Stolen Property.

§ 22E-2401 currently provides for five gradations of Possession of Stolen Property, separated by dollar value of the property at issue. USAO believes that too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing. Of note, some other property provisions within the RCC include only two or three gradations (see RCC § 22E-2203 (two gradations of check fraud); RCC § 22E-2204 (three gradations of forgery)).

B. RCC § 22E-2402. Trafficking of Stolen Property.

1. USAO recommends decreasing the number of gradations of Trafficking of Stolen Property.

§ 22E-2402 currently provides for five gradations of Trafficking of Stolen Property, separated by dollar value of the property at issue. USAO believes that too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing. Of note, some other property provisions within the RCC include only two or three gradations (see RCC § 22E-2203 (two gradations of check fraud); RCC § 22E-2204 (three gradations of forgery)).

2. USAO recommends, in subsection (4) of each gradation of Trafficking of Stolen Property, changing the word "property" to the words "total property trafficked."

With USAO's changes, each subsection (4) would provide:

"(4) The total property trafficked, in fact, has a value of . . ."

As currently written, the statue is unclear as to whether each occasions involving trafficked property must have the monetary value listed, or whether the *total* amount trafficked must have the monetary value listed. USAO believes that, because the purpose of the statute is to encompass multiple instances of buying or possessing stolen property, the total value of the

trafficked property is a more relevant number than each individual transaction. USAO's changes would clarify this provision.

XV. Chapter 25. Property Damage.

A. RCC § 22E-2501. Arson.

1. USAO recommends (1) striking references to "a person who is not a participant in the crime" from RCC § 22E-2501(a)-(b), and (2) amending "dwelling or building" to read "dwelling, building, or vehicle".

   With USAO's changes, § 22E-2501(a)-(b) would read:

   "(a) *First Degree*. A person commits first degree arson when that person:
   (1) Knowingly starts a fire or causes an explosion that damages or destroys a dwelling, ~~or~~ building, or vehicle;
   (2) Reckless as to the fact that a person ~~who is not a participant in the crime~~ is present in the dwelling, ~~or~~ building, or vehicle; and
   (3) The fire or explosion, in fact, causes death or serious bodily injury to any person
   (4) ~~Who is not a participant in the crime.~~
   (b) *Second Degree.* A person commits second degree arson when that person:
   (1) Knowingly starts a fire or causes an explosion that damages or destroys a dwelling, ~~or~~ building, or vehicle;
   (2) Reckless as to the fact that a person ~~who is not a participant in the crime~~ is present in the dwelling, building, or vehicle."

With respect to persons who are participants in the crime: As acknowledged in Appendix J, "There is limited support in the 50 states for including, with strict liability, that a person other than a participant was killed or suffered serious bodily injury as does the revised aggravated arson gradation." RCC App. J at 408. The Commentary provides no justification for this departure, which serves only to treat the loss of some human life as more important than others. Absent a much clearer justification, USAO urges the Commission to amend the proposed arson statute as suggested above.

With respect to including vehicles as objects of arson: § 22E-2501 currently addresses only dwellings or buildings, presumably because fires in/on structures or property "that are not dwellings do not endanger human life the same way as fires in buildings or dwellings" (Commentary at 109). However, the Commentary's rationale does not account for the idea that vehicles are intended for use by people, and thus people might be in or near vehicles even if those vehicles are not being used as dwellings. By way of example, a person who sets explosives underneath a vehicle and lies in wait until the vehicle is occupied before detonating the device would not be liable for arson under the current statute. USAO thus recommends the inclusion of vehicles in the arson statute to fully encompass the range of conduct that could put human life in danger.

2. USAO recommends that a protected person enhancement be added to this provision, consistent with the language proposed in the General Comments, above.

Under D.C. Code § 23-1331(4), arson is expressly included as a crime of violence. Of course, it can cause serious injury or death to a victim, so it is certainly a serious crime. Although it is included in the "Property Damage" chapter of the RCC, first degree arson requires the element of "death of serious bodily injury." When the victim of any arson is a protected person, that crime should be punished more severely. Thus, it is appropriate to include an enhancement for committing arson against a protected person.

B. RCC § 22E-2502. Reckless Burning.

1. USAO recommends renumbering the paragraphs of § 22E-2502.

Section 22E-2502 as currently drafted begins with paragraph (3), which appears to be a typographical error. USAO recommends renumbering the statute to begin with paragraph (1).

2. USAO recommends amending "dwelling or building" to read "dwelling, building, or vehicle" in § 22E-2502(a).

With USAO's changes, § 22E-2502(a) would read:

"(a) *Offense.* A person commits reckless burning when that person:
(1) Knowingly starts a fire or causes an explosion;
(2) With recklessness as to the fact that the fire or explosion damages or destroys a dwelling, ~~or~~ building, or vehicle."

§ 22E-2502(a) currently addresses only dwellings or buildings, presumably because fires in/on structures or property "that are not dwellings do not endanger human life the same way as fires in buildings or dwellings" (Commentary at 116). However, the Commentary's rationale does not account for the idea that vehicles are intended for use by people, and thus people might be in or near vehicles even if those vehicles are not being used as dwellings. USAO thus recommends the inclusion of vehicles in the reckless burning statute to fully encompass the range of conduct that could put human life in danger.

C. RCC § 22E-2503. Criminal Damage to Property.

1. USAO recommends decreasing the number of gradations of Criminal Damage to Property.

§ 22E-2503 currently provides for five gradations of Criminal Damage to Property, separated by dollar value of the property at issue. USAO believes that too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing. Of note, some other property provisions within the RCC include only two or three gradations (see RCC § 22E-2203 (two gradations of check fraud); RCC § 22E-2204 (three gradations of forgery)).

XVI. Chapter 26. Trespass.

A. RCC § 22E-2601. Trespass.

1. USAO recommends, in subsections (a)(2), (b)(2), and (c)(2), removing the words "under civil law."

With USAO's changes, subsections (a)(2), (b)(2), and (c)(2) would provide:

"(2) Without a privilege or license to do so ~~under civil law~~"

The requirement that a person be without a privilege or license "under civil law" is a confusing standard that could lead to inconsistent application of the law and require consultation with civil law in order to determine criminal liability under the statute. USAO believes that simply including the language "without a privilege or license to do so" is more clear and will be subject to less confusion.

The current standard under D.C. Code § 22-3302 is: "against the will of the lawful occupant or of the person lawfully in charge thereof, or being therein or thereon, without lawful authority to remain therein or thereon shall refuse to quit the same on the demand of the lawful occupant, or of the person lawfully in charge thereof." In the alternative, USAO recommends retaining the current standard or revising the proposed standard to, "against the will of the lawful occupant, or being without lawful authority to remain."

2. USAO recommends narrowing the category of offenses entitled to a jury trial to those offenses which impact an individual's constitutional rights.

§ 22E-2601(f)(1) allows a defendant to demand a jury trial for any trespass or attempted trespass, in a location "owned or occupied by a government, government agency, or government-owned corporation." § 22E-2601(f)(2) allows a defendant charged with committing any trespass or any attempted trespass by violating a District of Columbia Housing Authority barring notice to demand a jury trial. In recognizing the right of a jury trial to all trespasses in public buildings, the D.C. Court of Appeals in *United States v. Frey*, 137 A.3d 1000, 1004 (D.C. 2016) commented that the language of the current trespass statute does not impose a temporal (when the building is closed to the public) or spatial limit (private sections closed to the public of an otherwise public building). The court commented that had the D.C. Council intended such restrictions, it would have specifically listed them in the statute. While USAO recognizes the constitutional issues involved, USAO recommends imposing a temporal and spatial limit to narrow the category of offenses entitled to a jury trial in order to streamline prosecutions under this section. USAO recommends removing trespasses in private areas of public buildings or trespasses in public buildings after they are closed to the public from the category of offenses entitled to a jury trial. USAO also recommends removing trespasses in violation of a DCHA baring notice from the category of offenses entitled to a jury trial. Because an individual does not have a right to access a private area of a public building or a public building after it is closed to the public, USAO's proposed revision should not impact an individual's constitutional rights.

DCHA often issues barring notices to individuals whose conduct fails to abide by the regulations or whose conduct endangers the safety and welfare of other occupants.

XVII. Chapter 27. Burglary.

1. USAO recommends adding a "while armed" penalty enhancement, consistent with the language proposed in the General Comments, above.

Although several RCC statutes, including Assault and Robbery, contain offense gradations that account for the use of a dangerous weapon, Burglary contains no such gradation. Thus, under the RCC, a defendant is equally culpable for an armed burglary and an unarmed burglary. There should be a distinction between these two offenses, and a defendant who commits an armed burglary should be subject to a higher penalty than a defendant who commits an unarmed burglary. In addition to the increased fear or injury that a burglary victim may experience if a defendant has a gun or other weapon, a defendant creates an increased risk of danger by introducing a weapon to an offense. A firearm could either intentionally or inadvertently discharge, and a complainant could suffer additional either intentional or inadvertent injury as a result of that weapon.

Further, USAO believes that it is more clear to include this provision as an enhancement, rather than as an offense gradation. The RCC Sexual Assault statute includes this provision as an enhancement, and the Burglary statute should as well. This is more clear to a member of the public reading the elements of these offenses, and to a member of the public when used to describe the name of the charge (for example, Second Degree Burglary While Armed, instead of a potential corollary offense of First Degree Burglary).

2. USAO recommends, in subsections (a)(3), (b)(1)(A), (b)(1)(B), (c)(1)(A), and (c)(2), removing the words "under civil law."

With USAO's changes, subsections (a)(3), (b)(1)(A), (b)(1)(B), (c)(1)(A), and (c)(2) would provide:

"[W]ithout a privilege or license to do so ~~under civil law~~"

The requirement that a person be without a privilege or license "under civil law" is a confusing standard that could lead to inconsistent application of the law and require consultation with civil law in order to determine criminal liability under the statute. USAO believes that simply including the language "without a privilege or license to do so" is more clear and will be subject to less confusion.

XVIII. Chapter 34. Government Custody.

A. RCC § 22E-3401. Escape from a Correctional Facility or Officer.

1. USAO recommends clarifying that all gradations of escape will remain felony offenses.

Subsections (a) through (c) divide the offense of Escape into three gradations. USAO has no objection to differentiating between different types of Escape. Because the RCC has not yet addressed penalties, the draft statute does not specify whether third degree Escape is a felony or a misdemeanor. The comments, however, seem to imply that it could be prosecuted as a misdemeanor. USAO believes that walking away from or failing to return to a Halfway House should remain a felony offense, as it currently is. This is especially true where the underlying offense for which a defendant was sent to the Halfway House is itself a felony.

B. RCC § 22E-3402. Tampering with a Detection Device.

With all of USAO's proposed edits and additions, this statute would provide:

"RCC § 22E-3402. Tampering with a Detection Device.

(a) *Offense*. A person commits tampering with a detection device when that person:
(1) Knows he or she is required to wear a detection device while:
(A) Subject to a District of Columbia protection order;
(B) On pretrial release either:
(i) in a District of Columbia case; or
(ii) under the supervision of the Pretrial Services Agency for the District of Columbia;
(C) On presentence or predisposition release in a District of Columbia case;
(D) Committed to the Department of Youth Rehabilitation Services or incarcerated, in a District of Columbia case; or
(E) On supervised release, probation, or parole either:
(i) in a District of Columbia criminal case; or
(ii) under the supervision of the Court Services and Offender Supervision Agency for the District of Columbia; and
(2) ~~Purposely~~ Intentionally:
(A) Removes the detection device or allows an unauthorized person to do so; or
(B) Interferes with the operation of the detection device or allows an unauthorized person to do so.
(b) *Penalty*. Tampering with a detection device is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(c) *Definitions.*
(1) The terms "knows" and "~~purposely~~ intentionally" have the meaning specified in RCC § 22E-206;

(2) The terms "detection device," and "protection order" have the meanings specified in RCC § 22E-701;
(3) The phrase "interferes with the operation of the detection device" applies to any form of interference with the emission or detection of the device's signal and includes failing to charge the power for the device or allowing the device to lose the power required to operate.
(d) *Evidence of Guilt*. For purposes of adjudicating a defendant's guilt under this section, neither D.C. Code § 23-1303(d) nor any other provision of the D.C. Code shall be interpreted to preclude the admissibility of relevant evidence that is owned, possessed, or accessible by the Pretrial Services Agency for the District of Columbia.
(e) *Jurisdiction*. The offense of tampering with a detection device shall be deemed to be committed in the District of Columbia, regardless of whether the offender is physically present in the District of Columbia, if, at the time of the offense, he or she is required to wear a detection device under any of the circumstances listed in subsections (a)(1)(A)-(E) of this section."

1. USAO recommends amending subsections (a)(1)(B) and (a)(1)(E) to cover defendants in non-D.C. criminal cases who are supervised by D.C. agencies.

With USAO's changes, subsection (a)(1)(B) would apply to those "either [o]n pretrial release (i) in a District of Columbia case, or (ii) under the supervision of the Pretrial Services Agency for the District of Columbia." Subsection (a)(1)(E) would apply to those "[o]n supervised release, probation, or parole (i) in a District of Columbia criminal case, or (ii) under the supervision of the Court Services and Offender Supervision Agency for the District of Columbia."

These modifications account for the fact that D.C. residents charged with crimes in other jurisdictions may return to D.C. and be placed under the supervision of a local agency. For example, under the Interstate Compact for the Supervision of Probationers and Parolees, the Court Services and Offender Supervision Agency (CSOSA) supervises offenders "whose originating offenses and sentencing occurred in other jurisdictions." CSOSA Supervision Services Operations Manual, Ch. XIII, p. 1, available at https://www.csosa .gov/wp-content/uploads/bsk-pdf-manager/2018/08/CSS-Operations-Manual.pdf. Similarly, the Pretrial Services Agency (PSA) has informed USAO that, in some cases, it will supervise individuals with pending criminal cases in other jurisdictions. As with all individuals they supervise, CSOSA and PSA have the discretion to order these offenders to wear a detection device as a condition of release. The offenders may also be ordered to wear a detection device by the judges presiding over their non-D.C. criminal cases.

The CCRC's proposed language limits the statute's reach to those on release in "District of Columbia" cases, which means the statute would not apply to those with non-D.C. criminal cases who are supervised by CSOSA or PSA. This change would deprive the government of a means by which it can deter certain offenders from violating their terms of release. Removing this tool could jeopardize the safety of the community, since the offenders assigned to GPS

monitoring are typically those accused or convicted of serious offenses and/or at high risk of violating their release conditions.

2. USAO recommends replacing the word "purposely" with the word "intentionally" in subsections (a)(2) and (c)(1).

USAO recommends making no change to the required *mens rea* of the offense, which currently criminalizes "intentionally" tampering with a detection device. Under RCC § 22E-206(c), "[a] person acts intentionally with respect to a result when the person believes that conduct is practically certain to cause the result." USAO opposes raising the required mental state to purposefulness, which RCC § 22E-206(a) defines as the "conscious[] desire[]" that one's actions bring about a certain result. This change would deprive the government of the ability to prosecute those who act with deliberate indifference to the fact that their detection device will stop functioning. Two hypothetical examples illustrate the types of cases the statute would no longer reach under a "purpose" standard:

Example 1: The defendant knows he must charge the device immediately if it is in "low battery mode," during which the device vibrates every ten minutes, or else the device will go dead. The defendant receives a low-battery warning but plans to leave home that night and does not wish to be bothered staying home to charge the device. He is indifferent to whether the device dies, but he goes out believing it is practically certain that the battery will run dead before he has a chance to charge again. Later that evening, the device goes dead. Under the RCC, the defendant's conduct would not satisfy a standard of purposefulness, because the defendant did not "desire" the device to go dead.

Example 2: The defendant knows, from the instructions he received and the contract he signed when his GPS device was installed, that he must not submerge the device in water, such as a bathtub, hot tub, or swimming pool. The defendant is invited to join some friends in a hot tub. He knows or believes it is practically certain that his GPS device will be damaged if he submerges it in water, but he is indifferent to whether this damage actually occurs. The defendant elects to sit in the hot tub for an hour, and his device stops working. Under the RCC, the defendant's conduct would not violate the tampering statute because he had not acted with a "desire" to hinder the device's operation.

USAO believes criminal liability should attach in cases where the government can prove the defendant knew his acts or omissions would cause his device to stop working and made a conscious decision to take or not take those actions. The intentionality *mens rea* will allow the government to continue deterring supervised offenders from allowing their detection devices to fail, while at the same time ensuring that offenders are not punished for unwittingly allowing their devices to stop working.

An intentionality *mens rea* is more consistent with national trends than one of purposefulness. The commission's commentary in Appendix J notes that of the 12 reform jurisdictions with similar GPS-tampering statutes, seven specify the requisite mental state and require either "knowing or intentional conduct." But of those seven, only two, Indiana and Tennessee, require a *mens rea* that is equivalent to purposefulness as defined under the RCC.

Those statutes, moreover, are narrower in scope, in that they do not criminalize all forms of interference, such as failures to charge the device's battery. *See* Ind. Code Ann. § 35-44.1-3-4(b) (criminalizing "intentionally remov[ing]" a GPS device); Tenn. Code Ann. § 40-39-304(a) (criminalizing "[i]ntentional tampering with, removal of, or vandalism to a device"). Of the remaining five states, four use "knowledge" or "intentionality" standards that are akin to the intentionality standard USAO proposes here. *See* Ark. Code Ann. § 12-12-923(e)(1) ("knowingly"); Colo. Rev. Stat. Ann. § 17-27.5-104(1)-(2) ("knowingly"); Wash. Rev. Code Ann. § 9A.76.130 (1)(b) ("knowingly"); Wis. Stat. Ann. § 946.465 ("intentionally," defined under Wisc. Stat. Ann. § 939.23(3) as the equivalent of "knowingly"). Missouri requires intentionality but does not define the term. Thus, of the jurisdictions whose GPS-tampering statutes can fairly be compared to the District's, the majority require a mental state akin to what USAO proposes here.

3. USAO recommends defining the phrase "interferes with the operation of the detection device" in the body of the statute rather than in the commentary.

USAO agrees with OAG that the term "interfere" goes to the heart of the offense and should therefore be defined in the statute rather than in the commentary. The CCRC's draft statute no longer explicitly criminalizes failures to charge the device's power, even though many of the prosecutions that USAO brings under the statute are for failures to charge. The definition section of the statute should therefore make clear that "the phrase 'interferes with the operation of the detection device' applies to any form of interference with the emission or detection of the device's signal and includes failing to charge the power for the device or allowing the device to lose the power required to operate."

4. USAO recommends an additional provision clarifying that D.C. Code § 23-1303(d) has no impact on GPS-interference cases.

USAO recommends adding a separate subsection providing that "[f]or purposes of adjudicating a defendant's guilt under this section, neither D.C. Code § 23-1303(d) nor any other provision of the D.C. Code shall be interpreted to preclude the admissibility of relevant evidence that is owned, possessed, or accessible by the Pretrial Services Agency for the District of Columbia." This will clarify that no otherwise admissible evidence of pretrial GPS tampering should be excluded on account of § 23-1303(d), which provides that "any information contained in [PSA]'s files . . . shall not be admissible on the issue of guilt in any judicial proceeding . . .". First codified in 1966, § 23-1303(d), was meant to apply only to information collected by PSA during interviews with defendants, which were performed for the purpose of advising the court on pretrial release determinations. The statute long predates D.C. Code § 22-1211, the current GPS-tampering statute, which was first enacted in 2009 and expressly criminalizes GPS-tampering committed "while on pretrial release." *Id.* at § 22-1211(a)(1). The Council therefore clearly did not intend for § 23-1303(d) to affect the admissibility of evidence in GPS-tampering cases, which the statute should reflect.

5. USAO recommends an additional subsection providing that D.C. has jurisdiction when an offender interferes with a detection device across state lines.

USAO suggests additional language providing that "[t]he offense of tampering with a detection device shall be deemed to be committed in the District of Columbia, regardless of whether the offender is physically present in the District of Columbia, if, at the time of the offense, he or she is required to wear a detection device under any of the circumstances listed in subsections (a)(1)(A)-(E) of this section."

The Council has enacted similar jurisdictional provisions in at least two other statutes. D.C. Code § 22-3227.06 states that in specified circumstances, "[t]he offense of identity theft shall be deemed to be committed in the District of Columbia, regardless of whether the offender is physically present in the District of Columbia." D.C. Code § 22-3224.01 uses identical language with respect to credit card fraud, specifically providing for jurisdiction whenever (1) the credit card holder is a resident of D.C., (2) the person defrauded is located in D.C. at the time of the fraud, or (3) the loss occurs in D.C. *Id*.

In any case where the defendant's GPS-monitoring requirement was imposed or enforced in the District of Columbia, the D.C. Superior Court should have jurisdiction. USAO has taken the position that under the current statute, jurisdiction exists in these cases regardless of where the tampering event takes place, because another element of the crime – the imposition of the requirement that the defendant wear the device – takes place in D.C. Still, a jurisdictional provision would provide much needed clarity. Without it, individuals intent on tampering with their detection devices may be incentivized to do so across jurisdictional lines in the hopes of evading criminal liability.

C. RCC § 22E-3403. Correctional Facility Contraband.

1. USAO opposes the removal of the consecutive sentencing requirement.

Under current law, all sentences for contraband offenses must be imposed consecutively either to the sentence being served or to the sentence imposed on the matter for which the defendant was pending trial. The RCC proposal removes this requirement, claiming that it unnecessarily impinges on judicial discretion. But other statutes, such as the proposed RCC Escape statute, RCC § 22E-3401(e)(4), and the current Bail Reform Act statute, D.C. Code § 23-1327(d), require consecutive sentences. USAO believes that allowing this crime to be punished by concurrent sentences would invalidate the deterrent effect of the statute, as it only applies to individuals who are already confined to a correctional facility.

XIX. Chapter 43. Group Misconduct.

A. RCC §§ 22E-4301. Rioting.

1. USAO recommends aligning the number of persons required to trigger liability for Rioting and Failure to Disperse.

§ 22E-4301(a)(2) currently provides for criminal liability for rioting where a person is "reckless to the fact that seven or more people . . ." are engaging in specified conduct, while § 22E-4302(a)(2) provides for criminal liability for failure to disperse where a person is "reckless to the fact that eight or more people . . ." are engaging in the specified conduct. Given that the two crimes are related, USAO believes that the number of persons required to trigger liability should be the same.

2. USAO recommends reincorporating liability for inciting a riot by revising § 22E-4301(a)(1) to include language covering person who "urge or incite other persons" to engage in rioting.

With USAO's changes, subsection (a)(1) would provide

"(1) Knowingly attempts to commit or commits, or urges or incites another person to commit, a District crime . . . ."

Current law prohibits both rioting and inciting or urging to riot. D.C. Code § 22-1322. As written, the RCC no longer includes criminal liability for inciting or urging others to riot. Although the Commentary (at 29-30) suggests that inciting others to riot might be accounted for pursuant to the general accomplice liability provisions, USAO believes that specific provisions are warranted. USAO is concerned that dispensing with specifically enumerated criminal liability for inciting others to riot will create gaps in the ability of law enforcement to address situations where a person or persons are actively encouraging others toward criminal behavior.

3. USAO recommends including both misdemeanor and felony gradations of rioting.

As written, the RCC includes a single gradation for rioting and, because the penalty provision has not yet been drafted, it is unclear whether that single gradation will make rioting a felony or a misdemeanor. Regardless, USAO believes there should be both misdemeanor and felony liability for rioting. Under current law, there are misdemeanor and felony gradations for rioting, based on the level of injury and property damage caused. D.C. Code § 22-1322. Further, as acknowledged in Appendix J, half of the reform jurisdictions include gradations for rioting. *See* RCC App. J at 446. USAO believes that, consistent with those jurisdictions, gradations are appropriate.

4. USAO opposes making all rioting offenses jury demandable.

Under current law, as stated above, there are misdemeanor and felony gradations of rioting. D.C. Code § 22-1322. Under current law, misdemeanor rioting is not jury demandable. *Id.* USAO recommends that the revised statute track current law.

B. RCC § 22E-4302. Failure to Disperse.

1. USAO recommends aligning the number of persons required to trigger liability for Rioting and Failure to Disperse

§ 22E-4301(a)(2) currently provides for criminal liability for rioting where a person is "reckless to the fact that seven or more people . . ." are engaging in specified conduct, while § 22E-4302(a)(2) provides for criminal liability for failure to disperse where a person is "reckless to the fact that eight or more people . . ." are engaging in the specified conduct. Given that the two crimes are related, USAO believes that the number of persons required to trigger liability should be the same.

2. USAO opposes making all failure to disperse offenses jury demandable.

Under current law, the equivalent offense for failure to disperse is subject only to a civil fine, which is not jury demandable. D.C.M.R. § 18-2000.2, 18-2000.9. USAO recommends that the revised statute track current law with respect to jury demandability.

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: September 13, 2019

SUBJECT: First Draft of Report #37, Controlled Substance and Related Offenses and First Draft of Report #38, Enlistment of Minors & Maintaining Location to Distribute or Manufacture Controlled Substances.

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 #37, Controlled Substance and Related Offenses and First Draft of Report #38, Enlistment of Minors & Maintaining Location to Distribute or Manufacture Controlled Substances.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 48-904.01a. POSSESSION OF A CONTROLLED SUBSTANCE

Paragraph (a)(2) lists the drugs, the knowing possession of which, would constitute first degree possession of a controlled substance.[2] While the list includes many of the more popular abusive

[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] RCC § 48-904.01a (2) states:

(1) The controlled substance is, in fact:

(A) Opium, its phenanthrene alkaloids, or their derivatives, except isoquinoline alkaloids of opium;

drugs, the Commentary does not explain the rational for choosing these drugs as opposed to other equally, or more, dangerous drugs. OAG proposes that rather than the Commission picking and explaining which Schedule I or Schedule II drugs be placed on the list,[3] that the Commission rely instead on the Schedules themselves. The law has already determined which drugs have the highest potential for abuse and which may lead to the most severe psychological or physical dependence (and, therefore, also deserve to be included in the list constituting the first degree offense).

D.C. Code § 48-902.03 states:

> The Mayor shall place a substance in Schedule I if the Mayor finds that the substance:
>
> (1) Has high potential for abuse; and
>
> (2) Has no accepted medical use in treatment in the United States or in the District of Columbia or lacks accepted safety for use in treatment under medical supervision.

D.C. Code § 48-902.05 states:

> The Mayor shall place a substance in Schedule II if the Mayor finds that:
>
> (1) The substance has high potential for abuse;
>
> (2) The substance has currently accepted medical use in treatment in the United States or the District of Columbia, or currently accepted medical use, with severe restrictions; and
>
> (3) The abuse of the substance may lead to severe psychological or physical dependence.

In conclusion, OAG proposes that § 48-904.01a (2) be redrafted to say, "the controlled substance is, in fact, a Schedule I or Schedule II drug under District law."

RCC § 48-904.01b. TRAFFICKING OF A CONTROLLED SUBSTANCE

(B) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent to or identical with any of the substances referred to in subparagraph (A) of this paragraph;
(C) Opium poppy or poppy straw;
(D) Cocaine, its salts, optical and geometric isomers, or salts of isomers;
(E) Ecgonine, its derivatives, their salts, isomers, or salts of isomers;
(F) Methamphetamine, its salts, isomers, or salts of its isomers;
(G) Phenmetrazine, or its salts; or
(H) Phencyclidine or a phencyclidine immediate precursor.

[3] Many of the drugs listed in RCC § 48-904.01a (2) are, in fact, Schedule II drugs.

Paragraph (g)(6) states that "In addition to any general penalty enhancements in RCC §§ 22E-605 – 22E-608, the penalty classification for any gradation of this offense may be increased in severity by one class when, in addition to the elements of the offense gradation, one or more" of a list of enhancements are present[4]. On page 17 of the Commentary it explains that this means that only one enhancement applies. This means that a person who plans on selling drugs at a school might as well take a gun with him because there will not be any additional penalty for carrying the firearm while distributing the controlled substance. OAG does not believe, however, that the choice should be between allowing for unfettered stacking of enhancements and only permitting one enhancement (no matter how many enhancements apply). Given the dangerousness of firearms, especially when possessed while distributing drugs, OAG suggests that this offense permit an enhancement for possession of a firearm and up to one additional enhancement when one or more of the remaining enhancements are present.

Paragraph (g)(6)(C)(i) establishes an enhancement for the trafficking of controlled substances "within 100 feet of a school, college, university, public swimming pool, public playground, public youth center, public library, or children's day care center" when there is signage. As the Commentary notes on page 14, the current law covers a wider number of locations and sets the footage at 1000 feet.

OAG has two suggestions relating to the distance portion of this provision. First, while OAG assumes that the phrase "within 100 feet of a school …" means within a 100 feet of the school's property line and not the building[5], the text of the provision should be clear on this issue. To improve the clarity of this provision, OAG suggests that the provision be amended to say, "within 100 feet of the property line of a school, college, university…" Second, while OAG does not oppose reducing the current 1000 foot distance from the designated facilities, 100 feet is too short. For example, the typical school bus is between 30 and 40 feet long. So, 100 feet

[4] The enhancements listed in RCC § 48-904.01b (g)(6) are:

(A) The actor is, in fact, 21 years of age or older, and distributes a controlled substance to a person who is, in fact, under 18 years of age;

(B) The actor knowingly possesses, either on the actor's person or in a location where it is readily available, a firearm, imitation firearm, or dangerous weapon in furtherance of and while distributing, or possessing with intent to distribute, a controlled substance; or

(C) The actor commits an offense under this section when in a location that, in fact:

(i) Is within 100 feet of a school, college, university, public swimming pool, public playground, public youth center, public library, or children's day care center; and

(ii) Displays clear and conspicuous signage that indicates controlled substances are prohibited in the location or that the location is a drug free zone.

[5] To interpret the provision as meaning 100 feet from the school building would mean that the enhancement would not apply when a drug transaction was taking place in a school's basketball court or parking lot.

would be a bit longer than 2 or 3 school buses.[6] We believe that the enhancement should apply to someone trafficking in controlled substances a mere 3 school buses distance from a school. As a compromise, OAG suggests that the distance be set at a 100 yards (i.e., 300 feet). One hundred yards is the length of a football field and so is an easy distance for many people to visualize. Changing the distance in RCC § 48-904.01b (g)(6)(C)(i) to 300 feet would also make the distance consistent with the proposal to set 300 feet as the distance for which first degree carrying a dangerous weapon, under RCC § 22E-4102(a)(2)(C)(i), would apply. Using the same distance for an enhancement for trafficking in controlled substances as is used to establish first degree carrying a dangerous weapon will avoid confusion by citizens as to which distance applies.

Paragraph (h)(1) establishes a new defense. It states, "It is a defense to prosecution under this section for distribution or possession with intent to distribute that the actor distributes or possesses with intent to distribute a controlled substance but does not do so in exchange for something of value or future expectation of financial gain from distribution of a controlled substance."

While OAG generally agrees that a person should not be guilty of trafficking of a controlled substance for sharing their drugs with someone so that they can get high together, we disagree with a blanket defense that requires the government to prove – in all circumstances - that a controlled substance was ultimately exchanged for something of value or the future expectation of financial gain. Take the following example. An undercover officer sees an actor take out a bag with 400 grams (.88 lbs.) of cocaine.[7] The actor says to another person, "here's the stuff." The actor then hands over the drugs and walks away. The police then arrest the two people. Notwithstanding that 400 grams exceeds the amount of cocaine that one would possess for personal use (or even to share), because no money was exchanged or discussed, the defense would seem to apply. Rather than have a blanket defense, paragraph (h)(1) should be amended to apply to situations where the actor and the other person are about to use the drugs together or where the actor transfers to another person enough controlled substance for a single use.

RCC § 48-904.10. POSSESSION OF DRUG MANUFACTURING PARAPHERNALIA and RCC § 48-904.11. TRAFFICKING OF DRUG PARAPHERNALIA

RCC § 48-904.10 (a) states that "A person commits possession of drug manufacturing paraphernalia when that person knowingly possesses an object… [t]hat has been used to manufacture a controlled substance…" However, paragraph (b) excludes from liability an object "…[t]hat has been used to package or repackage a controlled substance for that person's own

[6] See https://www.google.com/search?q=how+long+is+a+school+bus&rlz=1C1NHXL_enUS708US708&oq=how+long+is+a+school+bus&aqs=chrome.0.0l6.5399j1j7&sourceid=chrome&ie=UTF-8.

[7] Pursuant to RCC § 48-904.01b (a)(2)(D) this amount cocaine, if proven, would make the distribution of the drug first degree trafficking of a controlled substance.

use…" It is unclear from the text and the Commentary how this provision should be applied if the paraphernalia is used both to manufacture a controlled substance and to package a controlled substance for own's own use. To clarify that objects that are used to manufacture a controlled substance are illegal despite the fact that they may also be used for personal use, OAG suggests that paragraph (b) be amended to read:

(b) *Exclusions to Liability.* Notwithstanding subsection (a), it shall not be a violation:
(1) If the object possessed is 50 years of age or older[8]; or
(2) If a person possesses an object:
(A) That has been used solely to package or repackage a controlled substance for that person's own use; or
(B) With intent to use the object solely to package or repackage a controlled substance for that person's own use.

RCC § 48-904.10 limits liability for possession of drug paraphernalia to objects related to the manufacture of a controlled substance. As the Commentary points out on page 31, "The current D.C. Code general paraphernalia statute requires a person to use or possess with intent to use 'drug paraphernalia,' a defined term, to 'plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inhale, ingest, or otherwise introduce into the human body a controlled substance[.]'" [footnotes removed] RCC § 48-904.11, however, makes it an offense to traffic in objects that a person will use "to introduce into the human body, produce, process, prepare, test, analyze, pack, store, conceal, manufacture, or measure a controlled substance." It is unclear why the RCC takes the position that it should be illegal to traffic in these items when it is not illegal to possess them.

RCC PROPOSAL TO REPEAL D.C. CODE § 48-904.03a

In the First Draft of Report #38, the Commission proposes repealing D.C. Code § 48-904.03a. That provision states:

> (a) It shall be unlawful for any person to knowingly open or maintain any place to manufacture, distribute, or store for the purpose of manufacture or distribution a narcotic or abusive drug.
>
> (b) Any person who violates this section shall be imprisoned for not less than 5 years nor more than 25 years, fined not more than the amount set forth in § 22-3571.01, or both.

The Commentary, on pages 1 and 2, explain perceived ambiguities in this provision. It argues that under one interpretation the provision is not needed because:

[8] D.C. Code § 48-1101 currently states that the phrase "drug paraphernalia" "shall not include any article that is 50 years of age or older."

> Under RCC § 22E-210, a person is guilty as an accomplice if that person acts with the culpability required by the underlying offense, and purposely assists another person with the planning or commission of the conduct constituting the offense, or purposely encourages another person to engage in specific conduct constituting the offense.[9] The revised trafficking of a controlled substance statute requires that a person knowingly distributes, manufactures, or possesses with intent to distribute or manufacture, a controlled substance. Consequently, a person who knowingly opens or maintains a place, with the *purpose* of assisting another person in distributing, manufacturing, or storing for the purposes of manufacturing or distributing a narcotic or abusive drug could be liable as an accomplice to trafficking of a controlled substance.

Instead of simply repealing D.C. Code § 48-904.03a, OAG suggests that the Commission draft a more targeted provision that only applies to the manufacture of methamphetamine. The internet is replete with news and videos of exploding methamphetamine labs and mobile labs and the injuries that they cause.[10] The community must be protected from such hazards.

As noted in a flyer produced by U.S. Department of Justice's National Drug Intelligence Center:

> The chemicals used to produce methamphetamine are extremely hazardous. Some are highly volatile and may ignite or explode if mixed or stored improperly. Fire and explosion pose risks not only to the individuals producing the drug but also to anyone in the surrounding area, including children, neighbors, and passersby. Even when fire or explosion does not occur, methamphetamine production is dangerous. Simply being exposed to the toxic chemicals used to produce the drug poses a variety of health risks, including intoxication, dizziness, nausea, disorientation, lack of coordination, pulmonary edema, serious respiratory problems, severe chemical burns, and damage to internal organs.[11]

Given the dangerousness associated with methamphetamine production, OAG suggests that the RCC contain a provision which makes it an offence for a person to knowingly use a building, vehicle, or watercraft with the intent to manufacture methamphetamine therein.

[9] The revised trafficking of a controlled substance statute specifies that the rules governing accomplice liability under RCC § 22E-210 apply to that offense.

[10] For example, see https://www.youtube.com/watch?v=U7MaaVtiGIQ, https://www.military.com/video/explosions/blast/meth-lab-explosion-almost-hits-cop/2034025445001, and https://www.complex.com/pop-culture/2011/12/the-25-scariest-meth-lab-explosion-photos/4.

[11] See https://www.justice.gov/archive/ndic/pubs7/7341/7341p.pdf.

MEMORANDUM

THE PUBLIC DEFENDER SERVICE
for the District of Columbia
CHAMPIONS OF LIBERTY

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service
Date:	September 16, 2019
Re:	Comments on First Draft of Report No. 37, Controlled Substance and Related Offenses

The Public Defender Service makes the following comments on Report #37, Controlled Substance and Related Offenses.

1) PDS recommends the full decriminalization of simple possession of controlled substances. Incarcerating individuals for the possession of controlled substances is a failed criminal justice policy and the wrong approach to a public health problem. There are many reasons why decriminalization would be the right approach for the CCRC. It is well-documented that there is discriminatory enforcement of drug possession laws against African-Americans. Much of the reasoning behind the Council's decriminalization of marijuana stemmed from the discriminatory enforcement of laws prohibiting possession of marijuana. The continued criminalization of drug possession leads to negative police encounters, burdensome supervision requirements for individuals on probation, and potentially devastating consequences for non-citizens. The resources dedicated to arresting and detaining individuals for simple possession of controlled substances would be better employed through a public health approach that provides treatment for addiction and encourages safe drug use practices.

In the absence of full decriminalization of simple possession, PDS makes additional recommendations related to possession of controlled substances.

2) In appendix A, the CCRC provides a mark-up of D.C. Code § 48-904.01. Beyond re-numbering, the RCC does not address D.C. Code § 48-904.01(e)(1). PDS recommends that the RCC expand D.C. Code § 48-904.01(e)(1) to allow on more than a single occasion for judges to sentence individuals to probation and dismiss the proceedings after the successful completion of probation. Recovery from drug addiction is often a long process that includes periods of relapse and abuse. Individuals who successfully complete probation under D.C. Code § 48-904.01(e)(1) may briefly relapse and may be subject to arrest, particularly if they use drugs outside in streets or alleys. Given the negative impact of a criminal conviction and our collective understanding

that individuals may relapse over a period of time, judges should have the ability to use their discretion to discharge drug possession convictions on more than one occasion pursuant to D.C. Code § 48-904.01(e)(1).

3) PDS recommends that the RCC adopt within Title 48, the provisions of D.C. Code § 7-403 that stem from the "Good Samaritan Overdose Prevention Act of 2012." D.C. Code § 7-403 provides immunity from prosecution for some drug offenses under circumstances where an individual seeks assistance for himself or other individuals in the event of a suspected drug overdose. This law encourages life-saving action for individuals suffering from a drug overdose. Including this provision within the substantive drug offenses would increase knowledge of that provision and could improve public health.

4) The RCC drug provisions grade offenses with regard to weight. RCC drug offenses do not include any requirement with respect to drug purity. Rather liability attaches when the individual possesses or traffics a measurable amount of the controlled substance. PDS has concerns about how the use of weight would disproportionately impact the possession or trafficking of controlled substances that are contained within edible substances. For instance, an individual selling an opium tea may sell eight ounces of liquid tea mixed with a measureable amount of opium. The eight ounces of tea would be roughly equal to "200 grams of any compound or mixture containing opium."[1] The sale of eight ounces of opium tea, regardless of its low purity level and its intended use by a single individual, would qualify as first degree trafficking of a controlled substance. This will typically be the case whenever controlled substances are baked into brownies, cakes, or otherwise mixed with a large quantity of inert substances.

   PDS recommends that the RCC address the disproportionate criminalization of all edibles by creating a different rule for measuring controlled substances that are mixed with edibles and that are intended to be eaten. PDS recommends the following language:

   <u>For controlled substances that are contained within edible products and that are intended to be consumed as food, candy, or beverages, the total weight of the controlled substance shall be determined by calculating the concentration of the controlled substance contained within the mixture and then calculating the total amount of controlled substance that is present. The weight of the inert edible mixture will not be added to determine the total weight of the controlled substance.</u>[2]

[1] RCC § 48-904.01b(a)(2)(A).

[2] PDS spoke with Dr. Ian A. Blair, the A.N. Richards Professor of Systems Pharmacology and Translational Therapeutics at the University of Pennsylvania, about the complexity of testing edible items such as teas and cakes for the presence of controlled substances and about any difficulty in calculating a total weight for the controlled substance. Dr. Blair advised that testing for the level of concentration of a controlled substance in an edible items was possible; indeed, such testing would be easier than testing for controlled substances in tissues, serum, or blood, which are routine functions of toxicology labs. Dr. Blair further advised that calculating the total amount of the controlled substance when it is mixed with a large amount of tea, cake, or other

5) PDS supports the proposal discussed at the September 4, 2019 Public Meeting of the Commission that the weight for purposes of liability should exclude non-consumables, such as the containers used to transport the substance or the by-products of consuming the substance.

6) RCC § 48-904.10, possession of drug manufacturing paraphernalia prohibits the knowing possession of an object that "has been used to manufacture a controlled substance" or "with the intent to use the object to manufacture a controlled substance." PDS recommends eliminating liability in the first instance, when an individual knowingly possesses an object that has been used to manufacture a controlled substance. Many common items such as bowls, spoons, and pans are used to manufacture controlled substances. Individuals sharing homes with people who manufacture drugs may use the same bowls and pots for cooking and eating. In that sense, RCC §48-904.10 is too broad and will criminalize the possession of household items by individuals who did not use the items to manufacture controlled substances and who have no intent to use the items to manufacture controlled substances.

7) PDS has two concerns about RCC § 48-904.11, Trafficking of drug paraphernalia.

   First, while the exceptions for testing kits and needles delivered by community organizations tracks the current law, PDS believes the exception should go farther. The RCC should allow community-based harm reduction organizations the flexibility to distribute clean and safe drug use supplies to individuals who smoke drugs as well as to those who inject drugs. Sharing pipes and smoking with unsafe objects can cause cuts, burns, and the transmission of infectious diseases including hepatitis C.[3] The use of brillo pads rather than appropriately-sized screens can lead to brillo pads being inhaled by the user.

   Second, the RCC should allow the transfer or delivery of clean supplies from one user to another user. For example, if an individual cannot arrive at the needle exchange van during its hours of operation, a friend should be able to collect the supplies and transfer them. For public health reasons, including that the District has the nation's highest rate of HIV diagnosis[4], the acquisition and transfer of safe supplies should be encouraged.

   PDS recommends that the RCC use the following language:

   (a) *Exclusions to Liability.* Notwithstanding subsection (a), it shall not be a violation of this section:

inert substance would involve multiplying the concentration of the controlled substance in the tea, cake, or other inert substance (example microgram/gram) by the total weight of the tea, cake, or other inert substance (example microgram/gram x total weight in grams).

[3] See, Crack Pipe Sharing Among Street-Involved Youth in a Canadian Setting, Tessa Cheng, Evan Wood, Paul Nguyen, Julio Montaner, Thomas Kerr, and Kora DeBeck, (2015). Available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4305503/

[4] See: https://www.cdc.gov/hiv/statistics/overview/geographicdistribution.html.

(1) For a community-based organization to sell or deliver, or possess with intent to sell or deliver, testing equipment or other objects used, intended for use, or designed for use in identifying or analyzing the strength, effectiveness, or purity of a controlled substance; or
(2) For a community-based organization to sell or deliver, or possess with intent to sell or deliver supplies such as pipes and screens for the safer ingestion of controlled substances by inhalation; or
(3) For person authorized by subsection (b) of 48-1103.01 to deliver any hypodermic syringe or needle distributed as part of the Needle Exchange Program authorized under D.C. Code § 48-1103.01; or
(4) For an individual who received materials described in (a)(1)-(3) to transfer or deliver those materials to another individual; or
(5) For a person to sell or deliver or possess with intent to sell or deliver an object that is 50 years of age or older.

8) The RCC creates a penalty enhancement when, "the actor is, in fact, 21 years of age or older, and distributes a controlled substance to a person who is, in fact, under 18 years of age." This enhancement fails to include a mens rea element and thus would create an enhanced penalty even where the defendant reasonably believed that the individual to whom he or she sold controlled substances was over the age of 18. Imposing additional penalties without a scienter requirement diminishes the proportionality of punishment. For instance, two individuals who sold cocaine to two different people inside of an age 21 and up night club would be punished differently if one individual, who looked just as old as the other individual entered the club by using fake identification. Without further differences between the two defendants, one should not be subject to additional punishment under essentially the same facts. Rather, PDS recommends that the RCC include that the defendant was reckless as to the age of the individual to whom the defendant distributed the controlled substance.

   Further, PDS recommends adding language to the commentary to specify that the penalty enhancement should not apply in instances when a defendant distributes a controlled substance to one individual and that individual transfers the controlled substance to another individual who is under age 18. Unless the government proves that the defendant knew that the controlled substance would be transferred to a minor, the enhancement should not apply.

9) RCC § 48-904.01b and related provisions create a penalty enhancement under (g)(6)(C) when the actor commits an offense and is within "100 feet of a school, college, university, public swimming pool, public playground, public youth center, public library, or children's day care center." PDS recommends amending "public youth center" to read "public recreation center." The term "youth center" does not have a specific meaning within the District while recreation centers are well known and easily identifiable with signs that state "recreation center."

10) PDS recommends rewriting for clarity the language for one of the defenses to Trafficking of a Controlled Substance to read as follows:

It is a defense to prosecution under this section for distribution or possession with intent to distribute that the actor distributes or possesses with intent to distribute a controlled substance but does not do so in exchange for something of value or ~~future~~ expectation of future financial gain from distribution of a controlled substance.

Memorandum

Jessie K. Liu
United States Attorney
District of Columbia

Subject: Comments to D.C. Criminal Code Reform Commission for First Draft of Reports #37 and #38	Date: September 16, 2019

To: Richard Schmechel, Executive Director, D.C. Criminal Code Reform Commission

From: U.S. Attorney's Office for the District of Columbia

The U.S. Attorney's Office for the District of Columbia (USAO) and other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the CCRC's First Draft of Reports #37 and #38. USAO reviewed this document and makes the recommendations noted below.[1]

Comments on Draft Reports #37 and #38

I. General Comment.

1. USAO recommends adding the words "a compound or mixture containing [a controlled substance]" to every gradation of controlled substance offenses.

This language already exists in RCC § 48-904.01b(a)(2) and (b)(2), and in RCC § 48-904.01c(a)(2) and (b)(2). USAO recommends its additional inclusion in RCC § 48-904.01a(a)(2) and (b); RCC § 48-904.01b(c)(2), (d), and (e); and RCC § 48-904.01c(c)(2), (d), and (e).

The draft RCC language lists each drug by name, instead of incorporating the schedules. Current law incorporates the drug schedules, which are set forth at D.C. Code § 48-902.03 *et seq.* Under these schedules, many substances require "any material, compound, mixture, or preparation which contains any quantity of" the enumerated substance. Of the drugs specifically listed in the RCC, this language exists under current law for: cocaine, D.C. Code § 48-902.06(1)(D); ecgonine, D.C. Code § 48-902.06(1)(D); methamphetamine, D.C. Code § 48-902.06(3)(B); phenmetrazine, D.C. Code § 48-902.06(3)(C); and phencyclidine and its immediate precursors, D.C. Code § 48-902.06(4)(E)–(F). This language does not exist for opium, D.C. Code § 48-902.06(1)(A), or for opium poppy and poppy straw, D.C. Code § 48-902.06(1)(C).

[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.

Requiring proof of the controlled substance, instead of requiring proof of *a compound or mixture containing* the controlled substance, would require purity testing. Purity testing is not required under current law, and it would create an additional, unnecessary burden to conduct purity testing in each case.

USAO recommends, to eliminate the need for unnecessary purity testing, including this language in each gradation relating to controlled substances.

II. RCC § 48-904.01a. Possession of a Controlled Substance.

1. USAO opposes eliminating a felony offense for possession of liquid PCP.

Under current law, possession of liquid PCP is a felony offense, punishable by not more than 3 years' imprisonment and a corresponding fine. D.C. Code § 48-904.01(d)(1). USAO believes that the CCRC's recommendations regarding liquid PCP should track current law.

The law creating this felony offense, the Liquid PCP Possession Amendment Act of 2009 (L18-0196), is a relatively new law that went into effect in 2010. The Committee Report to that law notes that "PCP use has decreased nationally since the 1970s; however, there are remaining pockets of abuse including in the District of Columbia." Committee on Public Safety and the Judiciary Report on Bill 18-0566 ("Committee Report") at 2. The Committee Report cites to the Metropolitan Police Department ("MPD")'s assessment of the "rebound in the use of PCP," and cites to data from MPD as "further evidence that PCP associates with a higher incidence of criminal (and violent) behavior than is the case with other drugs." Committee Report at 2. Although the Commentary notes that eliminating the separate penalty for liquid PCP is supported by national legal trends (Commentary at 5), as the Committee Report indicates, D.C. has a unique PCP problem. Therefore, other jurisdictions may not need to address this PCP problem, which creates public safety issues, in the same way that D.C. does. Further, as the CCRC cites (Commentary at 3 n.7), the purpose of this bill was not to punish users. This is consistent with the Committee Report's finding "[p]ossession of liquid PCP is rarely consistent with personal use." Committee Report at 5. Because of the unique PCP problems in the District, and because possession of liquid PCP is consistent with distribution of PCP, USAO opposes the CCRC's recommendation to eliminate a felony offense for possession of liquid PCP.

2. USAO recommends creating only one gradation of possession of a controlled substance, which would apply to any controlled substance.

USAO believes that creating multiple gradations for possession of a controlled substance is unnecessary and overly complicates simple possession. The CCRC notes that, of the 29 reformed jurisdictions, a slight minority creates gradations for possession (Commentary at 5). USAO recommends that the CCRC follow the majority of jurisdictions and create only one gradation of possession.

3. USAO recommends, in subsection (e), changing the words "RCC § 48-901.02" to "D.C. Code § 48.901.02."

   With USAO's changes, this subsection would provide:

   ". . . have the meanings specified in D.C. Code ~~RCC~~ § 48-901.02."

This change is not intended to be substantive. Given that there is no draft RCC § 48-901.02, USAO assumes that the CCRC intended to list the relevant D.C. Code provision.

III. RCC § 48-904.01b. Trafficking of a Controlled Substance.

1. USAO opposes creating an enhancement for possessing a firearm while committing the offense of trafficking of a controlled substances, instead of a stand-alone offense for the same.

Under current law, as part of the offense of Possession of a Firearm During Commission of Crime of Violence, an actor is prohibited from possessing a firearm "while committing a crime of violence or dangerous crime as defined in § 22-4501." D.C. Code § 22-4504(b). A "dangerous crime" is defined as "distribution of or possession with intent to distribute a controlled substance." D.C. Code § 22-4501(2). Under the RCC, however, the offense of Possession of a Dangerous Weapon During a Crime only applies to an offense against persons or burglary. RCC § 22E-4104. It would not apply to distribution or possession with intent to distribute a controlled substance.

USAO opposes this change in the law, which creates an enhancement for possession of a firearm while distributing or possessing with intent to distribute a controlled substance, instead of a stand-alone offense for this conduct. This change in law is inconsistent with both current D.C. law and comparable federal law to which the CCRC cites. 18 U.S.C. § 924(c)(1)(A) creates an enhanced punishment for possession of a firearm *either* during a crime of violence *or* during a drug trafficking crime. USAO recommends that the CCRC track both current law and comparable federal law in this respect.

2. To the extent that RCC § 48-904.01b(g)(6)(B) remains, USAO recommends removing the words "in furtherance of and."

   With USAO's changes, RCC § 48-904.01b(g)(6)(B) would provide:

   "The actor knowingly possesses, either on the actor's person or in a location where it is readily available, a firearm, imitation firearm, or dangerous weapon ~~in furtherance of and~~ while distributing, or possessing with intent to distribute, a controlled substance;"

The requirement that a firearm, imitation firearm, or dangerous weapon be used "in furtherance of and while" distributing or possessing with intent to distribute a controlled substance is a change from current law, which requires only that a person possess a firearm "while" distributing or possessing with intent to distribute a controlled substance. This change is

not warranted. A defendant creates an increased risk of danger by introducing a weapon to an offense. Even if a defendant does not use or display the firearm or other dangerous weapon, there is an additional level of risk created when a defendant has a weapon readily available. A firearm could inadvertently discharge, and another person could suffer injury as a result of that weapon. Of course, the presence of a firearm also increases the chances of the intentional use of the weapon at some point during the offense, and subsequent resultant injury. This is true even when the weapon is not used "in furtherance" of the underlying offense.

Further, the Commentary states that this language was taken from 18 U.S.C. § 924 (Commentary at 11). 18 U.S.C. § 924(c)(1)(A), however, provides for an increased punishment if the person "uses or carries a firearm, *or* who, in furtherance of any such crime, possesses a firearm" (emphasis added). The federal statute does not require that the firearm always be used in furtherance of a crime, but permits the firearm to be merely carried during an offense. Moreover, there is an enhancement in the federal statute for brandishing a firearm. 18 U.S.C. § 924(c)(1)(A)(ii). Presumably, for a firearm to be used "in furtherance" of a crime, it must, at a minimum, be brandished. Because the federal statute creates a penalty provision for cases in which the firearm was not brandished, *see* 18 U.S.C. § 924(c)(1)(A)(i), this statute is intended to punish both those who use the firearm in furtherance of a crime and those who possess the firearm, but do not necessarily use it in furtherance of a crime. Thus, the CCRC's reading of § 924(c)(1)(A) is too narrow, and does not include all of the permissible options under the statute.

Finally, the Commentary notes that "if a person sells a controlled substance while armed with a firearm, with intent to use the firearm if someone attempts to take the controlled substances from him without payment, the penalty enhancement would apply even if the person never actually uses or displays the firearm" (Commentary at 11 n.28). In most circumstances, however, it would be difficult, if not impossible, to prove this intent beyond a reasonable doubt, unless the actor actually uses the firearm. Rather, the fact that an actor possesses a firearm while trafficking a controlled substance should lead to an inference that the actor may use the firearm at some point. This inference should be codified in the statute, and require only that a person possess the firearm while committing the offense.

3. <u>USAO recommends removing the defense in RCC § 48-901.01b(h)(1) that creates a defense for distribution or possession with intent to distribute where an actor does not do so in exchange for something of value or future expectation of financial gain.</u>

As the CCRC acknowledges, creating this defense represents a change from current law. This defense is problematic for prosecution. If a person possesses drugs with intent to distribute them, but there is no proof of distribution, it will often be impossible for the government to overcome this defense. For example, despite possessing a large quantity of drugs that a drug expert would opine is more consistent with intent to distribute than person use, a defendant could claim that he had no intention to distribute them in exchange for value. He could claim, instead, that he possessed such a large quantity for the purpose of distributing them with friends. It will be difficult for the government to overcome this claim beyond a reasonable doubt, even where it is not true. Thus, although the CCRC's intent in creating this defense was to create a limited defense for those who provide small gifts to others (Commentary at 13), in reality, it would allow

traffickers to rely on this defense to justify their possession of quantities that are not intended for mere small gifts. USAO accordingly believes that this defense is inappropriate. Notably, the CCRC acknowledges that this defense is not supported by national legal trends, and that only one of the 29 reformed code jurisdictions has adopted this defense (Commentary at 19). The CCRC should stay in line with current law and the overwhelming majority of other jurisdictions and remove this defense.

IV. RCC § 48-904.01c. Trafficking of a Counterfeit Substance.

1. USAO reiterates the same objections here that it set out above for RCC § 48-904.01b.

V. RCC § 48-904.10. Possession of Drug Manufacturing Paraphernalia.

1. USAO opposes decriminalization of drug paraphernalia.

The RCC is essentially decriminalizing the offense of possession of drug paraphernalia (Commentary at 32 n.111). The RCC provides little support for this significant change, stating that "[t]his change improves the clarity and proportionality of the revised criminal code" (Commentary at 32).

Although there is no definition of "manufacturing" in the RCC, USAO assumes that the RCC term "manufacturing" relies on the definition at D.C. Code § 48-901.02(13). As the Commentary alludes to (Commentary at 32& n.115), this manufacturing definition likely would not include objects routinely used to distribute drugs, such as scales, zips, and other objects, because those objects were not necessarily "designed to" manufacture drugs. Thus, in addition to decriminalizing drug paraphernalia intended for personal use, the RCC has proposed decriminalizing drug paraphernalia intended for distribution as well.

The RCC notes that this change is not supported by national legal trends, stating that of the 29 reformed jurisdictions, none limit the scope of their statutes in a matter similar to the RCC's proposal, and that only two states have decriminalized drug paraphernalia in some way (Commentary at 34).

VI. Recommended Repeal of D.C. Code § 48-904.07. Enlistment of Minors.

1. USAO recommends incorporating the substance of D.C. Code § 48-904.07 into the enhancement set forth in RCC § 48.904.01b(g)(6)(A).

As proposed, RCC § 48-904.01b(g)(6)(A) provides an enhancement for trafficking of a controlled substance where: "The actor is, in fact, 21 years of age or older, and distributes a controlled substance to a person who is, in fact, under 18 years of age." USAO suggests supplementing this enhancement to also include an enhancement for an actor who "enlists, hires, contracts, or encourages any person under 18 years of age to sell or distribute any controlled substance for the profit or benefit of" the actor. Thus, to the extent that the conduct prohibited by D.C. Code § 48-904.07 is prosecuted under an accomplice liability theory, as contemplated by the Commentary in Report # 38 (at 3–4), there would be an enhanced penalty available for

enlisting a minor to distribute a controlled substance. This enhancement is consistent with the rationale for an enhancement for distributing a controlled substance to a minor, as it would deter adults from involving minors in the use and distribution of controlled substances.

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: September 27, 2019

SUBJECT: First Draft of Report #39, Weapon Offenses and Related Provisions.

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 #39, Weapon Offenses and Related Provisions.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 7-2502.01. POSSESSION OF AN UNREGISTERED FIREARM, DESTRUCTIVE DEVICE, OR AMMUNITION

The offense of Possession of an Unregistered Firearm, Destructive Device, or Ammunition is broken down into two degrees.[2] The first degree offense applies to possession of an unregistered

[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] RCC § 7-2502.0l (a) and (b) divides the two degrees as follows:

(a) First Degree. A person commits first degree possession of an unregistered firearm, destructive device, or ammunition when that person knowingly possesses:
(1) A firearm without, in fact, being the holder of a registration certificate issued under D.C. Code § 7-2502.07 for that firearm; or
(2) A destructive device.

(b) Second Degree. A person commits second degree possession of an unregistered firearm, destructive device, or ammunition when that person knowingly possesses:
(1) Ammunition without, in fact, being the holder of a registration certificate

firearm and destructive device and the second degree offense applies to both the possession of ammunition by someone who is does not have a firearm registration certificate (UA) and for restricted pistol bullets. Under current law the penalty for a UA (and one restricted pistol bullet[3]) is a fine of not more than $1,000 or imprisonment for not more than 1 year, or both. Current law also criminalizes transferring firearms to children. Recognizing the dangerousness associated with a person possessing multiple restricted pistol bullets this offense currently possesses a much higher penalty. A person convicted of knowingly possessing restricted pistol bullets in violation of § 7-2506.01(3) may be sentenced "to imprisonment for a term not to exceed 10 years and shall be sentenced to imprisonment for a mandatory-minimum term of not less than 1 year and shall not be released from prison or granted probation or suspension of sentence prior to serving the mandatory-minimum sentence, and, in addition, may be fined an amount not to exceed $10,000."

There is no reason why a 10 year offense should be reduced to a second degree offense when the first degree offense currently only carries a maximum penalty of one year in prison. OAG, therefore, recommends that the offense of Possession of an Unregistered Firearm, Destructive Device, or Ammunition be broken down into three degrees. The first degree being possession of restricted pistol bullets.[4] The second degree being possessing a firearm without, in fact, being the holder of a registration certificate, and the third degree being possessing ammunition without, in fact, being the holder of a registration certificate.

RCC § 7-2502.01 (c) lists exclusions from liability under possession of an unregistered firearm, destructive device, or ammunition. Subparagraph (c)(5) states "A person shall not be subject to prosecution under this section for possession of an unregistered firearm, destructive device, or ammunition when voluntarily surrendering the object." Although the commentary, on page 9, notes that "[t]he person must comply with the requirements of a District or federal voluntary surrender statute or rule", this limitation is not included in an otherwise non-ambiguous provision. In order to improve the clarity of this provision and to avoid needless litigation, OAG recommends that this limitation be added to the provision. Subparagraph (c)(5) should be redrafted to say, "A person shall not be subject to prosecution under this section for possession of an unregistered firearm, destructive device, or ammunition when voluntarily surrendering the object pursuant to District or federal law."

issued under D.C. Code§ 7-2502.07 for a firearm of the same caliber; or
(2) One or more restricted pistol bullets.

[3] A restricted pistol bullet is any bullet designed for use in a pistol that, when fired from a pistol with a barrel of 5 inches or less in length, is capable of penetrating commercially available body armor with a penetration resistance equal to or greater than that of 18 layers of Kevlar. See D.C. Code§ 7-2501.01(13a).

[4] The First Degree offense could read "A person commits first degree Possession of an Unregistered Firearm, Destructive Device, or Ammunition when that person:
(1) Commits third degree Possession of an Unregistered Firearm, Destructive Device, or Ammunition; and
(2) the ammunition is, in fact, a restricted pistol bullet.

RCC § 7-2502.0l (e) creates a jury right for a defendant charged with a violation of this section or an inchoate violation of this section. OAG is withholding any objections to this provision until after the penalty provisions, which will be established under paragraph (f), are determined. We do note, however, that on page 11 of the commentary the Report notes that under current District law, first offense attempted unregistered firearm and unlawful possession of ammunition are not jury demandable. Notwithstanding that the commentary goes on to say, "In contrast, the RCC's provision of a right to a jury for attempted is consistent with the District having recognized a heightened need to provide jury trials to defendants accused of crimes that may involve the exercise of civil liberties. Firearms are bearable arms protected by the Second Amendment to the United States Constitution. This change improves the consistency and proportionality of the revised code" [footnotes omitted]. OAG notes that giving a jury trial right when it is not constitutionally required does not improve the consistency and proportionality of the revised code. Rather, depending on the penalty which is established, this paragraph would give a jury right when a person is charged with the attempt version of this offense and would not give a jury right to a person who is charged with a different offense that has the same incarceration exposure.

RCC § 7-2502.15. POSSESSION OF A STUN GUN.

RCC § 7-2502.15(a)(2) makes it a crime to knowingly possess a stun gun:

> In a location that:
>
> (A) Is a building, or part thereof, occupied by the District of Columbia;
> (B) Is a building, or part thereof, occupied by a preschool, a primary or secondary school, public youth center, or a children's day care center; or ...

While OAG believes that it is clear from the text of this provision that an offense takes place when a person brings a stun gun into any portion of a building when a part of the building is occupied by the District, a preschool, a primary or secondary school, public youth center, or a children's day care center, we suggest that the commentary provide examples which demonstrate the provision's scope. We want to avoid questions about how large or distinctive the part of the building must be. The commentary should give an example like the following, "A person commits this offense when the person knowingly takes a stun gun into the restaurant portion of a building that is located on the first floor of a building that has a charter school that is located on the rest of the first floor, as well as on the second and third floors."

In addition, because the effects of a stun gun may be more enhanced when used on a child,[5] RCC § 7-2502.15(a)(2)(B) should be amended to ensure that stun guns are not brought near places that children frequent. People should not be permitted to bring stun guns onto school

[5] According to a TASER pamphlet, “Cardiac capture may be more likely in children and thin adults because the heart is usually closer to the CEW-delivered discharge (the dart-to-heart distance).” See https://prismic-io.s3.amazonaws.com/tasr%2Fa8e6e721-590b-459b-a741-cd0e6401c340_law-enforcement-warnings.pdf.

yards or the areas around youth and day care centers. These facilities use the grounds around their buildings as extensions of those facilities so that children can get outdoor play and exercise. Therefore, OAG proposes that rather than only making it an offence to bring a stun gun into a building or part thereof, where a school, youth center, or daycare center is located, that stun guns should not be permitted closer than the property line of such locations.[6]

RCC § 7-2507.02. UNLAWFUL STORAGE OF A FIREARM

RCC § 7-2507.02 (a) states:

(a) An actor commits unlawful storage of a firearm when that actor:
  (1) Knowingly possesses a firearm registered under D.C. Code§ 7-2502.07:
    (A) On premises under the actor's control; and
    (B) In a location that is neither:
      (i) A securely locked container or another location that a reasonable person would believe to be secure; nor
      (ii) Conveniently accessible and within reach of the actor; and
  (2) Is negligent as to the fact that:
    (A) A person under 18 years of age is able to access the firearm without the permission of the person's parent or guardian; or
    (B) A person prohibited from possessing a firearm under District law is able to access the firearm.

The offense makes it clear that firearms should not be stored in such a way that access can be obtained by children and other persons who are prohibited from possessing them. The reason behind this offense is clear — public safety. Given that the harm that society is trying to avoid is the danger that may happen when these people have access to firearms, it is unclear why the offense should be limited to people who legally possess a registered firearm. For example, it is just as dangerous for an 8 year old to gain access to a registered firearm as to an unregistered one. Similarly, it is just as dangerous for a person who is the subject of an Extreme Risk Protection Order to gain access to a registered firearm as an unregistered one. In both situations the potential for harm to the person and to others is the same. Therefore, OAG recommends that the language in RCC § 7-2507.02 (a)(l)(A) pertaining to the registration of a firearm be stricken so that that subparagraph (A) states, "Knowingly possesses a firearm."

As stated in the RCC provision quoted above, paragraph (a)(l)(A) limits this offense to premises that are under the actor's control. It is unclear why the proposal contains such a broad limitation. While OAG does not oppose putting reasonable limitations on the locations for which the offense of unlawful storage of a firearm applies, we do believe that a person should not be able to purposely store a firearm at another location knowing that

[6] Because OAG recognizes that stun guns are not as lethal as firearms and other destructive devices, we are not recommending that stun guns be banned 300 feet from these facilities as would be required for a firearm under RCC § 22E-4102 (a)(2)(C)(i)."

persons who are prohibited from possessing the firearm may gain access. It is just as dangerous - if not more so - for a person to leave a firearm in a brown paper bag in his girlfriend's closet, knowing that she has children who live with her, as it is to leave the same firearm in the person's own closet, knowing that he has children who live with him. OAG proposes that rather than put a blanket requirement that the offense only apply to premises under the actor's control, that the Commission, instead, list the specific locations that are exempted.

RCC § 22E-4101. POSSESSION OF A PROHIBITED WEAPON OR ACCESSORY

RCC § 22E-4101(e)(1) states, "(1) A person shall not be subject to prosecution under this section for possession of prohibited weapon or accessory when voluntarily surrendering the object." While the commentary, on page 58, clarifies that "The person must comply with the requirements of a District or federal voluntary surrender statute or rule", that limitation is not in the text of an otherwise unambiguous provision. To avoid the needless litigation, OAG recommends that the text of the provision be amended to include the limitation stated in the commentary. We, therefore, propose that RCC *§* 22E- 4101(e) (1) be redrafted to say, "A person shall not be subject to prosecution under this section for possession of prohibited weapon or accessory when voluntarily surrendering the object in compliance with the requirements of a District or federal law."

RCC § 22E-4102. CARRYING A DANGEROUS WEAPON

RCC § 22E-4102 (a)(2)(C)(i) requires that the dangerous weapon be carried "Within 300 feet of a school, college, university, public swimming pool, public playground, public youth center, public library, or children's day care center." In the commentary, on page 66, it states, "The 300-foot distance is calculated from the property line, not from the edge of a building." To avoid litigation concerning the meaning of the provision, OAG suggests that the provision, itself, reference the property line. This provision should read, "Within 300 feet of the property line of a school, college, university, public swimming pool, public playground, public youth center, public library, or children's day care center."[7]

Subparagraph (d)(l) has the same exclusions from liability as RCC § 22E-4101(e)(l) and for the same reasons we propose that paragraph (d)(l) be redrafted to say, "A person shall not be subject to prosecution under this section for possession of prohibited weapon or accessory when voluntarily surrendering the object in compliance with the requirements of a District

[7] In OAG's Memorandum concerning the First Draft of Report #37, Controlled Substance and Related Offenses, we suggested that the proposed enhancement for trafficking of a controlled substance be changed to from 100 feet to 300 feet from specified locations to make the distance in that provision consistent with the provision in RCC § 22E-4102 (a)(2)(i), above. We believe that using the same distance for an enhancement for trafficking in controlled substances as is used to establish first degree carrying a dangerous weapon will avoid confusion by citizens as to which distance applies.

or federal law."[8]

RCC § 22E-4105. POSSESSION OF A FIREARM BY AN UNAUTHORIZED PERSON

An element of the second degree version of this offense, found in subparagraph (b)(2)(A)(i), is that the person has a prior conviction for what is, in fact, "[a) District offense that is currently punishable by imprisonment for a term exceeding 1 year, or a comparable offense in another jurisdiction, within the last 10 years." [emphasis added] OAG proposes that the commentary provide an example that demonstrates how to interpret the word "currently." For example, a person is convicted of a comparable offense in Maryland. At the time that the person was convicted the offense carried a penalty that exceeded 1 year in both jurisdictions. However, prior to the time that the person committed the offense for which they are being charged, the penalty for that offense in the District had been reduced to a 6 month offense. In this example, the prior conviction would not count. In addition, For clarity, OAG suggests that the commentary state that "a comparable offense in another jurisdiction", includes a conviction for a federal offense, as well as an offense that occurred in another state.

Subparagraph (b)(2)(C) states:

> Is, in fact, subject to a 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;
> (ii) Restrains the person from assaulting, harassing, stalking, or threatening the petitioner or any other person named in the order, and:
> (I) Was issued after a hearing of which the person received actual notice, and at which the person had an opportunity to participate; or
> (II) Remained in effect after the person failed to appear for a hearing of which the person received actual notice.

In the commentary it states, "Subparagraph (b)(2)(C) criminalizes gun ownership by any person who has been ordered to not possess a firearm. Subparagraph (b)(2)(C) uses the term "in fact" to specify that there is no culpable mental state required as to whether the person is subject to an order to not possess any firearms. A person is strictly liable as to the order being of the variety described in sub-subparagraphs (b)(2)(C)(i) or (b)(2)(C)(ii).” [internal footnotes omitted] However, RCC § 22E-207 (a) states "Any culpable mental state specified in an offense applies to all subsequent result elements and circumstance elements until another culpable mental state is specified, with the exception of any result element or circumstance element for which the person is strictly liable under RCC § 22E- 207(b). OAG is concerned that when applying RCC § 22E-207(b) to RCC § 22E- 4105(b)(2)(C) a court will only apply the "in fact" mental state to the existence of a court order, and not to the type of order that is separately listed. To resolve this issue , the Commission can either modify the language in RCC § 22E-207 (a) to accommodate this situation or amend subparagraph

[8] This comment applies equally to the exclusion from liability found in RCC § 22E-4I05(c), pertaining to possession of a firearm by an unauthorized person.

(b)(2)(C). One way that the Commission could amend this provision is to state:

> Is, in fact, subject to a court order that:
> (i) In fact, 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) In fact, restrains the person from assaulting, harassing, stalking, or threatening the petitioner or any other person named in the order, and:
> (I) Was, in fact, issued after a hearing of which the person received actual notice, and at which the person had an opportunity to participate; or
> (II) In fact, remained in effect after the person failed to appear for a hearing of which the person received actual notice.

RCC § 22E-4106. NEGLIGENT DISCHARGE OF FIREARM

RCC § 22E-4106 makes it an offense to negligently discharge a firearm unless certain conditions are met. As the commentary notes, on page 103, this provision does not apply to air rifles or torpedoes. The commentary then states "Discharging an air rifle outside a building is punished as carrying an air or spring gun. Releasing a torpedo-or any other restricted explosive-is punished as possession of a prohibited weapon or accessory." [internal footnotes omitted]. The reason that it is an offense to negligently discharge a firearm is because of the damage that can occur from the projectile hitting someone or something. People who carry firearms, whether legally or not, must be careful not to negligently discharge their weapons. An air rifle is "a rifle whose projectile (such as a bb or pellet) is propelled by compressed air or carbon dioxide."[9] Pellets and BBs can cause injuries to persons or property either by direct hits or from the ammunition bouncing off of other surfaces. According to the BMJ,[10] "injuries from air weapons can be serious and even fatal." Given the harm that can be caused by an air rifle, it should be an offense to negligently discharge that weapon. It is disproportionate to make it an offense to discharge a firearm, but not an air rifle. It is equally disproportionate to treat the mere possession of an air rifle the same as the negligent discharge of that weapon. In addition, the commentary does not explain what offense would occur, if any, for the negligent discharge of an air rifle inside a building. Given the foregoing, OAG recommends that that this offense be retitled "Negligent Discharge of Firearm, Air Rifle, and Torpedo" and that the offense currently described in this provision be designated as the first degree of the offense and that the second degree of the offense apply to air rifles and torpedoes.
In the commentary, on page 107, it states:

> Third, the revised alteration of a firearm identification mark statute is prosecutable only by the Office of the United States Attorney for the District of Columbia ("USAO"). Current D.C. Code§ 22-4512 (Alteration of identifying marks of weapons prohibited) is prosecutable by USAO. However, current D.C. Code§ 7-2505.03(d) (Microstamping) is prosecutable by the

[9] See Merriam Webster's definition at https://www.merriam-webster.com/dictionaiy/air%20rifle.
[10] The BMJ is a weekly peer-reviewed medical journal. It is one of the world's oldest general medical journals.

> Office of the Attorney General for the District of Columbia. In contrast, the revised statute includes only a single gradation of a single offense prosecutable by USAO.

OAG does not agree that the revised statute would necessarily be prosecutable by USAO. It is our position that, given that OAG prosecutes gun offences that are regulatory in nature, that a determination of which agency will prosecute this offense can only be made after the penalty provision is drafted.[11]

RCC § 22E-4113. SALE OF FIREARM WITHOUT A LICENSE

RCC § 22E-4113 (a) states:

> An actor commits unlawful sale of a firearm without a license when that actor knowingly:
> (1) As a retail dealer:
> (A) Sells, exposes for sale, or possesses with intent to sell, a firearm; and
> (B) Is not licensed under RCC § 22E-4114 to engage in such activity; or
> (2) As a wholesale dealer, sells, or has in the actor's possession with intent to sell, a firearm to any person other than a firearms dealer.

While the definition's section found in paragraph (e) says that the term "firearms dealer", as used in paragraph (a)(2), has the meaning specified in RCC § 22E-701, neither the phrase "retail dealer" nor "wholesale dealer" are defined terms,. Similarly, the term "sell" is not defined in the provision. The commentary, on page 121, does say, however, that "'Sells' is an undefined term, intended to include any exchanging of pistol for monetary remuneration." It is unclear why the term "sells" should be limited to monetary remuneration as opposed to anything of value. For example, a wholesale dealer who trades a firearm for a few grams of cocaine to a someone other than a firearms dealer would not appear to fall within the scope of this provision. To avoid this outcome, OAG recommends that the commentary be redrafted to say, "'Sells' is an undefined term, intended to include any exchange of a firearm for anything of value."

RCC § 22E-4114. CIVIL PROVISIONS FOR LICENSES OF FIREARMS DEALERS.

RCC § 22E-4114 (b)(3) states:

> No firearm shall be sold if the purchaser is:
> (A) Not of sound mind;

[11] See D.C. Code§ 23-101 and *In re Prosecution of Hall,* 31 A.3d 453 (2011).

(B) Prohibited from possessing a firearm by RCC § 22E-4105; or
(C) Under 21 years of age, unless the purchaser is personally known to the seller or presents clear evidence of the purchaser's identity.

This provision appears to be an attempt to incorporate the current law found in D.C. Code § 22- 4510 (a)(3). That subparagraph states:

> No pistol shall be sold: (A) if the seller has reasonable cause to believe that the purchaser is not of sound mind or is forbidden by§ 22-4503 to possess a pistol [now "firearm"] or is under the age of 21 years; and (B) unless the purchaser is personally known to the seller or shall present clear evidence of his or her identity...[12]

Based upon both the logic of the current regulatory scheme and the punctuation of D.C. Code § 22-4510 (a)(3), OAG believes that the part of RCC § 22E-4114 (b)(3)(C) that states, "unless the purchaser is personally known to the seller or presents clear evidence of the purchaser's identity" should apply to RCC § 22E-4114 (b)(3)(A) and (B), as well.
As drafted, RCC § 22E-4114 (b)(3) would not prohibit the anonymous sale of a pistol to an adult who appears to be of sound mind. It would only require that a purchaser who is under 21 years of age present evidence of his or her identity when that youth is not known to the seller. Putting aside the question about how the seller of a pistol would know if a stranger is 21 or over without seeing identification, the District has an interest in knowing who has purchased a pistol within its borders. There is nothing in the D.C. Code or DCMR that contemplates anonymous pistol sales.

The analysis that a person who is under 21 is prohibited from possessing a firearm is consistent with D.C. Code § 7-2509.02 (a) which states "(a) A person who submits an application pursuant to§ 22-4506 shall certify and demonstrate to the satisfaction of the Chief that he or she ... (1) Is at least 21 years of age... " (D.C. Code § 22-4506 is entitled, "Issue of a license to carry a pistol" and it authorizes the Chief of police to issue a license to such person to carry a concealed pistol in the District.)

Based on the foregoing, OAG recommends that RCC § 22E-4114(b) be redrafted to state all purchasers who are not personally known to the seller shall present clear evidence of his or her

[12] Note that there is a semicolon at the end of D.C. Code § 22-4510 (a)(3)(A). A semicolon is "A punctuation mark(;) indicating a pause, typically between two main clauses, that is more pronounced than that indicated by a comma. See https://www.lexico.com/en/definition/semicolon. The first main clause of D.C. Code § 22-4510 (a)(3), proceeding the semicolon, is designated as subparagraph (A). That clause bars the sale of a pistol to persons whom the seller "has reasonable cause to believe that the purchaser is not of sound mind or is forbidden by § 22-4503 to possess a pistol [now "firearm"] or is under the age of 21 years." The second main clause of D.C. Code § 22-4510 (a)(3), following the semicolon, is designated as subparagraph (B). That clause, following the lead in language of D.C. Code § 22-4510 (a)(3) reads "No pistol shall be sold... unless the purchaser is personally known to the seller or shall present clear evidence of his or her identity... "

identity and that no firearm shall be sold if the purchaser is not of sound mind, is otherwise prohibited from possessing a firearm, or is under 21 years of age.

RCC § 22E-4117. CIVIL PROVISIONS FOR TAKING AND DESTRUCTION OF DANGEROUS ARTICLES.

RCC § 22E-4117(d) provides that "A person claiming a dangerous article shall be entitled to its possession only if certain conditions are met. The first two conditions are that:

> (1) Such person shows, on satisfactory evidence, that such person is the owner of the dangerous article or is the accredited representative of the owner, and that the ownership is lawful; [and]
> (2) Such person shows on satisfactory evidence that at the time the dangerous article was taken into possession by a police officer or a designated civilian employee of the Metropolitan Police Department, it was not unlawfully owned and was not unlawfully possessed or carried by the claimant or with his or her knowledge or consent.

Both of these conditions use the phrase "satisfactory evidence." This phrase was taken from D.C. Code § 22-4517(d). It is unclear whether this phrase refers to the type of evidence that may be used or if it is an evidentiary standard. OAG could not find any legislative history or case law that shines light on this issue. After reviewing the text, however, OAG is not sure that the phrase is needed. We, therefore, suggest that either the phrase be defined or it be deleted from both subsections.

RCC § 7-2507.02. UNLAWFUL STORAGE OF A FIREARM.

While OAG agrees with the intent of RCC § 7-2507.02 (a)(l)(B), we believe that this provision can be restructured to make it clearer. The current language of subparagraph (B) is:

> In a location that is neither:
> (i) A securely locked container or another location that a reasonable person would believe to be secure; nor
> (ii) Conveniently accessible and within reach of the actor.

The ambiguity is whether the word "neither" refers to (B) (i) only (i.e.," a securely locked container" or "another location that a reasonable person would believe to be secure") or whether the word "neither" refers to (B)(i) and (ii) ("A securely locked container or another location that a reasonable person would believe to be secure" and which is "Conveniently accessible and within reach of the actor.") To avoid a possible misinterpretation, we propose that it be amended to say:

> (B) In a location that is:
> (i) Not a securely locked container or another location that a reasonable person would believe to be secure; and

(ii) Not conveniently accessible and within reach of the actor.

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: September 27, 2019

SUBJECT: First Draft of Report #40, Self-Defense Sprays.

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 #40, Self-Defense Sprays.[1]

COMMENTS ON THE DRAFT REPORT

While OAG does not oppose the Commission's recommendation to repeal D.C. Code §§ 7-2502.12 (Definition of self-defense sprays) and 7-2502.13 (Possession of self-defense sprays), we believe that the Commission should recommend a conforming amendment to D.C. Code § 7–2501.01 (7)(C) that clarifies when the use of lacrimators are not considered destructive devices.

The possession of certain destructive devices are illegal.[2] Pursuant to D.C. Code § 7–2501.01 (7)(C), the definition of a destructive device includes lacrimators. That subparagraph states that one of the types of destructive devices is "Any device containing tear gas or a chemically similar lacrimator or sternutator by whatever name known." To ensure that self-defense sprays are not considered destructive devices, OAG recommends that subparagraph (C) be amended to state, "Any device containing tear gas or a chemically similar lacrimator or sternutator by whatever name known, other than a commercial product that is sold as a self-

[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] See the Commission's First Draft of Report #39 - Weapon Offenses and Related Provisions.

defense spray and which is propelled from an aerosol container that is labeled with or accompanied by clearly written instructions as to is use."[3]

[3] The additional language is modeled on D.C. Code § 7-2502.13(a).

MEMORANDUM

THE PUBLIC DEFENDER SERVICE
for the District of Columbia
CHAMPIONS OF LIBERTY

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service
Date:	September 27, 2019
Re:	Comments on First Draft of Report No. 39 Weapons Offenses and Related Provisions

The Public Defender Service makes the following comments on Report #39, Weapons Offenses and Related Provisions.

1) RCC § 7-2502.01(c)(4), possession of an unregistered firearm, destructive device, or ammunition provides that "a person shall not be subject to prosecution under subsection (b) of this section for possession of one or more empty cartridge cases or shells." Empty cartridge cases or shells may be kept as memorabilia or craft items. For instance, various American flags that incorporate cartridge cases are available for sale on the internet.[1] Cartridge cases themselves present no public safety concern because they cannot be immediately reused in firearms.

   Similarly, spent bullets do not present a public safety concern because they cannot be readily reused in a firearm. Reuse would require crafting the bullet into prohibited ammunition through a process that involves melting down the bullet and refilling a casing with primer. While spent bullets do not present a public safety concern, they do have uses as jewelry and for crafts.[2] PDS recommends adding the following language to RCC § 7-2502.01(c)(4) in order to exempt the possession of spent bullets from criminal liability.

   > A person shall not be subject to prosecution under subsection (b) of this section for possession of one or more empty cartridge cases or shells, or one or more spent bullets.

2) RCC § 7-2502.17(b)(1)(A), carrying an air or spring gun, excludes from liability possession of a spring or air gun that occurs "as part of a lawful theatrical performance or athletic contest." PDS

[1] See: https://www.range365.com/art-empty-shell/ or for various jewelry made from casings: https://bulletdesigns.com/

[2] For earrings created from spent bullets see: https://www.etsy.com/listing/581360543/30pcs-rose-gold-bullet-studs-spikes?ref=related-2 and https://bulletdesigns.com/

recommends expanding this exemption. Air guns and blowguns may also be used in cultural and educational presentations. For instance, Cherokee and other southeastern Indian tribes made extensive use of blowguns.[3] Blowguns have been used by tribes across the Amazon region. Further, individuals who possess blowguns in relation to an education, cultural, or athletic performance should be exempt from liability not only during the performance, but also during possession that occurs in relation to the performance. For example, an individual should be exempt from liability when he walks to the National Museum of the American Indian while carrying a blowgun for an educational presentation. PDS therefore recommends the following modification to RCC § 7-2502.17(b)(1)(A):

Notwithstanding subsection (a):

(1) A person shall not be subject to prosecution under the section if the conduct occurs during or is related to:

(A) ~~as part of~~ a lawful theatrical performance, educational or cultural presentation or athletic contest.

3. RCC § 7-2502.15, possession of a stun gun, criminalizes the possession of a stun gun by a person under age 18 or in a list of locations including a "public youth center." As noted in PDS's comments on CCRC Report #36, PDS recommends replacing the term "public youth center" with "public recreation center." The term "youth center" does not have a specific meaning within the District while recreation centers are well known and easily identifiable with signs that state "recreation center."

[3] See: http://www.cherokeeheritage.org/attractions/blowguns/

Memorandum

Jessie K. Liu
United States Attorney
District of Columbia

Subject: Comments to D.C. Criminal Code Reform Commission for First Draft of Reports #39 and #40	Date: September 30, 2019

To: Richard Schmechel, Executive Director, D.C. Criminal Code Reform Commission

From: U.S. Attorney's Office for the District of Columbia

The U.S. Attorney's Office for the District of Columbia (USAO) and other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the CCRC's First Draft of Reports #39 and #40. USAO reviewed these documents and makes the recommendations noted below.[1]

Comments on Draft Reports #39 and #40

I. General Comments.

A. USAO recommends that the "voluntary surrender" provisions be expressly categorized as an affirmative defense in the RCC, and that the burden and standard of proof be included in the plain language of the statute.

In several provisions, the RCC provides that a person shall not be subject to prosecution for an otherwise prohibited item when voluntarily surrendering the object. *See* RCC § 7-2502.01(c)(5); RCC § 22E-4101(c)(1); RCC § 22E-4102(d)(1); RCC § 22E-4105(c)(1). The Commentary implies that this is an affirmative defense, indicating that the "Commission's recommendations for general defenses, including an innocent or momentary possession defense, are forthcoming." (Commentary at 9 & n.28.) The plain language of the statute, however, implies that this could be an element of the offense that the prosecution must disprove beyond a reasonable doubt. The current jury instructions expressly include voluntary surrender as an affirmative defense, D.C. Crim. Jur. Instr. 6.501(C), and USAO believes that this defense should be labeled accordingly in the RCC. Further, USAO believes that the burden and standard of proof should be set out in the plain language of the statute, in addition to the fact that the surrender must conform with District and federal law. The Commentary provides: "Under D.C. Code § 7-2507.05, for example, the accused must show not only an absence of criminal purpose but also that the possession was excused and justified as stemming from effort to aid and enhance social policy underlying law enforcement. The accused must also show an intent to

[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.

abandon and an act or omission by which such intention is put into effect. Proof of that intent, must be clear and unequivocal. A firearm must be unloaded and securely wrapped in package at time of surrender." (Commentary at 91.) USAO believes that the defendant's burden of proof should be included in the plain language of the statute to avoid potential future confusion.

2. USAO recommends that the statutory text clarify whether or not the exclusions listed in various provisions are affirmative defenses, the party that must prove or disprove the defense, and the applicable burden of proof.

Several provisions in the RCC set out "exclusions from liability." *See* RCC § 7-2502.01(c); RCC § 7-2502.17(b); RCC § 22E-4101(c); RCC § 22E-4102(d); RCC § 22E-4105; RCC § 22E-4118. USAO recommends that, for each exclusion, the RCC clarify which exclusion is an affirmative defense, the party that must prove or disprove the defense, and the applicable burden of proof. For example, the Commentary states that, for RCC § 7-2502.01(c)(3), "[w]here the government presents a *prima facie* case of possession of ammunition without the necessary firearm registration, the defendant has the burden of proving this exclusion from liability by a preponderance of the evidence." (Commentary at 9.) USAO recommends putting this affirmative defense language into the plain language of the statute, so that litigating parties will not need to look at the commentary to assess the applicable burden of proof. Clarifying this in the plain language of the statute will avoid potential future confusion.

3. USAO recommends clarifying prosecutorial authority to remain consistent with current law.

Several provisions of the RCC provide that the Attorney General "shall" prosecute violations of this section. *See, e.g.*, RCC § 7-2502.01(d); RCC § 7-2502.17(c) ("The Attorney General shall prosecute violations of this section."). D.C. Code § 23-101 governs prosecutorial authority in current law. D.C. Code § 23-101 contains an exception, however, that is not in the CCRC, providing that the Attorney General for the District of Columbia shall prosecute certain offenses "*except as otherwise provided* in such ordinance, regulation, or statute, or in this section." D.C. Code § 23-101(a) (emphasis added). USAO believes it is appropriate to clarify in the RCC that this exception remains in place. For example, § 23-101(d) provides: "An indictment or information brought in the name of the United States may include, in addition to offenses prosecutable by the United States, offenses prosecutable by the District of Columbia, and such prosecution may be conducted either solely by the Corporation Counsel [Attorney General for the District of Columbia] or his assistants or solely by the United States attorney or his assistants if the other prosecuting authority consents." USAO recommends that the CCRC clarify that prosecutorial authority will remain consistent with current law.

II. RCC Title 7; Chapter 25.

A. RCC § 7-2502.01. Possession of an Unregistered Firearm, Destructive Device, or Ammunition.

1. USAO opposes the provision mandating a jury trial in subsection (e) for a completed or attempt to commit this offense.

As the Commentary recognizes, under current District law, attempted possession of an unregistered firearm and attempted unlawful possession of ammunition are not jury demandable offenses. (Commentary at 11.) USAO frequently charges these two attempt provisions as bench trials. The Commentary cites to potential civil liberties concerns related to this charge. (Commentary at 11.) Notably, however, the Commentary does not cite to any case law from the D.C. Court of Appeals regarding the constitutionality of this charge, and it is unclear why this provision raises more potential constitutional concerns than, for example, Carrying a Pistol in an Unlawful Manner, RCC § 7-2509.06, which does not have a similar jury trial mandate. USAO recommends tracking current law, which does not contain a similar provision, and removing this provision.

2. USAO recommends creating separate offenses for what are currently First Degree and Second Degree Possession of an Unregistered Firearm, Destructive Device, or Ammunition.

Under the RCC, the first degree gradation of this offense prohibits possession of a firearm without a registration certificate and a destructive device, and the second degree gradation prohibits possession of ammunition without a registration certificate and restricted pistol bullets. Under current law, these are covered by different offenses, and it seems more appropriate to keep them as separate offenses than to separate them by gradation, as they relate to different conduct, instead of varying levels of the same conduct.

3. USAO recommends removing subsection (c)(1).

Subsection (c)(1) provides that "[a] person shall not be subject to prosecution under subsection (a) of this section for possession of a firearm frame, receiver, muffler, or silencer." None of those items, however, are prohibited by subsection (a), so it is unclear how a person could be subject to liability under subsection (a) for any of those items. Rather, it would be possession of the firearm itself that would lead to liability. If the CCRC keeps this provision, USAO recommends adding the word "solely" to clarify that possession of any of those items does not preclude liability for possession of a firearm without a registration certificate. With that change, subsection (c)(1) would provide:

> "(1) A person shall not be subject to prosecution under subsection (a) of this section solely for possession of a firearm frame, receiver, muffler, or silencer."

4. USAO recommends incorporating the additional requirements of subsections (c)(2)(B)(i)–(ii) into subsection (c)(2)(A).

With USAO's changes, subsection (c)(2) would provide:

"(A) Participating in a lawful recreational firearm-related activity inside the District; or ~~(B)~~ Traveling to or from a lawful recreational firearm-related activity outside the District; and

(i) Upon demand of a law enforcement officer exhibits proof that:
(I) The person is traveling to or from a lawful recreational firearm-related activity outside the District; and
(II) The person's possession or control of the firearm is lawful in the person's jurisdiction of residence; and
(ii) The firearm is transported in accordance with the requirements specified in RCC § 22E-4109."

Subsections (c)(2)(B)(i)–(ii) contain additional requirements for a person traveling to or from a lawful recreational firearm-related activity outside the District. Subsection (c)(2)(A) relates to a person participating in a lawful recreational firearm-related activity inside the District. Given the similarity of these two provisions, and the societal interests they both seek to protect, USAO believes that it is appropriate to have the same additional requirements in both provisions. A person carrying a firearm to an event in the District should be subject to the same requirements as a person carrying a firearm to an event outside the District.

III. RCC Title 22E; Chapter 7. Definitions.

A. RCC § 22E-701. Definitions.

1. USAO recommends that the definition of "Dangerous weapon" expressly include both stationary and non-stationary objects.

In the RCC, the definition of "Dangerous weapon" exempts a "stationary object." In support of this proposal, the Commentary cites to *Edwards v. United States*, 583 A.2d 661 (D.C. 1990). (Commentary at 41 & n.204.) *Edwards*, however, does not stand for the proposition that a stationary object *per se* cannot be a dangerous object. *Edwards*, instead, holds the following: "The question before us is not whether [the complainant] could be injured as seriously by having her head slammed against a stationary toilet bowl as she could if she were bludgeoned with a detached one; she obviously could. *We have no doubt that the legislature has the authority to punish the conduct revealed in this record as severely as an assault with any hard object, should it elect to do so.* What we must decide, however, is not whether the legislature could or ought to treat the two situations interchangeably, but whether it has done so. Given the applicable principles of statutory construction described at pages 663–664, supra, we conclude that it has not." 583 A.2d at 667–68 (emphasis added). The *Edwards* court, therefore, was engaging in statutory construction, and the CCRC can make a legislative proposal to the contrary. The RCC should provide, instead, that a stationary object can be a dangerous weapon when "in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a

person." The *Edwards* court, notably, stated that "[m]orally, running a victim into a spike is as culpable as stabbing him with a dagger." 583 A.2d at 667. The CCRC should recognize the moral equivalence of injuring someone with a stationary or non-stationary object, and expressly recognize that, in the definition of "Dangerous weapon," "any object" can include objects that are both stationary and non-stationary.

2. USAO recommends clarifying the definition of "possession."

In Report #36, "possession" was defined as: "(A) Hold or carry on one's person; or (B) Have the ability and desire to exercise control over." RCC § 22E-701. In Report #39, the Commentary provides: "Evidence of knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession." (Commentary at 7.) Knowledge of an item's location is not required to demonstrate constructive possession. For example, if a person cannot find an object for a moment, but is clear that the object belongs to the person and to no one else, then that person is deemed to constructively possess that object. Evidence of knowledge of the location is a relevant consideration, but is not a requirement. USAO recommends clarifying the commentary to reflect this.

IV. RCC Title 22E; Chapter 41. Weapons.

A. RCC § 22E-4101. Possession of a Prohibited Weapon or Accessory.

1. USAO recommends, in subsection (a)(2), changing the requisite *mens rea* from recklessness to strict liability.

The items listed in subsection (a)(2) are very dangerous, and there is no legitimate reason for anyone to possess them in the District (unless that person falls into the exception criteria in RCC § 22E-4118). If someone were to possess, for example, a machine gun, that person should be required to know that the item they possess is a machine gun. Further, it is unclear how the government would prove that a defendant was reckless as to the nature of the weapon, aside from showing that the item clearly is a machine gun or other object. With USAO's recommendation, there would still be a requirement that the possession be knowing, so the overall *mens rea* for this offense would require knowledge.

2. USAO recommends that the Commentary clarify the current prosecutorial authority.

The Commentary states: "Under current law, possession of an extended clip is criminalized in Title 7's firearm regulations chapter and is prosecuted by the Office of the Attorney General for the District of Columbia." (Commentary at 59.) This offense, however, is actually currently prosecuted by USAO. This is not a substantive change, and does not affect the statute.

B. RCC § 22E-4103. Possession of a Dangerous Weapon with Intent to Commit Crime.

1. USAO opposes the new provision disallowing a prosecution for an attempt to commit this offense.

RCC § 22E-4103(c) provides that "[i]t is not an offense to attempt to commit the offense described in this section." This is a change from current law. The Commentary, however, does not provide a rationale for this change, and it is unclear why this change was proposed. If, for example, an actor engaged in the prohibited conduct with a weapon that the actor believed to be a dangerous weapon, but was not in fact a dangerous weapon, that would constitute an attempt to commit this offense. Thus, an attempt to commit this charge is legally appropriate. USAO opposes this new provision and recommends removing it from this section.

C. RCC § 22E-4104. Possession of a Dangerous Weapon During a Crime.

1. USAO opposes creating different gradation for possession of a firearm and possession of an imitation firearm.

The RCC proposes that First Degree Possession of a Dangerous Weapon During a Crime applies when a person possesses a firearm, and Second Degree applies when a person possesses an imitation firearm or dangerous weapon. There is no reason to have separate gradations for a firearm and imitation firearm. If a firearm is not recovered, it is impossible to tell if it is a real firearm or an imitation firearm. Imitation firearms are intended to look like real firearms, and often cannot be distinguished without test-firing them, or otherwise checking them for operability. Thus, if a defendant holds up a gun to a victim and flees the scene with the gun, and the gun is not recovered (which is a common situation), it will, practically, be impossible to prove whether that gun was real or imitation. A defendant should not be subject to a more favorable gradation simply because the defendant flees the scene and officers are not able to recover the gun.

2. USAO opposes eliminating offense categorized as dangerous crimes under current law as predicates for this offense.

By including all offenses against persons under Subtitle II as predicate offenses, the RCC in some ways expands the categories in which liability can attach, which the USAO believes is appropriate. But by eliminating offenses categorized under current law as dangerous crimes from the category of predicate crimes, the RCC eliminates other crimes. Aside from the elimination of drug crimes, the Commentary does not discuss the rationale for eliminating other types of dangerous crimes as predicate offenses. For example, under current law, arson is a "dangerous crime" under D.C. Code § 23-1331(3), so is a predicate offense for the crime of Possession of a Firearm During a Crime of Violence or Dangerous Crime under D.C. Code § 4504(b). It is unclear why arson is excluded as a predicate offense. Arson is a very serious offense that can often result in substantial injury to a person or to property, so should be included as an additional offense listed in subsections (a)(2) and (b)(2).

Further, as the Commentary acknowledges (Commentary at 82 & n.517), certain types of conduct currently penalized as Robbery would not be included in Subtitle II of the Title 22 of the RCC. USAO believes that the type of conduct currently penalized as Robbery should remain a predicate for this offense, so recommends including Theft as an additional offense listed in subsections (a)(2) and (b)(2).

3. USAO recommends removing the words "in furtherance of and."

With USAO's changes, subsections (a)(2) and (b)(2) would provide:

"(2) ~~In furtherance of and~~ while committing what, in fact, is . . ."

The requirement that a firearm, imitation firearm, or dangerous weapon be used "in furtherance of and while" committing a crime is a change from current law, which requires only that a person possess a firearm "while" committing a crime. This change is not warranted. A defendant creates an increased risk of danger by introducing a weapon to an offense. Even if a defendant does not use or display the firearm or other dangerous weapon, there is an additional level of risk created when a defendant has a weapon readily available. A firearm could inadvertently discharge, and another person could suffer injury as a result of that weapon. Of course, the presence of a firearm also increases the chances of the intentional use of the weapon at some point during the offense, and subsequent resultant injury. This is true even when the weapon is not used "in furtherance" of the underlying offense.

4. USAO opposes the new provision disallowing a prosecution for an attempt to commit this offense.

USAO relies on the same reasoning set forth above regarding RCC § 22E-4103(c).[2]

D. RCC § 22E-4105. Possession of a Firearm by an Unauthorized Person.

1. USAO recommends, in subsection (b)(2)(A), removing the requirement that the conviction be for a "comparable offense in another jurisdiction."

With USAO's changes, subsection (b)(2)(A) would provide:

"(A) Has a prior conviction for what is, in fact:

(i) A District offense or offense in another jurisdiction that is currently punishable by imprisonment for a term exceeding 1 year~~, or a comparable offense in another jurisdiction~~ . . ."

Current law requires that the offender "[h]as been convicted in any court of a crime punishable by imprisonment for a term exceeding one year." D.C. Code § 22-4503(a)(1).

[2] USAO also wants to clarify that the RCC is only intending to limit liability for Attempted Possession of a Dangerous Weapon During a Crime, and is not intending to limit liability for Possession of a Dangerous Weapon During a Crime in connection with an Attempted Offense, such as Attempted Robbery or Attempted Homicide. USAO understands the RCC's intent to be only to bar the former.

Changing this provision will lead to extensive litigation to ascertain what constitutes a comparable offense in another jurisdiction. This will be time-consuming, difficult to prove, and eliminate the certainty inherent in current law. Under current law, an offender knows that if he or she has been found guilty of an offense in any jurisdiction that is punishable by imprisonment for a term exceeding 1 year, they are subject to liability for possessing a firearm in the District. Under the RCC's proposal, there will be less certainty as to the requirements for this offense. Moreover, it is unclear whether this would be a question of law for a judge or a question of fact for a jury to consider.

2. USAO recommends removing the restriction on which intrafamily offenses qualify as predicate offenses under subsection (b)(2)(A)(iii).

   With USAO's changes, subsection (b)(2)(A)(iii) would provide:

   "(iii) An intrafamily offense, as defined in D.C. Code § 16-1001(8), ~~that requires as an element confinement, nonconsensual sexual conduct, bodily injury, or threats,~~ or a comparable offense in another jurisdiction within the last 5 years."

By limiting the predicate offenses to ones that involve, among other things, bodily injury, the RCC substantially limits the offenses that are eligible as predicate offenses. Particularly in the domestic violence context, the government may be unable to prove beyond a reasonable doubt that an offense resulted in bodily injury, even where, in fact, the offense resulted in bodily injury. This could include, for example, a situation where an eyewitness observes the entire assault, but cannot see whether the complainant had any visible injuries or suffered any physical pain. If the complainant is uncooperative, the government may rely exclusively on the eyewitness testimony to prove that the assaultive conduct took place. The effect of this bodily injury requirement helps to insulate a domestic abuser from greater liability on the underlying offense, and now will insulate a domestic abuser from liability for possessing a firearm. Possession of a firearm is particularly dangerous in the domestic violence context, and liability for possession of a firearm by a person previously convicted of a domestic violence offense should not be limited in this context. Current law appropriately has no such limitation, *see* D.C. Code § 22-4503(a)(6), and USAO recommends tracking current law in this respect. At a very minimum, to align with the District's firearm registration requirements set forth in the Commentary (at 93), the statute must include predicate offenses that involve "the use or attempted use of physical force, or the threatened use of a deadly weapon," which would include the RCC's offenses of attempted assault and menacing.

3. USAO recommends eliminating the requirement that the defendant "know" that they have a prior conviction or open warrant.

The Commentary provides that "the revised offense requires that the accused know that they have a prior conviction or open warrant." (Commentary at 95.) A defendant, however, may know that they committed an offense and have not been apprehended for it, or may know that they were in some kind of trouble with the law, but not be aware that there is, in fact, an open warrant. The requirement that a defendant "know" about this limits the eligible conduct too far.

4. USAO recommends removing subsection (e)(3)(C).

Subsection (e)(3)(C) provides that a "prior conviction" does not include "[a] conviction that is subject to a conditional plea agreement." A conviction subject to a conditional plea agreement, however, is no different for this purpose from a conviction following trial; it merely allows the possibility of appellate review on a certain issue. It would be inappropriate to exclude a conviction following trial from the definition of "prior conviction" merely due to the possibility of appellate reversal. Likewise, it is inappropriate to exclude a conditional plea agreement merely due to the possibility of appellate reversal. Rather, if a conviction is, in fact, reversed on appeal, then that conviction would no longer be a "prior conviction."

5. USAO recommends removing the 10-year limitation for prior felony convictions in subsection (b)(2)(A)(i).

Under current law, there is no such limitation. D.C. Code § 22-4503(a)(1). In support of this change, the Commentary cites to potential Second Amendment concerns. (Commentary at 92.) It is unclear, however, how any time limit could cure any constitutional issue. The Commentary notes that some courts permit a curtailing of Second Amendment rights based on a prior conviction only if the conviction indicates a propensity for violence, and that some courts hold that a person is unvirtuous for Second Amendment protection by committing any serious crime. (Commentary at 92–93.) The nature and seriousness of the crime, however, is the same, regardless of how much time has passed since the conviction. Moreover, by calculating the 10 years from the date of conviction, instead of from the date of release from incarceration or termination of supervision, a person who receives a 10-year sentence of incarceration under this provision could be permitted to possess a gun immediately upon release from incarceration, even while still on supervision for this offense. USAO accordingly recommends removing this 10-year limitation.

E. RCC § 22E-4118. Exclusions from Liability for Weapon Offenses.

A. USAO recommends that some of the exclusions from liability in subsection (b) be limited to those persons "on duty" to track current law.

Subsection (b)(2) and (b)(7) are appropriately limited to persons in that category who are "on duty." USAO recommends that the statute track other "on duty" requirements in current law. For example, consistent with D.C. Code § 22-4504(a)(3), USAO recommends that the exclusion in subsection (b)(1) be limited to "on-duty" members. Likewise, USAO recommends that subsection (b)(6) be limited to those persons who are "on duty," consistent with the requirement in D.C. Code § 22-4505(a)(1) that those persons only be allowed to carry a firearm "while engaged in the performance of their official duties." There is no reason for these persons to be exempt from certain possessory offenses while off-duty.

F. RCC § 22E-4119. Limitation on Convictions for Multiple Related Weapons Offenses.

A. USAO opposes this limitation, and recommends removal of RCC § 22E-4119 in its entirety.

USAO particularly opposes subsection (b). As the Commentary notes, there is no corresponding provision in current District law. (Commentary at 144.) There is necessarily a greater risk of harm introduced to a situation when a firearm is involved. As discussed above, the risk of both accidental and intentional discharge of a firearm increases when a firearm is present, which is a harm that the offense of Possession of a Dangerous Weapon During a Crime recognizes and seeks to deter. There is a difference, for example, between being armed with a knife during a crime and possessing a firearm during a crime of violence. Moreover, it is unclear why subsection (b)(3) includes any offense that includes as an element, of *any* gradation, that the person displayed or used a dangerous weapon. At a minimum, the person should have been convicted of the while armed provision of that offense; it should not just be a potential gradation of that offense.

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: November 15, 2019

SUBJECT: First Draft of Report #41, Ordinal Ranking of Maximum Imprisonment Penalties

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 #41, Ordinal Ranking of Maximum Imprisonment Penalties.[1]

COMMENTS ON THE DRAFT REPORT

OAG's comments will focus on the ranking of specific offenses to provide proportionate penalties and what offenses should be jury demandable.

THE RANKING OF SPECIFIC OFFENSES TO PROVIDE PROPORTIONATE PENALTIES[2]

- The relative ranking of Nonconsensual Sexual Contact and Arranging for a Sexual Conduct with a Minor.

[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] In this memorandum OAG will identify the proposed penalty first with reference to Model 1 followed by a backslash and then by the penalty proposed by Model 2. For example, "a penalty of 3 years/2 years" means that it would be a 3 year offense under Model 1 and a 2 year offense under Model 2.

The offense of First Degree Nonconsensual Sexual Conduct is a class 9 felony with a penalty of 3 years/2 years. The offense of Second Degree Nonconsensual Conduct is a class A misdemeanor with a penalty of 1 year/1 year. Arranging for a Sexual Conduct with a Minor is a class 8 felony with a penalty of 5 years/4 years.

The offense of Nonconsensual Sexual Conduct involves an actor recklessly causing the complainant to engage in a sexual act.[i] The offense of Arranging for a Sexual Conduct with a Minor generally prohibits the actor from arranging for a sexual act or sexual contact with a minor.[ii] There are numerous ways to commit this offense that have varying mental states, and other elements, that depend on the the age of the minor. Notwithstanding that the offense of Nonconsensual Sexual Conduct applies to adults and Arranging for a Sexual Conduct with a Minor applies to children, it seems disproportionate to penalize a person who actually engages in nonconsensual sexual conduct less than someone who merely arranges for someone to engage in sexual conduct. OAG, therefore recommends that the penalty for the offense of Nonconsensual Sexual Conduct be raised to be commensurate with First Degree Arranging for a Sexual Conduct with a Minor.

- The relative ranking of First Degree Check Fraud[iii] with other categories of First Degree fraud.

When analyzing why First Degree Check Fraud, which is a class 9 felony with a penalty of 3 years/2 years, was lower than all of the other First Degree Fraud offenses, we realized that check fraud, unlike the other fraud charges had only a felony offense for when the loss was $5,000 or more and a second degree offense for losses of any amount. The other fraud offenses have five degrees. RCC § 22E-2201, Fraud, has the following penalty structure.[3] If the property lost:

  - has a value of $500,000 or more the recommended penalty is a class 7 felony with a penalty of 10 years/8 years (first degree);
  - has a value of $50,000 or more the recommended penalty is a class 8 felony with a penalty of 5 years/4 years (second degree);
  - has a value of $5,000 or more the recommended penalty is a class 9 felony with a penalty of 3 years/2 years (third degree);
  - has a value of $5000 or more the recommended penalty is a class A misdemeanor with a penalty of 1 year/1 year (fourth degree);
  - has any value the recommended penalty is a class C misdemeanor with a penalty of 6 months/ months (fifth degree).

[3] RCC § 22E-2202, Payment Card Fraud, has the same five tier structure as RCC § 22E-2201, Fraud, and the proposed penalty for each degree is the same.

The Commission pegged the penalty for First Degree Check Fraud with Fourth Degree Fraud. As Fourth Degree Fraud applies when the loss has a value of $5000 or more, this, on its face, would seem appropriate. However, if the First Degree Check Fraud was for a loss of $50,000 then pegging the penalty to Fourth Degree Fraud seems inappropriate because the amount of the loss would be the same as the amount of loss in Second Degree Fraud. To make the fraud penalties proportionate, therefore, the offense of Check Fraud should have the same degree structure as the other fraud offenses.

- The relative ranking of Benefiting from Human Trafficking and Misuse of Documents in Furtherance of Human Trafficking

The Commission ranked RCC § 22E-1606, First Degree Benefiting from Human Trafficking, as a class 6 felony (15 years/12 years). To commit First Degree Benefiting from Human Trafficking one must knowingly financially benefit by participating in a group of people reckless to the fact that the group is involved in forced commercial sex, trafficking in commercial sex, or sex trafficking of minors. The Commission ranked Second Degree Benefiting from Human Trafficking as a class 7 felony (10 years/8 years). The difference between the degrees of this offense is that in Second Degree Benefiting from Human Trafficking one must derive the benefit reckless to the fact that the group is involved in forced labor or services or trafficking in labor or services rather than from sex trafficking.[iv]

The Commission ranked RCC § 22E-1607, Misuse of Documents in Furtherance of Human Trafficking, as a class 8 felony (5 years/4 years). To commit Misuse of Documents in Furtherance of Human Trafficking one must prevent a person from possessing government identification, including their passport, with the intent to restrict the person's liberty in order to maintain the labor, services, or performance of a commercial sex act by that person.[v]

While OAG agrees that benefiting from human trafficking, whether of sex or labor and services, should be a serious felony, it is the confiscation of the person's passport and other government identification that keeps the trafficked person in a position where they can be victimized. The penalty for knowingly destroying or concealing government identification should be punished commensurate with benefiting from human trafficking. Therefore, OAG recommends that Misuse of Documents in Furtherance of Human Trafficking should be redrafted to have two degrees; first degree for destroying or concealing documents of persons who are sex trafficked and second degree for persons who are trafficked for labor or services. OAG further recommends that the penalty for each degree of these offenses be the same as the corresponding penalties for Benefiting from Human Trafficking.

- The ranking of Burglary

RCC § 22E-2701, Burglary, is divided into three degrees. The difference between the degrees is that First Degree Burglary involves knowingly entering a dwelling with intent to commit bodily injury, a sexual act, a sexual contact, confinement, loss of property, or damage to property;

Second Degree Burglary is committed by knowingly entering a dwelling or a building, that is not open to the public, with intent to commit bodily injury, a sexual act, a sexual contact, confinement, loss of property, or damage to property; and Third Degree Burglary is committed by knowingly entering a building or business yard with intent to commit bodily injury, a sexual act, a sexual contact, confinement, loss of property, or damage to property.[vi] The Commission recommends that First Degree Burglary be penalized as a class 8 felony (5 years/4 years), Second Degree Burglary be penalized as a class 9 felony (3 years/2 years), and Third Degree Burglary be penalized as a class 8 felony A misdemeanor (1 year/1 year). This penalty scheme would be a radical departure from the current law for these offenses.

D.C. Code § 22-801 sets out the elements and penalty for burglary.[vii] The offense has two degrees. The penalty for a person who enters an occupied dwelling with intent to commit any criminal offense "shall be punished by imprisonment for not less than 5 years nor more than 30 years. The penalty for a person who enters any dwelling or building, whether occupied or not "shall be punished by imprisonment for not less than 2 years nor more than 15 years." The ranking of First Degree Burglary under the RCC, which is comparable to the current First Degree Burglary, would reduce the penalty to the "soft minimum" of the current penalty for this offense. Given the potential for harm to a victim that occurs when a person burglarizes an occupied dwelling or building or the potential of harm to property, whether the dwelling is occupied or not, OAG recommends that the penalties for Burglary be increased.

- The ranking of Unlawful Creation or Possession of a Recording

The offense of Unlawful Creation or Possession of a Recording, RCC § 22E-2105, is ranked as a class B misdemeanor with a penalty of 6 months/6 months. The Report recommends that this offense not be jury demandable. OAG recommends that this offense be reclassified as a Class C misdemeanor with a penalty of 3 months/10 days and that it remain a non-jury demandable offense.

- The ranking of Unlawful Labeling of a Recording

The offense of Unlawful Labeling of a Recording, RCC § 22E-2207, is ranked as a class B misdemeanor with a penalty of 6 months/6 months. The Report recommends that this offense not be jury demandable. OAG recommends that this offense be reclassified as a Class C misdemeanor with a penalty of 3 months/10 days and that it remain a non-jury demandable offense.

- The ranking of Alteration of Bicycle Identification Number

The offense of Alteration of Bicycle Identification Number, RCC § 22E-2404, is ranked as a class C misdemeanor with a penalty of 3 months/10 days. The Report recommends that this offense not be jury demandable. OAG recommends that this offense be reclassified as a Class D misdemeanor with a penalty of 1month/10 days and that it remain a non-jury demandable offense.

- The ranking of Disorderly Conduct

The offense of Disorderly Conduct, RCC § 22E-4201, is ranked as a class C misdemeanor with a penalty of 3 months/10 days. The Report recommends that this offense not be jury demandable. OAG recommends that this offense be reclassified as a Class D misdemeanor with a penalty of 1 month/10 days and that it remain a non-jury demandable offense.

WHAT OFFENSES SHOULD BE JURY DEMANDABLE

OAG supports the RCC retaining the statutory expansion of the Constitutional right to a jury trial to offenses classified as Class A or B misdemeanors - those offenses that carry a maximum penalty of six months or one year. We do not believe, however, that a jury right should attach to offenses that are classified as Class C, D, or E misdemeanors - those offenses that carry a maximum penalty of three months incarceration or less. Applying that principal to the offenses listed on pages 5 and 6, of 6, of the second addendum to Report #41, we propose that all class B misdemeanors, those carrying a penalty of 6 months/6 months be made jury demandable. All class C misdemeanors, those with a penalty of 3 months/3 months, class D misdemeanors, those with a penalty of 3 months/1 month, and all class E misdemeanors, those with no incarceration option would, therefore, not be jury demandable. We do not support the Report's recommendation that certain completed and inchoate offenses that carry incarceration exposure of under 6 months be made jury demandable. A corollary to the Commission's directive, under D.C. Code § 3–152 (6) that the Commission "Adjust penalties, fines, and the gradation of offenses to provide for proportionate penalties" is that defendants who are facing the same amount of time incarcerated should have the same rights to a jury trial.

[i] The offense of Nonconsensual Sexual Conduct, RCC § 22E-1307, is defined, in relevant part, as follows:

(a) *First Degree*. An actor commits first degree nonconsensual sexual conduct when that actor recklessly causes the complainant to engage in or submit to a sexual act without the complainant's effective consent.
(b) *Second Degree*. An actor commits second degree nonconsensual sexual contact when that actor recklessly causes the complainant to engage in or submit to sexual contact without the complainant's effective consent.

[ii] The offense of Arranging for Sexual Conduct with a Minor, RCC § 22E-1306, is defined, in relevant part, as follows:

(a) *Offense*. An actor commits arranging for sexual conduct with a minor when that actor:
    (1) Knowingly arranges for a sexual act or sexual contact between:
        (A) The actor and the complainant; or
        (B) A third person and the complainant; and

(2) The actor and any third person, in fact, are at least 18 years of age and at least 4 years older than the complainant; and
  (A) The actor is reckless as to the fact that the complainant is under 16 years of age; or
  (B) The actor:
    (i) Is reckless as to the fact that the complainant is under 18 years of age; and
    (ii) Knows that the actor is in a position of trust with or authority over the complainant; or
(3) The actor and any third person, in fact, are at least 18 years of age and at least 4 years older than the purported age of the complainant; and the complainant:
  (A) In fact, is a law enforcement officer who purports to be a person under 16 years of age; and
  (B) The actor is reckless as to the fact that the complainant purports to be a person under 16 years of age.

[iii] The offense of Check Fraud, RCC § 22E-2203, is defined, in relevant part, as follows:

(a) *First Degree.* A person commits first degree check fraud when that person:
  (1) Knowingly obtains or pays for property by using a check;
  (2) With intent that the check not be honored in full upon presentation to the bank or depository institution drawn upon; and
  (3) The amount of loss to the check holder is, in fact, $5,000 or more.
(b) *Second Degree*. A person commits second degree check when that person:
  (1) Knowingly pays for property by using a check;
  (2) With intent that the check not be honored in full upon presentation to the bank or depository institution drawn upon; and
  (3) The amount of loss to the check holder is, in fact, any amount.
(c) *Penalties*.
  (1) First degree check fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) Second degree check fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(d) *Definitions*. The terms "intent" and "knowingly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "check" and "property" have the meanings specified in RCC § 22E-701; and the term "person" has the meaning specified in RCC § 22E-2002.

[iv] The offense of Benefiting from Human Trafficking, RCC § 22E-1606, is defined, in relevant part, as follows:

(a) *First Degree.* An actor commits first degree benefiting from human trafficking when that actor:
  (1) Knowingly obtains any financial benefit or property;
  (2) By participating in a group of 2 or more persons;

(3) Reckless as to the fact that the group is engaging in conduct that, in fact: constitutes forced commercial sex under RCC § 22E-1604, trafficking in commercial sex under RCC § 22E-1606, or sex trafficking of minors under RCC § 22E-1605.

(b) *Second Degree.* An actor commits second degree benefiting from human trafficking when that actor:

(1) Knowingly obtains any financial benefit or property;

(2) By participation in a group of 2 or more persons;

(3) Reckless as to the fact that the group is engaging in conduct that, in fact: constitutes Forced Labor or Services under RCC § 22E-1603 or Trafficking in Labor or Services under RCC § 22E-1605.

[v] The offense of Misuse of Documents in Furtherance of Human Trafficking, RCC § 22E-1607, is defined, in relevant part, as follows:

(a) *Offense.* An actor commits misuse of documents in furtherance of human trafficking when that actor:

(1) Knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported government identification document, including a passport or other immigration document of another person;

(2) With intent to restrict the person's liberty to move or travel in order to maintain the labor, services, or performance of a commercial sex act by that person.

[vi] The offense of Burglary, RCC § 22E-2701, is defined, in relevant part, as follows:

(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 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 1 or more District crimes involving bodily injury, a sexual act, a sexual contact, confinement, loss of property, or damage to property.

(b) *Second Degree*. An actor commits second degree burglary when that actor:

(1) Knowingly and fully enters or surreptitiously remains in:

(A) A dwelling, or part thereof, without a privilege or license to do so under civil law; or

(B) A building, or part thereof, without a privilege or license to do so under civil law:

(i) That is not open to the general public at the time of the offense;

(ii) 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) With intent to commit inside 1 or more District crimes involving bodily injury, a sexual act, a sexual contact, confinement, loss of property, or damage to property.

(c) *Third Degree*. An actor commits third degree burglary when that actor:
(1) Knowingly and fully enters or surreptitiously remains in:
(A) A building or business yard, or part thereof, without a privilege or license to do so under civil law;
(B) That is not open to the general public at the time of the offense;
(2) Without a privilege or license to do so under civil law;
(3) With intent to commit inside 1 or more District crimes involving bodily injury, a sexual act, a sexual contact, confinement, loss of property, or damage to property.

[vii] D.C. Code § 22-801 defines Burglary as follows:

(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.

(b) Except as provided in subsection (a) of this section, whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be guilty of burglary in the second degree. Burglary in the second degree shall be punished by imprisonment for not less than 2 years nor more than 15 years.

MEMORANDUM

THE PUBLIC DEFENDER SERVICE
for the District of Columbia
CHAMPIONS OF LIBERTY

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service
Date:	November 15, 2019
Re:	Comments on First Draft of Report No. 41 Ordinal Ranking of Maximum Imprisonment Penalties

The Public Defender Service makes the following comments on Report # 41, Ordinal Ranking of Maximum Imprisonment Penalties.

1) In Report #41, the Criminal Code Reform Commission set the statutory maximum for class B misdemeanors at six months but provided that most of these offenses will not be jury demandable.[1] Since the right to trial by jury attaches for all individuals under the Constitution when the statutory maximum is more than six months[2] and under D.C. Code § 16-705 when the statutory maximum is six months or more, presumably, the CCRC would make offenses non-jury demandable by making them punishable by a maximum term of 180 days or less rather than six months.

   PDS believes that all offenses that permit a maximum punishment that includes incarceration should be jury demandable.[3] In comments to the CCRC's First Draft of Report No. 5, Recommendations for Chapter 8 of the Revised Criminal Code, Offense Classes & Penalties, PDS proposed a default rule of jury demandability regardless of whether the Council set the statutory maximum for an offense at six months or 180 days. Since those recommendations and comments by PDS, the case for jury demandability has been made all the more compelling by the

[1] As stated in Report #41, the CCRC made recommendations as to jury demandability in order to decrease variables moving forward but the CCRC has yet aligned statutory maxima to conform with the determination of jury demandability.

[2] *Baldwin v. New York*, 399 U.S. 66 (1970).

[3] On June 16, 2017, PDS submitted comments for First Draft of Report No. 5, Recommendations for Chapter 8 of the Revised Criminal Code, Offense Classes & Penalties. In those comments, PDS proposed a default rule that class B misdemeanors would be jury demandable unless otherwise provided by law. Under PDS's proposal, the default of jury demandability would apply regardless of whether the maximum penalty for the offense was set at six months or 180 days. As contemplated by PDS in the June 16, 2017 comments, a defendant charged with a class B misdemeanor would be entitled to a jury trial unless the legislature specifically provided otherwise.

en banc decision of the D.C. Court of Appeals in *Bado v. United States*.[4] In *Bado* the Court of Appeals held that a defendant facing a charge that carries incarceration of 180 days and the penalty of deportation has a right to a jury trial.[5]

The holding in *Bado* creates a series of complications for jury demandability moving forward. For example, where the statutory maximum is set at 180 days and there is not a statutory or constitutional right to a trial by jury, a defendant must disclose to the court and prosecutors that he is not a U.S. citizen in order to receive the protection of a jury trial. Forcing non-citizens to declare their immigration status in an adversarial forum in order to receive the benefit of a fair adjudication by their peers violates the District's commitment to being a sanctuary city and protecting immigrant communities.[6] At a time when individuals who have been nearly life-long residents of the District can be deported to a country that they do not remember, the CCRC should not force non-citizens to choose between disclosure of immigration status and the fundamental right to a trial by jury.

Further, as noted by Chief Judge Eric Washington in his concurrence in *Bado*, providing the right to a trial by jury to non-citizen defendants and denying that same right to citizens "creates a disparity between the jury trial rights of citizens and non-citizens that lay persons might not readily understand… The failure to [address this dispartity] could undermine the public's trust and confidence in our courts to resolve criminal cases fairly."[7] Citizens and non-citizens alike face a long list of collateral consequences from criminal convictions including loss of employment, housing, and sex offender registration. Providing a universal right to a jury trial ensures that all District residents are judged by the community before being stripped of their freedom and saddled with lifelong collateral consequences in education, housing, and employment.

The primary aim of depriving individuals of their right to a trial by jury appears to be efficiency. Concerns about court efficiency drove the Council's passage of the Misdemeanor Streamlining Act.[8] In addressing the merits of efficiency, Chief Judge Washington wrote in *Bado*:

"[T]he Council could reconsider its decision to value judicial economy above the right to a jury trial. Restoring the right to a jury trial in misdemeanor cases could have the salutary effect of elevating the public's trust and confidence that the government is more concerned with courts protecting individual rights and freedoms than in ensuring that courts are as efficient as possible in bringing defendants to trial. This may be an important message to send at this time because many communities, especially communities of color, are openly questioning whether courts are truly independent or are merely the end game in the exercise of police powers by the state. Those perceptions are fueled not only by reports that police officers are not being held responsible in

[4] *Bado v. United States*, 186 A.3d 1243 (D.C. 2018).

[5] *Id*. at 1251-52.

[6] See, e.g. Sanctuary Values Emergency Declaration of 2019, PR23-0501, effective October 8, 2019.

[7] *Bado*, 186 A.3d at 1262.

[8] Omnibus Criminal Justice Reform Act of 1994, D.C. Law § 10–151, 41 D.C. Reg. 2608 (effective Aug. 20, 1994).

the courts for police involved shootings of unarmed suspects but is likely also promoted by unwise decisions, like the one that authorized the placement of two large monuments to law enforcement on the plaza adjacent to the entrance to the highest court of the District of Columbia."[9]

Numerous other jurisdictions have provided a right to trial by jury when the defendant faces any possible incarceration. For example, California provides a right to trial by jury for misdemeanor and felony offenses.[10] Colorado guarantees the right of jury trial to all individuals accused of an offense other than a noncriminal traffic infraction, municipal or county ordinance.[11] In Illinois, every person accused of an offense shall have the right to a trial by jury unless the offense is an ordinance violation punishable by fine only.[12] Maine requires jury trials for all criminal prosecutions except decriminalized traffic offenses.[13]

According to the Supreme Court, the right to a jury trial provides the defendant "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[14] Like other jurisdictions, the CCRC should recommend that a defendant is entitled to a jury trial for all offenses that carry the possibility of any term of incarceration.

2. In Report #41, the RCC placed the offense of first degree robbery in class 5. First degree robbery is defined as fifth degree robbery where in the course of committing the robbery, the defendant recklessly causes serious bodily injury by displaying or using what, in fact, is a dangerous weapon or recklessly causes serious bodily injury to a protected person. By placing first degree robbery in class 5, the offense is ranked the same as voluntary manslaughter, first degree arson, and sex trafficking of minors. While armed robbery that results in bodily injury is a serious offense, it should not be considered on the same order of magnitude as voluntary manslaughter, first degree arson, and the sex trafficking of minors. First degree arson is defined as knowingly causing a fire or explosion that damages or destroys a building, reckless to the fact that a person is present in the building, and the fire or explosion causes death or serious bodily injury. Voluntary manslaughter includes recklessly, with extreme indifference to human life, causing the death of another.

PDS recommends moving first degree robbery to group 6 and moving each degree of robbery down one offense group, thereby making fifth degree robbery a one year misdemeanor. Moving robbery in this respect would increase the proportionality between offenses.

[9] *Bado*, 186 A.3d at 1264.

[10] California Constitution Article 1 § 16.

[11] Colorado Revised Statutes Title 16 Criminal Proceedings § 16-10-101 Jury trials.

[12] Illinois Compiled Statutes 5/103-6.

[13] Maine Constitution Article 1 § 6.

[14] *Duncan v. Louisiana*, 391 U.S. 145, 155–156 (1968).

Memorandum

Jessie K. Liu
United States Attorney
District of Columbia

Subject: Comments to D.C. Criminal Code Reform Commission for First Draft of Report #41	Date: November 15, 2019

To: Richard Schmechel, Executive Director, D.C. Criminal Code Reform Commission

From: U.S. Attorney's Office for the District of Columbia

The U.S. Attorney's Office for the District of Columbia (USAO) and other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the CCRC's First Draft of Report #41. USAO reviewed this document and makes the recommendations noted below.[1]

Comments on Draft Report #41

1. USAO recommends keeping jury demandability requirements for misdemeanors consistent with current law.

The RCC has proposed making many misdemeanor offenses jury demandable that are not jury demandable under current law. USAO recommends remaining consistent with current law with respect to jury demandability. Under the RCC's proposal, the following offenses would be jury demandable: 6th degree assault (including attempts), all degrees of threats (including attempts), 2nd degree menacing (including attempts), all degrees of offensive physical contact (including attempts), all degrees of trespass (including attempts), stalking (including attempts), sexually suggestive conduct with a minor (including attempts), 1st and 2nd degree nonconsensual sexual conduct (including attempts), 3rd degree criminal neglect of a minor (including attempts), 3rd degree criminal abuse of a minor (likely including attempts), rioting (including attempts), failure to disperse, and possession of an unregistered firearm or ammunition (including attempts).

Creating new rights to demand a jury in misdemeanor cases will strain both prosecutorial and court resources. Jury trials take longer to try than bench trials, and must be scheduled further in advance than bench trials. Thus, creating additional misdemeanor jury trials will require more judges, more jurors (which would result in D.C. residents being called for jury duty more frequently), and additional prosecutorial resources. It may also result in delayed justice for victims, as victims will need to wait longer for cases to resolve at trial.

[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.

According to the D.C. Superior Court data gathered by the CCRC, between 2009 and 2019, there were 3,865 charges of simple assault and 1,312 charges of threats to do bodily harm. Even if just those offenses were deemed jury demandable, that would be a tremendous increase in the number of jury demandable cases.

Further, making these misdemeanor offenses automatically jury demandable runs counter to the D.C. Council's history of making these offenses non-jury demandable. The Omnibus Criminal Justice Reform Amendment Act of 1994, D.C. Law 10-151 (eff. Aug. 20, 1994) had the stated purpose of "reduc[ing] the length of sentence for various crimes to make them non-jury demandable." Council for the District of Columbia, Committee on the Judiciary, Report on Bill 10-98, at 3 (Jan. 26, 1994). The Committee Report further states: "Both the Superior Court and the U.S. Attorney support this change to allow for efficiencies in the judicial process. While there would be no actual monetary savings, this change will relieve pressure on current misdemeanor calendars, allow for more cases to be heard by hearing commissioners, and allow more felony trials to be scheduled at an earlier date." Committee Report at 4.

Fred B. Ugast, then-Chief Judge of the D.C. Superior Court, stated the following regarding these misdemeanor streamlining provisions:

> "Last year, the Council passed an amendment to D.C. Code § 16-705(b)(1) providing for the right to a trial by jury in criminal cases where the maximum penalty exceeds 180 days incarceration or a fine of $1000 (up from 90 days and $300). Because the vast majority of charged misdemeanors currently have maximum penalties of one year, the amendment has not significantly reduced the number of jury trials in misdemeanor cases. Bill [10]-268 and Title V of Bill 10-98 would reduce the maximum penalty of most commonly charged misdemeanors from one year to 180 days and to a fine that does not exceed $1000, thereby eliminating the defendant's entitlement to a trial by jury.
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> "In 1992, the Superior Court disposed of 25,034 misdemeanor cases brought by the United States and the District of Columbia (including cases "no papered" and nolle prossed by the prosecutor). Our best estimate is that at least 20,000 of these cases were jury demandable misdemeanors, for which we have maintained six calendars, each presided over by an associate judge and with between 500 and 600 active cases at any given time. Since 1989, there has been a steady growth in U.S. misdemeanor filings: 13,515 cases were brought in 1989; 17,260 cases were brought in 1992. Given limited judicial resources in light of court-wide demands, it should be obvious that the pressure on these six calendars has become enormous and appears to be growing. As a practical matter, the actual number of misdemeanor jury trials is relatively small and the vast majority of cases is disposed of short of trial. However, carrying a case in which a jury demand has been made and readying it for trial by jury take[s] significantly longer than the comparable time for non jury matters.
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> "Enactment of the revised penalty structure would have little or no effect on the sentences actually imposed on misdemeanants. Notwithstanding one-year maximums now applicable to most misdemeanor offenses, first, even second, and, sometimes, third-time offenders are generally sentenced to probation or incarceration under 180 days.

> Thus, the reduction in sentence maximums is little more than a reflection of current realities. However, the proposed changes would have a significant impact on the Court's ability to manage these calendars and deploy its judicial resources. They would permit the Court to schedule more trials on earlier dates, given the elimination of lengthier jury trials; to reduce court-wide jury costs by nearly $200,000 a year; and, of course, to assign commissioners to some or all of these calendars, thereby freeing up judges to handle the more serious and complex felony cases.
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> "In the final analysis, it is, of course, a question of legislative policy whether persons charged with misdemeanor violations should be afforded a jury trial. Suffice it to note from the Court's point of view, the proposed downgrading of misdemeanor penalties and resultant elimination of jury trials would not adversely affect the quality of justice while, at the same time, it would significantly improve the Court's ability to deliver prompt justice in both misdemeanor and felony cases."

Letter from Fred B. Ugast, Chief Judge, Superior Court of the District of Columbia, to Councilmember James E. Nathanson, Chair, Judiciary Committee, Council of the District of Columbia, Re: Bill 10-98, "Omnibus Criminal Justice Reform Act of 1993"; Bill 10-268, "Misdemeanor Streamlining Amendment Act of 1993" (Sept. 20, 1993).

Likewise, regarding the Misdemeanor Jury Trial Act of 2001, B14-2, [2] Rufus G. King III, then-Chief Judge of the D.C. Superior Court, stated the following:

> "This bill would have a significant impact on a number of aspects of courthouse procedure and hence I felt it important to bring those to your attention.
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> "The U.S. Supreme Court and the D.C. Court of Appeals have both found that there is no constitutional right to a jury trial for misdemeanor offenses punishable by less than six months imprisonment, even when a case involves multiple misdemeanor charges such that the aggregate sentence may exceed six months. This bill would provide a right to a jury trial for those being prosecuted in the District of Columbia on multiple misdemeanor counts if the aggregate penalty exceeded 180 days. The majority of misdemeanants in D.C. are charged with a single count in which the penalty does not exceed 180 days. However more than 38% of the misdemeanor cases tried by the D.C. U.S. Attorney's Office involve multiple misdemeanor charges. While the bulk of these cases (well over 90%) involve only 2 or 3 misdemeanor counts, the majority would become 'jury demandable' because of the possibility of a sentence of more than 180 days.
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> "The Court's concern is the toll this would take on juror and judicial resources. The Court has recently begun implementation of a jury duty enforcement program, to achieve better compliance with its jury summonses and expand the number of available jurors. Over the past few years the Court has enhanced its jurors' lounge and added a 'quiet room' with modems for those who want to use their computers while awaiting jury

[2] As introduced, this bill proposed that, where a defendant is charged with more than one offense, and the cumulative maximum penalty is a fine of more than $1,000 or imprisonment for more than 180 days, the defendant may demand a jury trial. As enacted, this law limited jury demandability to cases where a defendant is charged with multiple misdemeanor offenses if the cumulative maximum penalty is a fine of more than $4,000 or imprisonment for more than two years.

service. Child care is available to all jurors free of charge, in the courthouse itself. In addition, the Court now uses not just voting rolls and lists from the Motor Vehicle Bureau, but also culls potential juror names and addresses from unemployment compensation and public assistance lists, as well as the Department of Revenue rolls. All these efforts have been made to ensure that more D.C. residents voluntarily participate in jury service, that all eligible residents share the responsibility of jury duty and thus that the Court can maintain its current rule requiring jury service no more than once every two years. The Court's assumption is that most defendants would opt for a jury trial if they had the right to demand one. Additional misdemeanor jury trials would put those cases in competition with felonies for available jurors. The Court estimates it would have to summon an additional 8,000 jurors per year to handle the additional misdemeanor jury trials. This increase could result in the Court having to summon jurors more frequently than every two years as provided in the current jury plan.

"This legislation would also result in significantly more judicial time spent on these multiple count misdemeanor cases. Jury trials for minor criminal matters take a day and a half to two days, sometimes longer. Bench trials—the current practice for multiple count misdemeanor cases—typically take between two and four hours. The legislation would dramatically increase the number of jury trials and thus mean each judge would be able to resolve many fewer cases per month. The result would be a longer time between arrest and trial and a realignment of Criminal Division resources from felonies to misdemeanors. To the extent that the 38% of misdemeanor cases prosecuted by the U.S. Attorney's Office become jury trials, there would be a need for more judges handling misdemeanor calendars. The Court estimates that there would be an additional 300 jury trials per year. The Court is currently working with Congress on a reform of its Family Division, and Congress has made clear that additional resources and judges are needed for that crucial work. This bill would result in a further depletion of the resources from other Divisions in order to handle the new jury trials in multiple count misdemeanor cases.

"The Court is currently involved in a major effort to establish a case management plan that would bring it into compliance with case processing guidelines concerning timeliness that have been established by the American Bar Association. An increase of 300 additional misdemeanor jury trials would have a significant impact on the Court's ability to meet the ABA's guideline of disposing of 90% of misdemeanor cases within 90 days and 100% within 100 days. These guidelines are a performance measure that the Court is committed to meeting; without additional judges (and jurors), it would be practically impossible to meet these goals with an increased number of misdemeanor jury trials.

"It is important to note that the vast majority—well over 90%—of multi-count misdemeanor cases involve just two or three counts, and thus the maximum possible penalty, which is rarely imposed, is less than eighteen months. Over 97% of those sentenced in 2000 received 180 days or less; less than a tenth of one percent of the defendants received a sentence of two years or more.

"Most of multi-count misdemeanor cases involve allegations of possession of two or more drugs, possession of drugs when committing another offense, or a domestic violence incident leading to charges of assault along with a weapons charge or a civil protection order. The Court is concerned that scarce judicial resources would be diverted

> from more serious felony trials or from Family Court to try misdemeanor jury trials where only 3% (fewer than 84 individuals) were sentenced to more than 180 days in jail."

Testimony of Chief Judge Rufus G. King III on Behalf of the D.C. Superior Court Before the Judiciary Committee of the D.C. Council (Oct. 12, 2001).

Roscoe C. Howard, Jr., then-U.S. Attorney for the District of Columbia stated that, as a result of the Omnibus Criminal Justice Reform Act of 1994,

> "[m]isdemeanor cases which used to languish up to a year or more are now set for trial within 2 to 3 months of arrest. Instead of taking a few days to try, they take a few hours. This means that a judge might be able to resolve several cases in the same amount of time that it would take a jury to decide one case. Moreover, the certainty of going to trial as scheduled spurs many pleas. The District of Columbia is better served by a more expeditious trial system, which enables victims to return to their lives, and defendants to either get on with their sentence (which usually does not entail jail time for misdemeanors) or, by an acquittal, to put the matter behind them."

Statement of United States Attorney Roscoe C. Howard, Jr. on Bill 14-2, the "Misdemeanor Jury Trial Act of 2001," Committee on the Judiciary, Council of the District of Columbia (Oct. 12, 2001).

The Committee Report to the Misdemeanor Jury Trial Act of 2001 stated:

> "As Councilmember Phil Mendelson noted at the Committee hearing on October 12, 2001, the 'right to trial by jury [is] a fundamental right. It is fundamental to the American scheme of justice, [and] it is so fundamental that this right appears in not one, but two places in the United States Constitution.' While the U.S. Supreme Court has held that it is permissible to aggregate misdemeanor penalties without violating the Sixth Amendment, the Committee has determined that, as a matter of public policy, there should be limits placed on the amount of time a person can be imprisoned without the right to a jury trial. The threshold for a jury demandable offense was set at two years in order to balance the interests of justice and fairness to the defendant with the efficiency of the judicial process."

Council for the District of Columbia, Committee on the Judiciary, Report on Bill 14-2, at 1–2 (Nov. 21, 2001).

As reflected in this Committee Report, the D.C. Council has already balanced the defendant's interests with the judicial process efficiency interests, and the RCC should remain consistent with this previously legislated balance.

2. USAO recommends, consistent with current law, a maximum sentence of life imprisonment for the offenses of enhanced 1st degree homicide, enhanced 2nd degree homicide, enhanced 1st degree sexual assault, 1st degree sexual abuse of a minor (both enhanced and unenhanced), and enhanced 2nd degree sexual abuse of a minor.[3]

Under current law, 1st degree murder and 1st degree murder while armed are subject to a 60-year statutory maximum without the presence of aggravating circumstances, and life imprisonment with aggravating circumstances. D.C. Code §§ 22-2104(a); 24-403.01(b-2)(1)–(2). 2nd degree murder and 2nd degree murder while armed are subject to a 40-year statutory maximum without the presence of aggravating circumstances, and life imprisonment with aggravating circumstances. D.C. Code §§ 22-2014(c); 24-403.01(b-2)(1)–(2). 1st degree sexual abuse and 1st degree sexual abuse while armed are subject to a 30-year statutory maximum without the presence of aggravating circumstances, and life imprisonment with aggravating circumstances. D.C. Code §§ 22-3002; 22-3020; 24-403.01(b-2)(1)–(2). 1st degree child sexual abuse and 1st degree child sexual abuse while armed are also subject to a 30-year statutory maximum without the presence of aggravating circumstances, and life imprisonment with aggravating circumstances. D.C. Code §§ 22-3008; 22-3030; 24-403.01(b-2)(1)–(2).

A statutory maximum of life imprisonment never requires a judge to sentence a defendant to life imprisonment. Rather, it recognizes that murder, vaginal, anal, or oral sexual assault involving force or children can be particularly horrific, heinous, and/or gruesome offenses. A statutory maximum of life imprisonment allows the judge the possibility of sentencing a defendant to life imprisonment in the particularly brutal cases in which that is an appropriate sentence. A statutory maximum should reflect the worst possible version of that offense, and allow the judge discretion to impose an appropriate sentence. D.C. Superior Court data provided by the CCRC shows that, between 2009 and 2019, judges have imposed 6 life sentences for 1st degree child sexual abuse, 9 life sentences for 1st degree murder (felony murder), and 22 life sentences for 1st degree murder (other than felony murder). Advisory Group Memo #28, App. C at 1. There are no cases listed in which a charge of 1st degree sexual abuse resulted in a life sentence, but USAO is aware of at least one case in which the judge imposed a life sentence for 1st degree sexual abuse while armed, having been found guilty of committing sex offenses against 2 or more victims (along with sentences for other charges).[4] This data shows that, although life sentences are imposed infrequently, there are some rare cases in which D.C. Superior Court judges have found it appropriate to impose these sentences in recent years.

The RCC has proposed categorizing felony murder as 2nd degree homicide instead of 1st degree homicide. USAO strongly opposed this change in its July 8, 2019 comments on Report #36 (at 16). If the RCC adopts USAO's recommendation, and categorizes felony murder as 1st degree homicide, then USAO no longer believes that a statutory maximum of life imprisonment is necessary for enhanced 2nd degree homicide. Rather, a statutory maximum of 60 years (Class

[3] As discussed in its July 8, 2019 comments on Report #36 (at p. 45), USAO recommends applying the Offense Penalty Enhancements in RCC § 22E-1301(g) to all offenses in RCC §§ 1301–1307. Applying these enhancements to all sex offenses is crucial, and protects important interests. Among other offenses, this would create an enhanced penalty for sexual abuse of a minor.

[4] This case is Demetrius Banks, 2015 CF1 12148.

2) for enhanced 2nd degree homicide, and a statutory maximum of 40 years (Class 3) would be appropriate for 2nd degree homicide. If the RCC does not accepts USAO's recommendation, then USAO believes it is appropriate for enhanced 2nd degree homicide to have a statutory maximum of life imprisonment (Class 1), and 2nd degree homicide to have a statutory maximum of 40 years (Class 3).

Further, USAO recommends creating a statutory maximum of life imprisonment for enhanced 1st degree sexual assault, 1st degree sexual abuse of a minor (both enhanced and unenhanced), and enhanced 2nd degree sexual abuse of a minor. Enhanced 1st degree sexual assault could include particularly gruesome or horrific facts, such as a home invasion followed by a brutal armed rape, committed by a serial rapist, against a young child that resulted in serious injuries. A maximum of life imprisonment would allow a judge to use his/her discretion to impose an appropriate sentence after accounting for the conduct at issue, the defendant's criminal history, and any other information that may be relevant.

USAO recommends including 1st degree sexual abuse of a minor (both enhanced and unenhanced) and enhanced 2nd degree sexual abuse of a minor to track current law. 1st degree sexual abuse of a minor is, in effect, an enhanced version of the current 1st degree child sexual abuse statute, in that it includes the enhancement for a victim under 12 years old in its elements. 2nd degree sexual abuse of a minor tracks the current 1st degree child sexual abuse statute where the victim is 12 years old or older. Thus, both enhanced 1st and 2nd degree sexual abuse of a minor would be comparable to the current 1st degree child sexual abuse statute with aggravating circumstances, which has a statutory maximum of life imprisonment. Particularly if the RCC does not permit the possibility of the sex offense penalty enhancements with this provision, the statutory maximum must include the conduct that would otherwise be captured by those enhancements. This would include the existence of a significant relationship, such as the victim being abused by a biological parent or grandparent, the presence of multiple assailants, etc. Frequently, child sexual abuse is not forced, and would not qualify as a forced sexual assault, because the perpetrator uses various forms of grooming to induce the victim's submission to the sexual acts, and to ensure that the victim remains silent about the abuse to allow the abuse to continue for a prolonged period of time. Non-forced abuse could result in the victim becoming pregnant, contracting a sexually transmitted disease, suffering significant emotional distress including suicidal thoughts and actions, or various other serious consequences. Non-forced sexual abuse of children can be just as brutal as forced sexual assault, and the statutory maximum should account for that.

USAO therefore recommends ranking enhanced 1st degree homicide, enhanced 2nd degree homicide, enhanced 1st degree sexual assault, 1st degree sexual abuse of a minor, and enhanced 2nd degree sexual abuse of a minor as Class 1 felonies, and that Class 1 felonies have a maximum penalty of life imprisonment.

3. <u>USAO recommends increasing the proposed penalties for Manslaughter.</u>

Under current law, Manslaughter is subject to a 30-year statutory maximum. D.C. Code § 22-2015. The D.C. Code does not distinguish between Voluntary and Involuntary Manslaughter. Voluntary Manslaughter is categorized as a Group 4 offense in the D.C.

Sentencing Guidelines, and Involuntary Manslaughter is categorized as a Group 5 offense in the D.C. Sentencing Guidelines. Voluntary Manslaughter while armed is categorized as a Group 3 offense in the D.C. Sentencing Guidelines, and Involuntary Manslaughter while armed is categorized as a Group 5 offense in the D.C. Sentencing Guidelines. The RCC has proposed that Voluntary Manslaughter be a Class 5 offense with a 20-year statutory maximum, and that Involuntary Manslaughter be a Class 7 offense with a 10-year statutory maximum.[5] The RCC has proposed that Enhanced Voluntary Manslaughter be a Class 4 offense, and Enhanced Involuntary Manslaughter be a Class 6 offense.

Although USAO does not object to a lower statutory maximum for Involuntary Manslaughter than for Voluntary Manslaughter, USAO believes that the statutory maximum for each offense should be increased. Consistent with current law, Voluntary Manslaughter should be subject to a 30-year statutory maximum (Class 4), and Involuntary Manslaughter should be subject to a 20-year statutory maximum (Class 5). The enhanced versions of Voluntary and Involuntary Manslaughter should be Class 3 and Class 4, respectively. Although the RCC has permitted higher punishments for enhanced versions of these offenses, the reality is that these enhancements will rarely be used. Most charges of manslaughter involve cases with imperfect self-defense claims. In such cases, the offender's knowledge of the victim's status as a protected person may be difficult to assess, or to prove. Thus, USAO will not be able to charge the enhancement. Although there could be cases where the enhancement is appropriate, USAO does not want the enhancements to, in effect, diminish the value of the unenhanced offense by creating a lower maximum for the unenhanced version of the offense.

4. USAO recommends increasing the proposed penalties for Burglary.

Under current law, 1st Degree Burglary has a 30-year statutory maximum, and 2nd Degree Burglary has a 15-year statutory maximum. D.C. Code § 22-801. 1st Degree Burglary is currently ranked as a Category 5 offense in the D.C. Sentencing Guidelines, with a low-end guideline of 3 years' incarceration for a person with a Class A criminal history. The RCC has proposed ranking 1st Degree Burglary as a Class 8 felony, with a 5-year statutory maximum, 2nd Degree Burglary as a Class 9 felony, with a 3-year maximum, and 3rd Degree Burglary as a Class A misdemeanor, with a 1-year maximum. USAO recommends increasing these rankings, as they understate the serious nature of burglaries.

With the proposed statutory maximum of 5 years' incarceration under the RCC for 1st Degree Burglary, a defendant could only effectively receive a sentence of 3 years' incarceration due to the requirement that back-up time be reserved. *See* D.C. Code § 24-403.01(b-1). Thus, the RCC has proposed that the new statutory maximum essentially be the same period as the current minimum sentencing guideline for a person with no criminal history. This is inappropriate.

[5] USAO recognizes that the CCRC is not at this time recommending specific penalties, but rather assessing relative severity of offenses. Because the specific penalties proposed, however, are a useful tool to help assess USAO's view of the relative severity of offenses, USAO will rely on the proposed penalties in its analysis. Because Model 1 is a closer corollary to the penalties under current law, and because it creates higher penalties , USAO will rely on Model 1 proposals in this discussion.

A statutory maximum should not represent the minimum that the legislature believes a crime should be punished, or even the average amount that the legislature believes a crime should be punished. Rather, a statutory maximum should reflect the legislature's belief as to what a person should be sentenced to for the worst possible version of that offense. It would not be appropriate for every defendant sentenced for that offense to receive the maximum penalty, but that sentence should be available for those who merit it. Although some burglaries are accompanied by offenses that carry higher maximum sentences (for example, if a defendant murdered, violently assaulted, or raped someone in the course of a burglary), many burglaries are not. If, for example, a defendant entered a victim's home while the victim and the victim's young children were asleep, and the victim woke up to the defendant punching the victim (6th Degree Assault), threatening to rape the victim's young children (1st Degree Threats), or even threatening to rape the victim at gunpoint (1st Degree Menacing), that defendant has engaged in serious conduct through the burglary and related offenses that has traumatized that victim and should be punished accordingly. Burglaries are a unique invasion of privacy that can destroy a person's feelings of safety and security in their own home. That feeling of an invasion of privacy could even exist more prominently for a burglary than, for example, if a person was robbed at gunpoint on a street. A home should be a place where a person can be secure, and a defendant who invades that space with the purpose of committing a crime should be punished accordingly.[6] USAO therefore recommends ranking 1st, 2nd, and 3rd Degree Burglary as Class 4, Class 6, and Class 7 offenses, respectively.

5. <u>USAO opposes decreasing penalties for firearms offenses from those in current law.</u>

In a time of increased gun violence, an increase in homicides in the District, and a need to reduce the number of guns in the District, the RCC should not lower penalties for firearms offenses. Firearm violence is a critical public safety issue, and the firearms that lead to that violence should not be treated lightly. Indeed, the D.C. Council recently increased the penalty for possessing a large capacity ammunition feeding device from 1 year's imprisonment to 3 years' imprisonment. Firearms Safety Omnibus Amendment Act of 2018, D.C. Law 22-314 (eff. May 10, 2019). In support of that amendment, the Committee on the Judiciary and Public Safety cited to recent mass shootings that involved these high-capacity magazines. Council for the District of Columbia, Committee on the Judiciary and Public Safety, Report on Bill 22-588, at 3–5 (Nov. 28, 2018). The Committee Report also cited to the homicide rate in the District, including the fact that the majority of homicides were committed with a firearm. *Id.* at 5. In increasing this penalty, the Committee found "that the increased lethality of a weapon using a large capacity ammunition feeding device—accomplished through its ability to fire more rounds without reloading—and the resulting threat to the public and law enforcement, warrants a more stringent prohibition on their possession. Court records related to the shooting of Makiyah Wilson revealed that a large capacity ammunition magazine was likely used in the incident. . . . The Committee, therefore, adopts an incremental response on this issue commensurate with the prevalence of the problem in the District and the increased lethality of the devices." *Id.* at 18.

[6] Further, USAO proposed adding a "while armed" enhancement to burglary in its July 8, 2019 comments on Report #36 (at 83), and that recommendation is pending. If that recommendation is not accepted, however, it would mean that an armed burglary is subject only to a 5-year maximum sentence, which is wholly insufficient.

6. USAO recommends increasing the proposed penalties for Carrying a Dangerous Weapon.

2nd Degree Carrying a Dangerous Weapon is the equivalent of the current Carrying a Pistol Without a License ("CPWL") statute. Under current law, CPWL is subject to a 5-year statutory maximum, or a 10-year statutory maximum if the defendant has a previous conviction for CPWL or another felony. D.C. Code § 22-4504(a). The RCC has proposed making 2nd Degree Carrying a Dangerous Weapon a Class 9 felony, subject to a 3-year statutory maximum. This would lower the applicable penalty for CPWL, and is inconsistent with CPWL's ranking as a Group 8 offense in the D.C. Sentencing Guidelines. As discussed above, the RCC should not lower penalties for firearms offenses. USAO recommends ranking 1st and 2nd degree Carrying a Dangerous Weapon as Class 7 and 8 felonies, respectively.

7. USAO recommends increasing the proposed penalties for Possession of a Firearm by an Unauthorized Person.

The RCC has proposed ranking 1st Degree Possession of a Firearm by an Unauthorized Person as a Class 9 felony, with a 3-year statutory maximum, and 2nd Degree Possession of a Firearm by an Unauthorized Person as a Class A misdemeanor, with a 1-year statutory maximum. This is a steep drop from current penalties, and is inappropriate. The RCC has essentially proposed that the new statutory maximums be equal to the mandatory minimums under current law. *See* D.C. Code § 22-4503. Due to requirements regarding back-up time, *see* D.C. Code § 24-403.01(b-1), that means that the current mandatory minimum would not even be a permissible sentence for 1st Degree Possession of a Firearm by an Unauthorized Person. Under current law, a person who has been previously convicted of a felony or is subject to other limitations on firearm possession is subject to a 10-year statutory maximum, and a person who has been previously convicted of a crime of violence is subject to a 15-year statutory maximum. D.C. Code § 22-4503(b)(1). USAO recommends ranking 1st Degree and 2nd Degree Possession of a Firearm by an Unauthorized Person as Class 6 and Class 7 felonies, respectively.

Crucially, persons convicted of this offense not only carried a firearm, but also had been previously convicted of a felony or crime of domestic violence, or a prior crime of violence. Persons previously convicted of these offenses should not be permitted to carry firearms, and should be subject to penalties commensurate with their actions.

Further, it is incongruous that the penalty for 2nd Degree Carrying a Dangerous Weapon is the same penalty as 1st Degree Possession of a Firearm by an Unauthorized Person who has a prior conviction for a crime of violence (Class 9 felony), and is punished more severely than 2nd Degree Possession of a Firearm by an Unauthorized Person. It should be a more serious offense to possess a weapon after having been convicted of a crime than to possess a weapon generally.

8. USAO recommends increasing the proposed penalties for Possession of a Dangerous Weapon During a Crime.

The RCC has similarly proposed ranking 1st Degree Possession of a Dangerous Weapon During a Crime as a Class 9 felony, with a 3-year statutory maximum, and 2nd Degree Possession of a Dangerous Weapon During a Crime as a Class A misdemeanor, with a 1-year statutory

maximum. This also represents a steep drop from current penalties, and is also inappropriate. The RCC has essentially proposed that the new statutory maximum for this offense be substantially *lower* than the mandatory minimum under current law. *See* D.C. Code § 22-4504(b). Under current law, a person convicted of Possession of Weapons During Commission of a Crime of Violence is subject to a 15-year statutory maximum. *Id.* As detailed in its September 30, 2019 comments to Reports #39 and 40 (at 6), USAO opposes creating different gradations of this offense for firearms and imitation firearms, as it is frequently impossible to prove where a firearm is real or imitation. Assuming that the CCRC accepts USAO's recommendation and includes imitation firearms in 1st Degree, USAO recommends ranking 1st Degree Possession of a Dangerous Weapon During a Crime as a Class 6 felony, and ranking 2nd Degree Possession of a Dangerous Weapon During a Crime as a felony. If the CCRC does not accept USAO's recommendation regarding imitation firearms, USAO recommends ranking both 1st Degree and 2nd Degree as Class 6 felonies.

As stated above, USAO opposes reducing maximum penalties for firearms offenses at a time when firearms violence is a threat to the public safety of the community. This offense involves not just possession of firearms, but possession of firearms when the firearms are being used to commit offenses against others. This proposal does not adequately deter either possession of firearms or the use of firearms during the commission of offenses against others. USAO therefore recommends that the penalties for this offense track current law.

9. <u>USAO recommends that all gradations of Trafficking of a Controlled Substance and Trafficking of a Counterfeit Substances be felony offenses.</u>

The RCC has proposed numerous gradations of Trafficking of a Controlled Substance and Trafficking of a Counterfeit Substance. Although USAO does not oppose multiple gradations, USAO recommends that all gradations be felonies. As drafted, 4th Degree Trafficking of a Controlled Substance includes trafficking of any controlled substance listed in Schedule I, II, or III, that is not specifically listed as one of the eight controlled substances prohibited by 1st, 2nd, or 3rd Degree Trafficking. 5th Degree Trafficking of a Controlled Substance includes trafficking of any controlled substance. Trafficking of any controlled substance, regardless of the type of substance, should constitute a felony offense.

10. <u>USAO recommends increasing the proposed penalties for Robbery.</u>

4th Degree Robbery is the equivalent of the current offense of Armed Robbery without injury, and 5th Degree Robbery is the equivalent of the current offense of Robbery. The RCC has proposed that 4th Degree Robbery be a Class 8 felony, with a statutory maximum of 10 years' incarceration, and that 5th Degree Robbery be a Class 9 felony, with a statutory maximum of 5 years' incarceration. Under current law, Robbery is a subject to a statutory maximum of 15' years' imprisonment, and Armed Robbery is subject to a statutory maximum of 30 years' imprisonment. D.C. Code §§ 22-2801; 22-4502. Under the RCC's proposal, the most serious gradation of Robbery—1st Degree Robbery—is a Class 5 offense, subject only to a statutory maximum of 20 years' incarceration. USAO recommends that 1st Degree Robbery be a Class 4 offense, 2nd Degree Robbery be a Class 5 offense, 3rd Degree Robbery be a Class 6 offense, 4th Degree Robbery be a Class 7 offense, and 5th Degree Robbery be a Class 8 offense.

Further, in its July 8, 2019 comments on Report #36 (at 30–31), USAO opposed subsuming the offense of Carjacking within the offense of Robbery. The RCC has proposed that 3rd Degree Robbery—which includes the equivalent of the current offense of Armed Carjacking—be a Class 7 felony subject to a statutory maximum of 10 years' incarceration. The RCC has proposed that 4th Degree Robbery—which includes the equivalent of the current offense of Carjacking—be a Class 8 felony, with a statutory maximum of 5 years' incarceration. These statutory maxima are lower than the current mandatory minima for these offenses. *See* D.C. Code § 22-2803. Under current law, the statutory maximum for Carjacking is 21 years' incarceration, and the statutory maximum for Armed Carjacking is 40 years' incarceration, but may only exceed 30 years' incarceration if certain aggravating factors are present. D.C. Code §§ 22-2803; 24-403.01(b-2). Likewise, Armed Carjacking is a Group 3 offense under the D.C. Sentencing Guidelines, and Carjacking is a Group 4 offense under the D.C. Sentencing Guidelines. Carjacking is a serious offense, and the statutory maximum should reflect that. USAO recommends that, if USAO's recommendations are accepted, and Carjacking is a stand-alone offense in the RCC, that Carjacking be a Group 5 offense, and Armed Carjacking be a Group 4 offense.

11. USAO recommends increasing the proposed penalties for 1st Degree Menacing.

The RCC has categorized 1st Degree Menacing as a Class 9 felony, with a statutory maximum of 3 years' incarceration. This offense is the equivalent of the current offense of Assault with a Dangerous Weapon, where the weapon is never fired. That offense is subject to a statutory maximum of 10 years' incarceration. D.C. Code § 22-402. USAO believes that the offense of 1st Degree Menacing should be penalized more severely, as either a Class 7 felony or a Class 8 felony. In the public opinion survey conducted by the CCRC, respondents ranked "threatening to kill someone face-to-face, which displaying a gun," at a mean score of 7.6 Advisory Group Memo #27, at 2. This demonstrates that, even where the gun is not fired, public opinion supports attaching a greater penalty to this offense.

12. USAO recommends increasing the proposed penalties for Enhanced Stalking.

Under current law, Stalking is a misdemeanor subject to a 12-month statutory maximum if there are no aggravating circumstances present, a 5-year statutory maximum if there are certain aggravators present, and a 10-year statutory maximum if the defendant has 2 or more prior convictions for stalking. D.C. Code § 22-3134. USAO does not object to the RCC's categorization of Stalking as a Class A misdemeanor subject to a 1-year statutory maximum. For the reasons described above, however, with respect to jury demandability, USAO recommends that Attempted Stalking not be jury demandable. With respect to Enhanced Stalking, USAO recommends that Enhanced Stalking be categorized as a Class 8 felony subject to a 5-year statutory maximum. Stalking is serious behavior that can be linked to lethal behavior. The penalty enhancements in the RCC, including the violation of a no contact order or a previous conviction for stalking, are particularly serious and should be punished accordingly.

13. USAO recommends increasing the proposed penalties for Criminal Neglect of a Minor and Criminal Neglect of a Vulnerable Adult.

The RCC has proposing ranking 1st, 2nd, and 3rd Degree Criminal Neglect of a Minor and Criminal Neglect of a Vulnerable Adult as Class 8, 9, and A offenses, respectively. Under current law, with respect to children, this conduct is included within both 1st and 2nd Degree Cruelty to Children. 1st Degree Cruelty to Children includes conduct that "creates a grave risk of bodily injury to a child, and thereby causes bodily injury." D.C. Code § 22-1101(a). Both 1st and 2nd Degree Criminal Neglect of a Minor have a higher standard than this, in that they require that the defendant create a "substantial risk that the complainant would experience serious bodily injury or death" or create "a substantial risk that the complainant would experience significant bodily injury," although they does not require any bodily injury. RCC § 22E-1502(a)–(b). Given the overlap of these provisions, USAO believes it is appropriate for the statutory maximum for both 1st and 2nd Degree Criminal Neglect of a Minor to be the same as the current penalty for 1st Degree Cruelty to Children—15 years' incarceration (Class 6). *See* D.C. Code § 22-1101(c)(1). USAO is also concerned that the provision in 3rd Degree Criminal Neglect of a Minor regarding knowingly abandoning a child be appropriately punished. *See* RCC § 22E-1502(c)(2)(A). Under current law, that offense is subject to a statutory maximum of 10 years' incarceration as 2nd Degree Cruelty to Children. D.C. Code § 22-1101(b), (c)(2). USAO accordingly recommends that both 1st Degree and 2nd Degree Criminal Neglect of a Minor be categorized as Group 6 offenses, and that 3rd Degree be categorized as a Group 7 offense. USAO recommends that the penalties for Criminal Neglect of a Vulnerable Adult track the penalties for Criminal Neglect of a Minor.

14. USAO recommends decreasing the monetary thresholds in each gradation for Theft, Fraud, Identity Theft, and Extortion.

USAO does not oppose the highest gradation of these offense being a Class 7 offense, but the monetary thresholds for each gradation are so high that the top gradations will likely only be used very rarely, if ever. USAO proposes eliminating the top gradation of $500,000, and creating only four gradations. USAO also proposes that car theft be punished more severely than currently proposed. Therefore, USAO proposes creating the following thresholds for these offenses:

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

15. USAO recommends increasing the proposed punishment for Unauthorized Use of a Motor Vehicle.

Under current law, Unauthorized Use of a Motor Vehicle ("UUV") is a felony subject to a 5-year statutory maximum, and a 10-year statutory maximum if the defendant caused the motor vehicle to be taken, used, or operated during the court of or to facilitate a crime of violence. D.C. Code § 22-3215(d). The RCC has proposed making this offense a Class A misdemeanor with a

1-year statutory maximum. This offense should be a Class 8 felony. This ranking is consistent with the placement of UUV as a Group 8 offense in the D.C. Sentencing Guidelines. Making this offense a misdemeanor will substantially decrease deterrence for auto theft. Although there is a separate punishment for auto theft under the theft statute, RCC § 22E-2101(c), it can be difficult, in practice, to prove that a person stole a car, even when the person did, in fact, steal a car. Likewise, when a person, in fact, commits a carjacking, it may be difficult to prove that the person committed the carjacking. Thus, UUV may be the only offense available for prosecution of a person who either carjacked a car or stole a car.

16. USAO recommends that all gradations of Escape be felonies.

As USAO stated in its July 8, 2019 comments on Report #36 (at p. 84), USAO recommends that all gradations of Escape be felony offenses, including where a defendant escapes from a halfway house. This is especially true where the underlying offense for which a defendant was sent to a halfway house is itself a felony. If escape from a halfway house is a misdemeanor, especially a Class C misdemeanor as recommended, there will be very minimal deterrent effect to keep a defendant from leaving a halfway house.

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 23, 2020

SUBJECT: First Draft of Report #42, Obscenity, Privacy, and Related 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 #42, Obscenity, Privacy, and Related Offenses.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22E-701. DEFINITIONS

On page 3 of the Report it defines "Live performance." It states, "'Live performance' means a play, dance, or other visual presentation or exhibition for an audience." In the Explanatory Note it states "The RCC definition of "live performance" is used in the revised offenses of unlawful creation or possession of a recording, arranging a live sexual performance of a minor, and attending or viewing a live sexual performance of a minor." While OAG agrees that the definition works in most cases, it does present an issue of applicability when applied to some of these offenses.

[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.

For example, the elements of First Degree Attending or Viewing a Live Sexual Performance of a Minor, pursuant to RCC § 22E-1810, is:

(a) … [A]n actor commits attending or viewing a live sexual performance of a minor when that actor:
    (1) Knowingly attends or views a live performance or views a live broadcast;
    (2) Reckless as to the fact that the live performance or live broadcast depicts, in part or whole, the body of a real complainant under the age of 18 years of age engaging in or submitting to:
        (A) A sexual act or simulated sexual act;
        (B) Sadomasochistic abuse or simulated sadomasochistic abuse;
        (C) Masturbation or simulated masturbation; or
        (D) A sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering.

Plugging in the definition of "live performance" to RCC § 22E-1810(a)(1) we get "Knowingly attends or views a play, dance, or other visual presentation or exhibition for an audience or views a live broadcast. The issue is whether a person who arranges a live sexual performance of a minor for the viewing pleasure of a single person and the single person viewing the live sexual performance are guilty of an offense. The RCC does not define the word "audience." Merriam-Webster defines "audience" as "a group of listeners or spectators."[2] To resolve this issue, OAG suggests that the definition of "Live performance" be amended to say that it "means a play, dance, or other visual presentation or exhibition for an audience, including an audience of one."

RCC § 22E-1803. VOYEURISM

RCC § 22E-1803 (a) states that a person commits first degree voyeurism when they:

(1) Knowingly:
    (A) Creates an image, other than a derivative image, of the complainant's nude or undergarment-clad genitals, pubic area, anus, buttocks, or developed female breast below the top of the areola; or
    (B) Creates an image or audio recording, other than a derivative image or audio recording, of the complainant engaging in or submitting to a sexual act or masturbation;
(2) Without the complainant's effective consent; and
(3) In fact, the complainant has a reasonable expectation of privacy under the circumstances.

The improper creation of an image under subparagraph (A) can happen in two scenarios, 1) where the complainant approves of the person seeing them fully or partially nude but does not

[2] See https://www.merriam-webster.com/dictionary/audience.

give effective consent for the creation of an image and 2) where the complainant is unaware that the person is viewing them or creating the image. Because this can happen in the two scenarios, there is a question about what is meant by "without the complainant's effective consent." Does it apply to creation of the image alone or does it apply to the actual viewing of the nude complainant?[3] To clarify the scope of the effective consent, OAG recommends that subparagraph (a)(2) be redrafted to say, Without the complainant's effective consent to being observed and for the creation of an image."[4]

RCC § 22E-1803(c)(3) provides for the penalty enhancements for the offense of Voyeurism. In addition to the general penalty enhancements that apply, "the penalty classification for this offense may be increased in severity by one class when, in addition to the elements of the offense, it is proven that the actor knew the complainant was under 18 years of age." [emphasis added] The Commentary does not explain why the penalty enhancement is limited to situations where the actor "knew" the complainant was under 18. OAG would note that the following offenses and/or their enhancements apply when the complainant is in fact a minor or the actor is negligent as to the fact that the complainant is under 18 years of age (or in some cases a lower age): RCC § 22E-1302, Sexual Abuse of a Minor; RCC § 22E-1304, Sexually Suggestive Conduct with a Minor; RCC § 22E-1305, Enticing a Minor into Sexual Conduct; RCC § 22E-1306, Arranging for Sexual Conduct with a Minor; RCC § 22E-1605, Sex Trafficking of Minors; RCC § 22E-1806, Distribution of an Obscene Image to a Minor; RCC § 22E-1807, Trafficking an Obscene Image of a Minor; RCC § 22E-1808, Possession of an Obscene Image of a Minor; RCC § 22E-1809, Arranging a Live Sexual Performance of a Minor; and RCC § 22E-1810, Attending or Viewing a Live Sexual Performance of a Minor. As the offense of Voyeurism, the creation of a sexual image, is closely related to some of the foregoing offenses when the complainant is a minor and because none of those offenses require that an actor knew the complainant was under a specific age, OAG recommends that RCC § 22E-1803(c)(3) be redrafted to apply when the actor was reckless as to the fact that the complainant was under 18 years of age..

RCC § 22E-1804. UNAUTHORIZED DISCLOSURE OF SEXUAL RECORDINGS

RCC § 22E-1804 (c) provides for an affirmative defense. Subparagraph (2) provides the burden of proof. It states, "The defendant has the burden of proof for an affirmative defense by a preponderance of the evidence." OAG recommends that this provision be redrafted to clarify that defendant has both the he "burden of production" and the "burden of persuasion" (i.e.,Proof by preponderance of the evidence

RCC § 22E-1805. DISTRIBUTION OF AN OBSCENE IMAGE

[3] The same analysis applies to RCC § 22E-1803 (a)(1)(B).
[4] To make the effective consent provision in second degree voyeurism parallel, OAG also suggests that (b)(2) be amended to read "Without the complainant's effective consent to be observed."

The first element of this offense includes when the actor "Knowingly distributes or displays to a complainant an image that depicts a real or fictitious person engaging in or submitting to an actual or simulated… Sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering…"[5] This provision is clear in situations where the complainant is engaging in behavior that is sexual (or sexualized) in nature. However, through the use of electronic equipment a person can focus in on the complainant in such a way, or edit otherwise non-sexual behavior, to make it appear sexual (or sexualized). While OAG believes that this offense would cover such manipulated images, to avoid any ambiguity, OAG suggests that this provision be redrafted to make clear that the language pertaining to sexual or sexualized image pertains to the image that is eventually distributed, not what the person who was filmed was actually doing.

Paragraph (2) requires that the person act without the complainant's effective consent. To explain this in the context of "Relation to Current District Law, the Commentary, states, ".,.the revised offense makes it unlawful to distribute or display obscene materials only if it is unsolicited, unwelcome, and unwanted." However, these two statements are not coextensive because lack of effective consent can occur in more situations than where materials are distributed "unsolicited, unwelcome, and wanted. To clarify the Commentary, OAG suggests that this phrase be redrafted to state "the revised offense makes it unlawful to distribute or display obscene materials only if it is unsolicited, unwelcome, and unwanted, and in other situations were effective consent has not been given."

RCC § 22E-1806. DISTRIBUTION OF AN OBSCENE IMAGE TO A MINOR

RCC § 22E-1806 decriminalizes the distribution of obscene images to a minor by a person under the age of 18 to a complainant who is under 16 years of age. Paragraph (a)(3) states that the offense only applies when "[I]n fact, the actor is 18 years of age or older and at least 4 years older than the complainant. However, the Commentary does not explain why it should not be an offense for a teenager to show obscene images to a young child. Showing obscene imagines to a child is frequently done as part of grooming the child for sexual relations. OAG has prosecuted teenagers aged 14 to 17 for child sexual assault of children between the ages of 4 and 8 in

[5] The full text of RCC § 22E-1805 is:

(a) An actor commits distribution of an obscene image when that actor:
  (1) Knowingly distributes or displays to a complainant an image that depicts a real or fictitious person engaging in or submitting to an actual or simulated:
    (A) Sexual act;
    (B) Sadomasochistic abuse;
    (C) Masturbation;
    (D) Sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering;
    (E) Sexual contact; or
    (F) Sexual or sexualized display of the breast below the top of the areola, or buttocks, when there is less than a full opaque covering;
  (2) Without the complainant's effective consent; and
  (3) Reckless as to the fact that the image is obscene.

situations where prior to the sexual assaults the teenager showed the younger child pornography on numerous occasions. The goal of the juvenile justice system is to rehabilitate youth so that they do not commit offenses when they become adults. By failing to treat a teenager who grooms younger children by showing them sexually explicit movies, we are not only failing to treat the teenager, and thus rehabilitate them, prior to them committing sexual offenses as adults for the same behavior, but we are failing to address the victimization of those future younger children who need not have been groomed or assaulted. This is not to say that OAG believes that this offense should apply when a child distributes or displays such an image to a friend of similar age. To address this problem, OAG suggests that paragraph (a)(3) be redrafted to say, "I]n fact, the actor is at least 4 years older than the complainant."

RCC § 22E-1806 (c) creates an affirmative defense for a defendant who "(A) Is an employee of a school, museum, library, or movie theater (B) is acting in within the reasonable scope of that role; and (C) Has no control over the selection of the image." As these individuals do not have a choice concerning what films their employers show, OAG agrees that these individuals should be able to avail themselves of this affirmative defense. However, there are other venues that also show movies and the employees of those venues should be able to avail themselves of this affirmative defense as well. For example, movies in the District are shown at the convention centers, RFK Stadium Armory, Gateway DC, and at outdoor venues. Rather than litigate whether these facilities are movie theaters, OAG recommends that RCC § 22E-1806 (c)(A) be amended to include a catchall provision as follows, "Is an employee of a school, museum, library, movie theater, or other venue."[6]

RCC § 22E-1807. TRAFFICKING AN OBSCENE IMAGE OF A MINOR[7]

RCC § 22E-1807 presents a similar issue as the decriminalization of distribution of obscene images to a minor explained above. Paragraph (c)(4)(B) excludes from liability an actor who is under 18 years of age and who "[a]cted with the effective consent of every person under 18 years of age who is, or who will be, depicted in the image, or reasonably believed that every person under 18 years of age who is, or who will be, depicted in the image gave effective consent." An example may be helpful to highlight the issue. Say a 17 year old knowingly makes an image of an 8 year old, whom they have groomed, engaging in a sexual act accessible to an audience on an electric platform. The 17 year old would not be guilty of this offense if the 8 year old gave effective consent. Because the 8 year old was groomed, the 8 year old gave consent that was not "induced by physical force, a coercive threat, or deception."[8] In addition to the arguments that OAG made concerning the decriminalization of distribution of obscene images to a minor explained above, OAG does not believe that young children are capable of giving effective consent to the distribution of their sexual images. To resolve these issues OAG proposes that

[6] OAG suggests that this language also be incorporated into the other offenses in Report #42 that have the same affirmative defense.

[7] The same comment, analysis, and suggestion should be applied to paragraph (c)(4)(B) of RCC § 22E-1808, Possession of an Obscene Image of a Minor and paragraph (c)(2)(B) of RCC § 22E-1809, Arranging a Live Sexual Performance of a Minor."

[8] RCC § 22E-701 states that "'Effective consent' means consent other than consent induced by physical force, a coercive threat, or deception."

paragraph (c)(4)(B) add a sentence that says, "However, this exclusion does not apply if the actor is at least 4 years older than the complainant or the complainant is 8 years old or younger."

RCC § 22E-1810. ATTENDING OR VIEWING A LIVE SEXUAL PERFORMANCE OF A MINOR

The Commentary states, "Mere nudity is not sufficient for a "sexual or sexualized display" in subparagraphs (a)(2)(D) or (b)(2)(D). There must be a visible display of the relevant body parts with an unnatural or unusual focus on them, regardless of the minor's intention to engage in sexual activity or the effect on the viewer." [emphasis added]. It is not clear, however, what is meant by the terms "unnatural" and "unusual" in this context. For example, if the performance included a 15 year old boy viewing erotica with an exposed erect penis, would the focus on the relevant body part be a "natural" or "unnatural", "usual" or "unusual" display? We recommend that the Commentary explain or give examples of what a "natural", "unnatural", "usual", and "unusual" focus on the relevant minor's body parts would be.

RCC § 22E-4206. INDECENT EXPOSURE

Both First and Second Degree Indecent Exposure requires that the exposure be made "without the complainant's effective consent." See RCC § 22E-1810 (a)(2)(B) and (b)(3)(B). However, there is no exception for when the complainant is a young child. Similar to what OAG noted regarding RCC § 22E-1807, Trafficking an Obscene Image of a Minor, OAG does not believe that young children are capable of giving effective consent to indecent exposure. This position is consistent with the Court's finding in *Parnigoni v. District of Columbia*, 933 A.2d 823 (DC 2007). In that case the defendant was convicted of exposing himself to an eleven-year-old and the child's father. The facts of the case are as follows:

> On the day of the events at issue here, the then--thirty-three-year-old Parnigoni spent the day with the then eleven-year-old O.J. That afternoon, the two were alone in O.J.'s home when Parnigoni suggested that they play a game of ping-pong. O.J. agreed, and they went into the basement where there was a ping-pong table. Parnigoni suggested an additional rule for this particular game of ping-pong: that whoever lost a game would have to play the next game naked. O.J. agreed to play according to that rule and proceeded to beat Parnigoni at the first game they played. Parnigoni then took off all of his clothes and began to play the next match naked. O.J. testified that he was able to see Parnigoni's "whole body except for his legs down," including his "private parts." *Parnigoni*, at 825.

Though the defendant argued that the eleven-year-old had consented to the indecent exposure, the Court held that, under the indecent exposure statute in affect at the time, a child under the age of 16 was incapable of giving consent. OAG suggests that language similar to what it proposed to amend RCC § 22E-1807, Trafficking an Obscene Image of a Minor, also be included for this offense. That language is "The element of lack of effective consent does not apply if the complainant is under 16 years of age and the actor is at least 4 years older than the complainant or the complainant is 8 years old or younger."

One of the elements of Second Degree Indecent Exposure is that the actor is "Reckless as to the fact that the conduct… Alarms or sexually abuses, humiliates, harasses, or degrades any person."[9] The current indecent exposure statute does not require this element and the Commentary does not explain why it should be added.[10] The following example may be helpful. As a crossing guard is approaching the intersection where she assists children in safely crossing the street, she sees a man sitting on a METRO bus bench masturbating. Though the crossing guard does not feel alarmed, sexually abused, humiliated, harassed or degraded, she is concerned that the children coming home from school will soon be walking by and will see the man. As written, the man would not be committing a crime until the children see him. There is no reason to add this limitation. OAG recommends amending this offense to remove this requirement.

RCC § 22E-1809. ARRANGING A LIVE SEXUAL PERFORMANCE OF A MINOR

An element of both degrees of this offense is that the actor knowingly "Creates, produces, or directs a live performance.[11] An affirmative defense, under subparagraph (d)(3), applies when the actor:

(A) Is an employee of a school, museum, library, or movie theater;
(B) Is acting within the reasonable scope of that role;
(C) Has no control over the creation or selection of the live performance; and
(D) Does not record, photograph, or film the live performance.

Because a person who "creates, produces, or directs" a live performance must have some level of "control" over its creation, OAG believes that either the employee will never be able to meet the requirements of (d)(3)(C) or a court will consider this improper burden shifting. In addition, OAG questions whether an employee of a school, museum, library, or movie theater should have this affirmative offense. Unlike the affirmative defenses contained in the offenses pertaining to obscene images, in this offense there is an actual child engaging in sexual acts in the actor's presence.[12]

[9] See RCC § 22E-4206 (b)(3).
[10] D.C. Code § 22–1312, Lewd, indecent, or obscene acts; sexual proposal to a minor, states in relevant part, "It is unlawful for a person, in public, to make an obscene or indecent exposure of his or her genitalia or anus, to engage in masturbation, or to engage in a sexual act as defined in § 22-3001(8)."
[11] See RCC § 22E-1809 (a)(1)(A) and (b)(1)(A).
[12] The affirmative defenses pertaining to possession or transfer of obscene images can be found in RCC §§ 1805 (c), 1806 (c), 1807(d)(2), and 1808 (d)(2).

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 23, 2020

SUBJECT: First Draft of Report #43, Blackmail

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 #43, Blackmail.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22E- XXXX. BLACKMAIL

RCC § 22E-XXXX (a) states the elements for offense of blackmail. It says:

> A person commits blackmail when that person:
> (1) Purposely causes another person to do or refrain from doing any act,
> (2) By threatening that any person will:
> (A) Engage in conduct that, in fact, constitutes:
> (i) An offense against persons as defined in subtitle II of Title 22E; or
> (ii) A property offense as defined in subtitle III of Title 22E;
> (B) Take or withhold action as an official, or cause an official to take or withhold action;
> (C) Accuse another person of a crime;

[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.

(D) Expose a secret, publicize an asserted fact, or distribute a photograph, video or audio recording, regardless of the truth or authenticity of the secret, fact, or item, that tends to subject another person to, or perpetuate:
  (i) Hatred, contempt, ridicule, or other significant injury to personal reputation; or
  (ii) Significant injury to credit or business reputation;
(E) Impair the reputation of a deceased person;
(F) Notify a federal, state, or local government agency or official of, or publicize, another person's immigration or citizenship status;
(G) 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.

OAG is concerned that this language appears overly broad. We suggest narrowing it to limit any risk of legal challenge. Much of the conduct this language would forbid – for example, saying, as someone who opposes a business's editorial practices, that I will publicize those practices in newspaper editorials until those practices change, or saying that I will run ads against an elected official so long as he or she continues holding a stance I oppose – is protected by the First Amendment. See *NAACP V. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Organization for a Better Austin v. O'Keefe*, 402 U.S. 415 (1971). It thus risks legal challenge. See, e.g., *Gerhart v. State*, 360 P.3d 1194 (Okla. Crim. App. 2015) (successful as-applied challenge to a state law that reached "caustic," yet protected, political speech). The equivalent federal law avoids such challenges because it applies only when a person acts with "intent to extort," a requirement federal courts have read to limit the statute to wrongful (i.e., malicious) threats.[2] See *United States v. Coss*, 677 F.3d 278, 284 (6th Cir. 2012) (federal law applies only to wrongful threats); *State v. Weinstein*, 898 P.2d 513 (Ariz. Ct. App. 1995) (successful overbreadth challenge to a law that lacked a wrongfulness requirement). The proposed Code language moves in this direction, with exclusions and defenses that shield certain threats[3], but those limited exclusions and defenses fall short of protecting the wide range of constitutionally protected threats. To ensure First Amendment speech is fully protected, we recommend incorporating into this offense a wrongfulness requirement similar to that in federal law. We, therefore, recommend stating that, to commit the offense, the actor must act "with the purpose to extort" (borrowing the federal language noted in footnote 3 and adapting it to the Revised Code's mens rea categories).

[2] 18 USCS § 875(d) provides "Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime, shall be fined under this title or imprisoned not more than two years, or both." [emphasis added]

[3] See RCC § 22E-XXXX(b) and (c).

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: December 18, 2019

SUBJECT: First Draft of Report #44, Trademark Counterfeiting

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 #44, Trademark Counterfeiting.[1]

COMMENTS ON THE DRAFT REPORT

Both first and second degree trademark counterfeiting include as an element that the person "[k]nowingly manufactures for commercial sale, possesses with intent to sell, or offers to sell, property bearing or identified by a counterfeit mark." [emphasis added] See RCC § 22E-2210 (a)(1) and (b)(1). It is unclear why the proposal includes the word "commercial." The term is not defined, and its inclusion may cause unnecessary litigation. While a primary definition of commercial is "of or relating to commerce", a secondary definition is "viewed with regard to profit."[2] There should be no question that the government does not have to prove that the manufacturer of counterfeit products turned a profit on its production or sale. OAG believes that this offense should clearly state that it applies to anyone who "knowingly manufactures for sale…" such property. In addition, it should be clear that the term "sale" in this context includes the transfer of the property to a third party for anything of value – and not merely for money. This would also help clarify the portion of the Commentary that states, "By contrast, the revised

[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] See https://www.merriam-webster.com/dictionary/commercial.

statute clarifies that merely using a counterfeit mark, without intent to sell property bearing or identified by a counterfeit mark, is not criminalized." Finally, to make this clear and for consistency throughout the RCC, OAG proposes that the term "sale" be defined in § 22E-701 to include transfers to third parties for anything of value.[3]

Paragraph (c) contains the exclusion from liability. It states, "Nothing in this section shall be construed to prohibit uses of trademarks that are legal under civil law." The term "civil law" is not defined in either the text of the offense or in the Commentary. It is unclear if what is meant is that "civil law" means anything that is not "criminal law" or if it carries a narrower meaning (e.g. that this provision is meant to exempt only what is legal under trademark law. To clarify this provision, OAG suggests that it be redrafted to say, "Nothing in this section shall be construed to prohibit the legal uses of trademarks."

In the Commentary it states, "Use of wrappers, bottles, or packaging may be covered by the revised statute only if they constitute a "counterfeit mark." To avoid confusion, OAG suggests that the Commentary clarify that while wrappers, bottles and packaging may constitute a counterfeit mark, for purposes of determining whether "the property, in fact, has a total retail value of $5,000 or more" that the value of the property that is contained in the wrapper, bottle, or package is included in the valuation – and not merely the value of the container that bears the counterfeit mark.[4]

[3]RCC § 22E-701 does not currently define the term "sale."
[4] One way to commit first degree Trademark Counterfeiting, pursuant to RCC § 22E-2210 (a)(2), is for the property to, in fact, have a total retail value of $5,000 or more.

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 23, 2020

SUBJECT: First Draft of Report #46, Possession of an Open Container of Alcohol

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 #46, Possession of an Open Container of Alcohol.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 25-1001. POSSESSION OF AN OPEN CONTAINER OR CONSUMPTION OF ALCOHOL IN A MOTOR VEHICLE

RCC § 25-1001 (a) (2) makes it illegal to possess or consume an alcoholic beverage: "In the passenger area of a motor vehicle on a public highway, or the right-of-way of a public highway." The term "public highway is defined in RCC §22E-701 by referencing 23 U.S.C .§ 101(a).

Subparagraph (11) of the federal law states:

> The term "highway" includes—
> **(A)** a road, street, and parkway;

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

> **(B)** a right-of-way, bridge, railroad-highway crossing, tunnel, drainage structure including public roads on dams, sign, guardrail, and protective structure, in connection with a highway; and
>
> **(C)** a portion of any interstate or international bridge or tunnel and the approaches thereto, the cost of which is assumed by a State transportation department, including such facilities as may be required by the United States Customs and Immigration Services in connection with the operation of an international bridge or tunnel.

There is no reason, however, to incorporate federal law into a provision dealing with alcohol in a motor vehicle when District law already has defined "highway" in our driving while impaired statutes. Having two definitions of "highway" when dealing with a person operating a motor vehicle with an open container or while consuming alcohol, is unnecessary and adversely affects the clarity of District law. D.C. Code § 50-1901 (6) states:

> "Highway" means any street, road, or public thoroughfare, or the entire width between the boundary lines of every publicly or privately maintained way, when any part thereof is open to the use of the public for purposes of vehicular or pedestrian travel.

The following example highlights this issue. A person is drinking alcohol in her car in a McDonalds parking lot. Drinking vodka in a car in a McDonald's parking lot is just as dangerous as drinking on a street. It is unclear from the text of 23 U.S.C .§ 101(a) whether the parking lot is a highway.[2] However, under District law it is clear that such behavior is prohibited as the parking lot is a privately maintained way that is open to the use by the public for purposes of vehicular or pedestrian travel. Therefore, OAG recommends that the definition of "highway" in RCC §22E-701 be amended to reference D.C. Code § 50-1901(6).

RCC § 25-1001 (b) contains exclusions from liability. It states:

> (1) A person shall not be subject to prosecution under this section for conduct in a vehicle that operates on rails.
> (2) A person shall not be subject to prosecution under this section if that person is:
> (A) Located in:
> (i) The passenger area of a motor vehicle designed, maintained, or used primarily for the transportation of persons for compensation; or
> (ii) The living quarters of a house coach or house trailer; and
> (B) Not operating the motor vehicle.

[2] It is unclear because, though the federal statute does not specifically mention a privately maintained way that is open to vehicular traffic, it utilizes the word "includes."

RCC § 25-1001 (b)(1) categorically excludes from prosecution anyone who is in a vehicle that operates on rails. While OAG does not oppose that exclusion when it comes to passengers, we do not believe that it should reach people who operate or are in physical control of trains, including METRO trains. Person's who operate, or who are in physical custody of trains, should be subject to the offense like people who operate, or who are in physical control of, a motor vehicle.

RCC § 25-1001 (b)(1)(B) excludes from prosecution someone who is not operating a motor vehicle. While it is certainly a safety matter that a person who is operating a motor vehicle not consume an alcoholic beverage or be in possession of an open container of an alcoholic beverage, it is equally a safety matter that a person who is in physical control of a motor vehicle not consume an alcoholic beverage or be in possession of an open container of an alcoholic beverage. That's why D.C. Code § 50-2206.11, the DUI statute provides:

> No person shall operate or be in physical control of any vehicle in the District:
> (1) While the person is intoxicated; or
> (2) While the person is under the influence of alcohol or any drug or any combination thereof. [emphasis added]

In light of the DUI statute and the safety issues involved with alcohol use in cars, OAG recommends that the exclusion found in (a)(2) (B) be amended to state "Not operating or being in physical control of the motor vehicle."

While OAG does not oppose the Commission's proposals to decriminalize open container of alcohol outside of a vehicle and public intoxication due to alcohol, we would note that this runs counter to the Council's apparent desire to treat marijuana use the same as alcohol. Therefore, should Congress lift the restrictions that it has placed on the ability of the District to further decriminalize marijuana, OAG suggests that the Council consider whether the laws prohibiting the public consumption of marijuana and public intoxication due to marijuana be decriminalized to the same extent recommended in this proposal.

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 23, 2020

SUBJECT: First Draft of Report #49 - Parental Kidnapping and Related Statutes

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 49, Parental Kidnapping and Related Statutes.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 16-1022. PARENTAL KIDNAPPING CRIMINAL OFFENSE

RCC § 16-1022 (d) describes fourth degree parental kidnapping. This offense is incorporated in all of the higher degrees. Paragraph (d) states:

> A person commits the offense of fourth degree parental kidnapping when that person:
> (1) Knowingly takes, conceals, or detains a person who has another lawful custodian;
> (2) With intent to prevent a lawful custodian from exercising rights to custody of the person;
> (3) The complainant is, in fact, under the age of 16; and

[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.

(4) The actor is, in fact, a relative of the complainant, or a person acting pursuant to the direction of a relative of the complainant.

The use of the word "complainant" in subparagraph (d)(3) may be ambiguous. Because the offense requires the taking, concealment, or detention of a child by another lawful custodian, one would assume that the complainant is the custodian who is being denied access to their child. However, because the offense is limited to situations where "[t]he complainant is, in fact, under the age of 16", OAG interprets this phrase to refer to the child. The Commentary does not address who the term "complainant" was meant to refer to. For clarity, OAG suggests that this phrase be redrafted to make clear that it refers to the child. One way that this can be done is to amend subparagraph (d)(3) to say, "The person taken, concealed, or detained is, in fact, under the age of 16.[2]

Paragraph (h) designates OAG as the prosecutorial authority. This proposal retains the jurisdiction granted by the Council in 1986. See D.C. Code 16-1025. However, that designation predates the case of *In re Crawley, 978 A.2d 608 (D.C. 2009).* As the Court of Appeals explained, D.C. Code § 23-101 "bifurcates the prosecuting authority for crimes committed in the District." *In re Crawley*, at 609 (internal quotation marks and alteration omitted). OAG may prosecute "violations of all police or municipal ordinances or regulations," "violations of all penal statutes in the nature of police or municipal regulations, where the maximum punishment is a fine only, or imprisonment not exceeding one year," and certain other offenses not relevant here. D.C. Code § 23-101(a)-(b). "All other criminal prosecutions shall be conducted" by and in the name of the USAO. *Id.* § 23-101(c). Thus, unless the offense of parental kidnapping fits into either of Section 23-101(a)'s prongs, it is an offense properly prosecuted by the USAO.

For subsequent cases where the Court of Appeals recognized OAG's authority to prosecute cases, see *In re Hall*, 31 A.3d 453, 456 (D.C. 2011) and *In re Prosecution of Nicco Settles*, 218 A.3d 235 (D.C. 2019). None of the distinctions made in those cases for why the Council had authority to designate OAG as the prosecutorial agency apply to parental kidnapping. Because parental kidnapping does not fall into one of the exceptions noted in *Crawely*, or any other exception subsequently recognized by the Court of Appeals, the Council is without authority to designate OAG as agency to prosecute this offense.

The penalties provision authorizes the reimbursement of expenses to the District and to the parent whose rights were violated. Subparagraph (i)(5) states "Any expenses incurred by the District in returning the child shall be reimbursed to the District by any person convicted of a violation of this section. Those expenses and costs reasonably incurred by the lawful custodian

[2] If this suggestion is adopted, the Commission may want to consider substituting the word "actor" for the word "person" in each instance where the use of that term refers to the person who is concealing the child.

and child victim as a result of a violation of this section shall be assessed by the court against any person convicted of the violation." As both the District and the lawful custodian of the child victim are entitled to reimbursement of expenses, it is unclear why the two sentences in the restitution provision are not drafted in parallel. In both cases the requesting party has to request reimbursement and the court has to order that reimbursement. In addition, as to the lawful custodian, it is unclear what the difference is between an "expense" and a "cost." The Commentary does not address these issues. For the foregoing reasons, and for clarity, OAG suggests that paragraph (i)(5) be redrafted to say "Any expenses incurred by the District in returning the child shall be assessed by the court against any person convicted of the violation and reimbursed to the District. Those expenses reasonably incurred by the lawful custodian and child victim as a result of a violation of this section shall be assessed by the court against any person convicted of the violation and reimbursed to the lawful custodian."

MEMORANDUM

THE PUBLIC DEFENDER SERVICE
for the District of Columbia
CHAMPIONS OF LIBERTY

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	January 24, 2020
Re:	Comments on First Draft of Report Nos. 42, 43, 44, 45, 46, 47, 48, and 49

The Public Defender Service makes the following comments on reports 42, 43, 44, 45, 46, 47, 48, and 49.

1) RCC § 22E-1802, electronic stalking, prohibits engaging in a particular course of conduct directed at a complaint with either the "intent to cause the complainant to fear for the complainant's safety or the safety of another person; or negligently causing the complainant to fear for the complainant's safety or the safety of another person; or suffer significant emotional distress." (emphasis added) Negligently causing a complainant to fear for his or her safety or to feel emotional distress is substantially less culpable conduct than intentional action meant to provoke distress and fear. An actor who unintentionally caused distress should not be held responsible to the same degree as an actor who had the intent to harm.

   To appropriately differentiate between harm that is intentionally caused and harm that is negligently caused, PDS recommends creating two degrees of electronic stalking,

2) RCC § 22E-1802, RCC § 22E-1803, and RCC § 22E-1807 include the term "derivative image." While there are examples of derivative images given in the commentary and footnotes, PDS recommends incorporating a definition of derivative image into the statute. Whether an individual's conduct is criminalized will depend in some instances on whether an image or recording is "derivative." Since the term is central to culpability, in order to provide notice to individuals and clarity in the application of the law, the CCRC should define the term.

3) RCC § 22E-1804, unauthorized disclosure of sexual recordings, provides that it is an affirmative defense to a prosecution under this section that the defendant: "(A) Distributed the image or audio recording to a law enforcement agency, prosecutor, attorney, school administrator, or person with a responsibility under District civil law for the health, welfare, or supervision of the person that the actor reasonably believed to be depicted in the image or involved in the creation

of the image; (B) with intent, exclusively and in good faith, to report possible illegal conduct or seek legal counsel from an attorney."

PDS understands that the purpose of this defense is to exclude from liability individuals who, in good faith, disclose the image in order to prevent its further dissemination or to seek legal counsel on its legality. In order to properly limit liability consistent with this purpose, the defense should be applicable where an individual discloses the image to someone who he or she believes has a responsibility under District civil law for the person depicted in the image even if it turns out that no such legal responsibility exists. For instance, if an individual discloses an image to a child's grandparent as a result of a mistaken belief that the grandparent has assumed full custody of the child, the individual should not be barred from asserting this defense if it turns out that the grandparent's role is limited to driving the child to school.

PDS also recommends expanding the individuals to whom someone can disclose to include teachers and counselors since they may be a more direct point of contact for adults who interact with school systems.

PDS therefore recommends the following amendments:

> "(A) Distributed the image or audio recording to a law enforcement agency, prosecutor, attorney, school administrator, teacher, or counselor, or a person who he or she reasonably believed had ~~with~~ a responsibility under District civil law for the health, welfare, or supervision of the person that the actor reasonably believed to be depicted in the image or involved in the creation of the image; (B) with intent, exclusively and in good faith, to report possible illegal conduct or seek legal counsel from an attorney."

PDS recommends that the language above also be amended in RCC § 22E-1807 and RCC § 22E-1808.

4) PDS recommends modifying RCC § 22E-1807, trafficking an obscene image of a minor. RCC § 22E-1807 provides five ways for an individual to commit the offense of trafficking an obscene image of a minor. The first way is when an individual knowingly "(A) creates an image, other than a derivative image, by recording, photographing, or filming the complainant, or produces or directs the creation of such an image." This first category of action is dissimilar and typically less severe than the other actions encompassed by this offense which include giving consent for recording or photographing a minor over whom the individual has a responsibility under District civil law, displaying, distributing, or manufacturing with intent to distribute an image, making an image accessible to another user on an electronic platform, or selling or advertising the image. In each of these other instances, the minor complainant's privacy is further violated by the transfer of the image to others, the intent to transfer, or a violation of trust that may lead to the exposure of the image to the adult with a responsibility over the complainant as well as to the individual creating the image. In light of these differences, PDS recommends separating the conduct defined in (A) into a lesser included offense. The excised conduct would include creating an image or recording or directing another to create an image in instances where the defendant

directs the complainant to create the image and no other individuals are involved in the creation of the image.

PDS also recommends expanding the affirmative defenses for RCC § 22E-1807. As currently drafted, the statute would hold criminally liable a 25 year old who during the course of a consensual relationship with a 17 year old creates a sexually explicit image at the request of the 17 year old. The 25 year old would be criminally liable for trafficking in an obscene image of a minor despite the fact that the 25 year old created the image at the request of the minor and did not share the image with anyone. The 17 year old would have reached the age of consent, so there would be nothing illegal about the 25 year old having sex with the 17 year old. Instead, the criminal action would be the creation, with the 17 year old's consent, of for example, "a sexualized display of the breast below the top of the areola."

Since the current code[1] and the RCC[2] deem 16 year olds capable of consenting to sexual activity, the RCC should similarly deem that an individual who has reached the age of consent for sexual activity can consent to the creation of explicit images that are not shared with any other individuals without his or her separate consent. The RCC should only criminalize the consensual creation or exchange of explicit images between a consenting 16 year old and an adult who is more than 4 years older than the 16 year old when the adult is in a position of trust or authority over the minor.[3]

PDS also recommends expanding the affirmative defense in (d)(4). The affirmative defense currently includes a narrow list of civic institutions and commercial establishments that may come in contact with artistic images. PDS recommends the following addition:

> It is an affirmative defense to subparagraphs (a)(1)(C), (a)(1)(D), (a)(1)(E), (b)(1)(C), (b)(1)(D), and (b)(1)(E) of this section that the actor:
>
> (A) Is an employee of a school, museum, library, ~~or~~ movie theater, or <u>other cultural institution</u>;
>
> (B) Is acting within the reasonable scope of that role; and
>
> (C) Has no control over the creation or selection of the image.

5) PDS recommends that the CCRC make the two changes above to the affirmative defenses in RCC § 22E-1808, possession of an obscene image of a minor. Since RCC § 22E-1808 prohibits the mere possession of an obscene sexual image, without PDS's proposed changes, a 25 year old would be criminally liable for possessing a sexually explicit image of his17 year old girlfriend that she created in the context of their legal, consensual relationship. Criminal liability in this

[1] D.C. Code § 22-3001 defines child, for the purposes of the sexual abuse chapter, as an individual who has not yet reached the age of 16.

[2] See RCC § 22E-1301(e) sexual assault.

[3] PDS's proposed modification would be consistent with RCC § 22E-1302, third degree sexual abuse, which prohibits otherwise consensual sexual contact between a minor under the age of 18 and an adult who is in a position of trust or authority over the minor.

instance makes little sense and does nothing to protect the minor who has been deemed sufficiently mature to consent to the relationship.

6) RCC § 22E-1811 provides that a person under the age of 12 is not subject to prosecution for offenses in that subchapter. PDS recommends raising this exemption to age 14. By raising the age to 14, children will not typically be subject to prosecution until they have reached 8th grade. By 8th grade children frequently have had some exposure to sex education classes and to the concept of affirmative consent which is now being taught in more jurisdictions.[4]

7) PDS recommends that the age of prosecution for RCC § 22E-4206, indecent exposure, be raised to age 14. For the reasons listed above, children age 12 and 13 may have limited understanding of masturbation and inappropriate public sexual behavior. Their conduct should be addressed outside of the confines of juvenile court where they could be subject to detention, separation from their families, and the trauma of arrest.

8) PDS recommends decriminalizing the crime of incest as proposed in RCC § 22E-1312. Consensual sexual conduct where the complainant is under 18, the defendant is more than four years older than the complainant and the defendant is in a position of trust or authority with respect to the complainant is already criminalized in RCC § 22E-1302, third degree sexual abuse of a minor. Incest criminalizes consensual sexual contact between adults. This sexual conduct may be viewed as socially or morally repugnant, but there is no clear justification for criminalizing consensual conduct between adults. For example, the crime of incest would criminalize a consensual sexual relationship between a similarly aged niece and an uncle by marriage. In such an instance, both actors would be subject to prosecution. While it may be morally reprehensible for a niece to have an affair with the husband of her aunt, the conduct should not be a crime.

   As a result of large families, the passage of years between the birth of sibling, marriages between people with wide age differences, and varied decisions about when to have children, it is impossible to assume that a niece and an uncle or a step-grandchild and a step-grandparent would be far apart in age or share other qualities that may create a coercive power dynamic. Similarly, an adopted teenage sibling may never share the same house as his or her brother or sister who left home at age 18. Rather than allowing prosecutions in myriad situations that should be outside the scope of the court system, the RCC should decriminalize this conduct.

   If the CCRC does not decriminalize incest, PDS urges the CCRC to drop the terms “legitimately or illegitimately” from the statute. The current statute prohibits knowingly engaging in a sexual act with a person who is “related, either legitimately or illegitimately.” The state of being related to someone legitimately or illegitimately is not defined in the RCC. The terms are most closely associated with prejudice and racism that is deeply embedded in the American legal system as

[4] Samantha Schmidt, “*Middle Schools Enter a new era in sex ed — Teaching 13-year-olds About Consent*,” Washington Post, January 14, 2020. Available at:

https://www.washingtonpost.com/local/social-issues/middle-schools-enter-a-new-era-in-sex-ed--teaching-13-year-olds-about-consent/2020/01/14/27c17c80-35ad-11ea-bf30-ad313e4ec754_story.html

seen in the prohibition of interracial marriage, gay marriage, and the adoption of children by gay or single parents. The terms also have been used to define and demean children who were born to parents who were not married, or to mothers who did not include an acknowledgement of paternity on a birth certificate. If the CCRC continues to criminalize incest, it should define the prohibited relationships without the use of racist and pejorative terms.

In addition, PDS recommends using the terms "sibling," "half-sibling," and "step-sibling," rather than the binary gendered terms of "brother" and "sister." Similarly, in place of "aunt, uncle, nephew or niece," PDS recommends CCRC use "a parent's sibling or sibling's child."

9) With respect to RCC § 16-1022, parental kidnapping, PDS recommends clarifying the element "knowingly takes, conceals, or detains the child outside of the District" which appears in first, second, and third degree parental kidnapping. Taking the child out of the District should only increase the severity of the offense when the purpose of taking the child out of the District is to further the kidnapping by keeping the child hidden from view or evading detection in the District. As drafted, knowingly taking a child to Maryland for a trip to the grocery store and then returning to the District would increase the severity of the offense in the same manner as renting an apartment in Maryland in order to avoid authorities who are likely to check a District address. To address the harmful conduct rather than incidental contact with neighboring jurisdictions, PDS recommends the following language:

(a) *First Degree*. A person commits the offense of first degree parental kidnapping when that person:
    (1) Commits fourth degree parental kidnapping; and
    (2) Knowingly takes, conceals, or detains the child outside of the District <u>with the purpose of avoiding detection</u>; and
    (3) The child is, in fact, outside the custody of the lawful custodian for more than 30 days.

(b) *Second Degree*. A person commits the offense of second degree parental kidnapping when that person:
    (1) Commits fourth degree parental kidnapping; and
    (2) Knowingly takes, conceals, or detains the child outside of the District <u>with the purpose of avoiding detection</u>; and
    (3) Fails to release the child without injury in a safe place prior to arrest.

(c) *Third Degree*. A person commits the offense of third degree parental kidnapping when that person:
    (1) Commits fourth degree parental kidnapping;
    (2) Knowingly takes, conceals, or detains the child outside of the District <u>with the purpose of avoiding detection</u>;

(d) *Fourth Degree*. A person commits the offense of fourth degree parental kidnapping when that person:
    (1) Knowingly takes, conceals, or detains a person who has another lawful custodian;

(2) With intent to prevent a lawful custodian from exercising rights to custody of the person;
(3) The complainant is, in fact, under the age of 16; and
(4) The actor is, in fact, a relative of the complainant, or a person acting pursuant to the direction of a relative of the complainant.

Memorandum

Jessie K. Liu
United States Attorney
District of Columbia

Subject: Comments to D.C. Criminal Code Reform Commission for First Draft of Reports #42–49	Date: January 24, 2020

To: Richard Schmechel, Executive Director, D.C. Criminal Code Reform Commission

From: U.S. Attorney's Office for the District of Columbia

The U.S. Attorney's Office for the District of Columbia (USAO) and other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the CCRC's First Draft of Reports #42–49. USAO reviewed these documents and makes the recommendations noted below.[1]

Comments on Draft Report #42—Obscenity, Privacy, and Related Offenses

A. RCC § 22E-701. Generally Applicable Definitions.

1. USAO recommends that the definition of "image" be modified to include other possible formats.

   With USAO's changes, the definition of "image" would provide:

   " 'Image' means a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram, whether in print, electronic, magnetic, ~~or~~ digital, or other format."

This would allow for the possibility of future technology to fall under this definition as well.

2. USAO recommends that the definitions of "live performance" and "live broadcast" clarify the definition of "audience."

USAO recommends that, within the definitions of "live performance" and "live broadcast," the RCC clarify that an "audience" can consist of one or more people, and that the defendant alone can qualify as an "audience." This is particularly relevant as applied to RCC § 22E-1809 and RCC § 22E-1810, to clarify that an audience of one person qualifies as an

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

"audience," and to eliminate any potential confusion as to whether there must be multiple people present to constitute an "audience."

3. USAO recommends that the definition of "obscene" be modified to remove the words "in sex."

   With USAO's changes, subsection (A) of the definition of "obscene" would provide:

   "(A) Appealing to a prurient interest ~~in sex~~ . . ."

"Prurient interest" is defined in the Commentary (at 5 n.33) as "a morbid, degrading, or unhealthy interest in sex." Thus, it is redundant to state "a prurient interest in sex." This is not a substantive change.

4. Consistent with USAO's previous comments, USAO recommends that the definitions of "sexual act" and "sexual contact" be modified to remove the additional requirement that the intent be "sexual" in nature.

   With USAO's changes, subsection (C) of the definition of "sexual act" would provide:

   "(C) Penetration, however slight, of the anus or vulva of any person by a hand or finger or by any object, with the desire to ~~sexually~~ abuse, humiliate, harass, degrade, arouse, or gratify any person, or at the direction of a person with such a desire;"

   With USAO's changes, subsection (B)(ii) of the definition of "sexual contact" would provide:

   "(ii) With the desire to ~~sexually~~ abuse, humiliate, harass, degrade, arouse, or gratify any person, or at the direction of a person with such a desire."

In its July 8, 2019 comments on Report #36 (at 13), USAO provided an example of a case in which a defendant grabbed the buttocks of a stranger, causing the victim to feel sexually violated. Absent evidence of the defendant having an erection or outwardly manifesting sexual pleasure, however, the government may not be able to prove that the defendant's actions were sexually motivated. The government would be able to prove at a minimum, however, that the defendant intended to humiliate or harass the victim. The Commentary (at 10 n.80) states that hitting someone on their buttocks while commenting on their sexual attractiveness would constitute a sexual assault. But if the defendant made no such statement to the complainant about the complainant's sexual attractiveness, then the fact that a defendant hit a complainant on their buttocks may not as easily satisfy the sexual motivation requirement.

Moreover, the Commentary (at 10 n.80) states that "there can be virtually no penetration or oral contact that satisfied the definition of 'sexual act' that is not sexual in nature." That is not necessarily the case, however, where there is penetration with an object. For example, if, at a fraternity hazing, a defendant anally penetrated another person with an object, the defendant may not have been acting with a sexual desire, but may have been acting with an intent to abuse,

humiliate, harass, or degrade the complainant. This would and should constitute a sexual offense. Likewise, when committing a sexual offense, including a rape, a defendant may be motivated by a desire to be violent or to assert power over a victim, not necessarily to be sexually aroused.

B. RCC § 22E-1802. Electronic Stalking.[2]

1. USAO recommends, to eliminate confusion, defining "course of conduct" as "2 or more occasions."

   With USAO's changes, subsection (a)(1) would provide:

   "(1) Purposely[3]~~, on 2 or more separate occasions,~~ engages in a course of conduct directed at a complainant that consists of:"

   A new subsection (f)(3) would provide:

   "(3) In this section, the term 'course of conduct' means actions taken on 2 or more occasions."

As subsection (a)(1) is currently drafted, it could be interpreted that a defendant must engage in a course of conduct on 2 or more occasions—that is, that the full course of conduct must take place on 2 or more occasions. Rather, the opposite is true—that is, a course of conduct *consists of* actions on 2 or more occasions. Under current law, a "course of conduct" is defined in relevant part to include actions taken "on 2 or more occasions." D.C. Code § 22-3132(8). USAO recommends this change to eliminate potential confusion on this point.

2. USAO requests that the RCC clarify the exclusion in subsection (b)(2)(A).

Subsection (b)(2)(A) provides that a person is not subject to prosecution under subsection (a)(1)(A) if that person is "a party to the communication." It is unclear what this exclusion would cover. For example, if a defendant took numerous photos of the complainant, but took a photo in "selfie" mode and included himself in that photo, it is unclear if this exclusion would means that the defendant was not liable for stalking.

3. USAO recommends that the Commentary be rephrased for clarification.

   With USAO's changes, the Commentary on page 19 would provide:

   "Paragraph (a)(1) specifies that the accused must purposely engage in a course of conduct directed at a particular complainant. As applied here, "purposely," a term defined in RCC § 22E-206, requires a conscious desire to ~~cause~~ engage in a pattern of misconduct. A course of conduct does not have to consist of identical conduct, but the conduct must

[2] USAO recommends consistent changes to Stalking, RCC § 22E-1206, as appropriate.

[3] In its July 8, 2019 comments on Report #36 (at 39), USAO recommended changing the culpability standard in this provision from "purposely" to "knowingly." USAO reiterates that comment here.

share a~~n uninterrupted~~ purpose and must consist of one or both of the activities listed in subparagraphs (a)(1)(A) and (a)(1)(B). The behavior must be directed at a specific person, not merely surveilling the general public."

The requirements of this offense are more appropriately characterized as "engaging" in a pattern of misconduct than "causing" a pattern of misconduct. Moreover, there should not be a requirement that the purpose be "uninterrupted." Stalking behavior may be interrupted, as a defendant engaging in stalking will engage in activities other than stalking during the course of the stalking.

4. USAO reiterates several of its July 8, 2019 comments on Report #36 (at 40-41) that related to Stalking, RCC § 22E-1206.

Specifically, USAO reiterates its comment #5 regarding jury trials; comment #6 regarding violation of a court order prohibiting stalking, harassing, assaulting, or threatening the complainant; comment #7 regarding an enhancement for one "or more" previous convictions for stalking; and comment #8 regarding the defendant's reckless disregard for the complainant's age.

5. USAO recommends that the jurisdictional limitations of this offense be clarified.

The Commentary discusses the jurisdictional limitations of this offense. (Commentary at 28-29.) Although, under the RCC's proposal, there would not be jurisdiction based *solely* on the victim's residence in the District, the RCC should clarify that, if the victim suffers any harm in the District stemming from the defendant's actions, then there would be jurisdiction to prosecute this offense in the District.

C. RCC § 22E-1803. Voyeurism.

1. USAO recommends, in subsections (a)(1)(A) and (b)(1)(A) removing the word "developed" from the words "developed female breast," requiring only a "female breast."

The RCC acknowledges that this is a change from current law, *see* D.C. Code § 22-3531(a)(1), which includes the words "female breast." Adding the word "developed" limits this definition too far. If a girl is going through puberty, and is in the process of developing, she may not have "developed." A girl who has not yet begun puberty, and thus does not even have a "developing" female breast, may still have an interest in privacy in her breast. Likewise, if an adult woman undergoes a mastectomy, there could be a question as to whether her breast is "developed." Therefore, USAO believes that, consistent with current law, it is appropriate to require only a "female breast," not a "developed female breast."

2. USAO opposes removal of observing someone using a restroom or bathroom as a basis for voyeurism liability.

Under current law, a person is liable for voyeurism if they observe or record another person "using a bathroom or rest room." D.C. Code § 22-3531(b)(1), (c)(1)(A). The Commentary provides that capturing an image of a person urinating or defecating that does not show that

person's private areas could constitute attempted voyeurism. (Commentary at 43 n. 266.) But liability for only attempted voyeurism understates the privacy interests that individuals hold in using the bathroom, as it is a very intimate and private experience. In eliminating this as a basis for liability, the RCC Commentary is concerned that it may inadvertently criminalize, for example, a bathroom selfie showing a stranger in the background applying makeup. (Commentary at 42 n.265.) To alleviate these concerns, and to protect the privacy interests of individuals using a toilet or urinal, USAO proposes that liability attach for voyeurism if a defendant either observes or creates an image or audio recording of a person "using a toilet or a urinal."

3. USAO recommends that liability attach for a defendant observing or creating an image of another person engaging in or submitting to a sexual contact.

   With USAO's changes, subsections (a)(1)(B) and (b)(1)(B) would provide:

   " . . . the complainant engaging in or submitting to a sexual act, sexual contact, or masturbation."

Under current law, a person is liable for voyeurism if they observe or record another person "engaged in sexual activity." D.C. Code § 22-3531(b)(3), (c)(1)(C). The Commentary is concerned that the term "sexual activity" could be too broadly construed. (Commentary at 43.) The RCC therefore only includes "sexual act or masturbation" as a basis for liability in subsections (a)(1)(B) and (b)(1)(B). USAO proposes that liability also attach where the defendant observes or creates an image of the complainant engaging in or submitting to a sexual contact. A sexual contact can be a private and intimate experience, even where the parties remain clothed. For example, if a person is touching another person's genitalia underneath the clothing, even though they may be clothed, that is a private experience in which they have an expectation of privacy. It would create a strange dichotomy if voyeurism liability attached for a defendant creating an image of another person touching their own genitalia (masturbation), but no voyeurism liability attached for a defendant creating an image of someone else touching that person's genitalia (sexual contact). A defendant should be liable for voyeurism for observing or creating an image of that intimacy.

4. USAO recommends that the *mens rea* required under subsection (c)(3) be modified from requiring that the actor "knew" the complainant was under 18 years of age to requiring that the actor "recklessly disregarded" that the complainant was under 18 years of age.

Throughout the RCC, this enhancement applies when the actor recklessly disregarded that the complainant was under 18 years of age. It is unclear why the enhancement for voyeurism would require knowledge. USAO recommends that this *mens rea* be modified to be consistent with the same enhancement throughout the RCC.

5. USAO recommends that the RCC clarify that "upskirting" is expressly criminalized under the voyeurism statute.

The Commentary is unclear as to whether "upskirting" would be criminalized under the voyeurism statute. The Commentary notes that, "[f]or example, a woman who exposes her underwear by sitting on the steps of the Lincoln Memorial at a time when many people are photographing the historic landmark does not have a reasonable expectation that her underwear will not be photographed." (Commentary at 36 n.223.) The Commentary then goes on to say that "the revised statute criminalizes all upskirting behavior that violated a reasonable expectation of privacy, even if the accused does not produce a recorded image." (Commentary at 37-38.) USAO recommends that the RCC clarify these provisions, and expressly codify upskirting as a basis for voyeurism liability.

The Commentary also seems to suggest that the onus is on a complainant to ensure that they are properly covered at all times to ensure they are not "upskirted," stating that "[t]he more public the place and the more likely it is that people will take photographs there, the more conscientious and personally responsible one must be about what they do and do not expose." (Commentary at 36 n.223.) But this ignores the frequent reality of upskirting, and the often stealthy nature of upskirting actions. Upskirting can take place when a woman is sitting on the steps of the Lincoln Memorial, but if she does not see a nearby camera, she would not expect to be photographed. Rather, a zoom lens could be used to stealthily photograph up her skirt from far away. Likewise, if a woman is sitting in a seat on the metro with her legs slightly ajar (a frequent posture), she should not have to be conscientious about ensuring that someone is not using a cell phone camera across from her to take photos up her skirt. Finally, if a woman is on an escalator, she should not have to be conscientious of a person standing just below her with a stealthy cell phone camera to take photos up her skirt. USAO recommends that the RCC expressly clarify that "upskirting" activity (where the complainant has not provided effective consent) constitutes voyeurism.

Finally, the Commentary states that "[c]hasing a woman and lifting her skirt would also be punished as assault under RCC § 22E-1202." (Commentary at 38 n.236.) However, because the RCC definition of "assault" requires bodily injury to the complainant, it is unclear how this could constitute an assault.

D. RCC § 22E-1804. Unauthorized Disclosure of Sexual Recordings.

1. USAO recommends changing the name of this offense from "Unauthorized Disclosure of Sexual Recordings" to "Unauthorized Disclosure of a Sexual Recording."

USAO recommends that the title of this offense be modified to clarify that an actor must only disclose one sexual recording to be liable for this offense, and that there is no requirement that an actor disclose multiple sexual recordings to be liable for this offense. This is not a substantive change, and aligns the title of the offense with the elements.

2. USAO recommends, in subsection (a)(1), adding the words "or causes to be distributed or displayed to a person other than the complainant" and "causes to be made accessible."

With USAO's changes, subsection (a)(1) would provide:

"(1) Knowingly distributes or displays, or causes to be distributed or displayed, to a person other than the complainant, or makes accessible, or causes to be made accessible, on an electronic platform to a user other than the complainant or actor:"

The RCC proposed eliminating language currently codified in D.C. Code § 22-3531(f)(2) that provides liability for distributing images "directly or indirectly, by any means," on the ground that the language is surplusage. (Commentary at 56 & n.334.) USAO does not believe that this language is necessarily surplusage, but believes that it can be rephrased to clarify its applicability. If a defendant asks another person to distribute a sexual recording—that is, distributes an image indirectly—the statute should clarify that the defendant should be liable for this offense on the basis that the defendant caused the recording to be distributed.

3. USAO recommends, in subsection (a)(1)(A)(ii), removing the word "developed" from the words "developed female breast," requiring only a "female breast."

USAO relies on the same rationale as set forth above for the Voyeurism statute. USAO also recommends that this statute contain a footnote similar to footnote 216 in the Voyeurism statute (Commentary at 35 n.216) clarifying that a "female breast" means the breast of both a cisgender and a transfeminine woman.

4. USAO recommends, in subsection (a)(1)(B), including a "sexual contact."

With USAO's changes, subsection (a)(1)(B) would provide:

"(B) An image or an audio recording of the complainant engaging in or submitting to a sexual act, a sexual contact, masturbation, or sadomasochistic abuse;"

As discussed above with respect to the Voyeurism statute, a sexual contact can be an intimate, private experience that a complainant has an interest in keeping private. This could be true even if nude genitalia are not visible. USAO recommends that, to protect this privacy interest, "sexual contact" be added to this subsection.

5. USAO recommends that, in subsection (a)(4)(A), the statute clarify that an agreement or understanding can be either explicit or implicit.

With USAO's changes, subsection (a)(4)(A) would provide:

"(A) After reaching an agreement or understanding, whether explicit or implicit, with the complainant that the image or audio recording will not be distributed or displayed, . . ."

This is alluded to in the Commentary (at 47 n.280), but USAO recommends that it be codified in the plain language of the statute to eliminate any potential confusion. Most agreements and understandings are implicit. For example, if a married couple exchanges nude photos of themselves via text message, there is an implicit agreement that neither party will share the photos. But if one of the parties later discloses the photos to another person, they have

violated that implicit agreement or understanding, even if there was no explicit agreement or understanding in place.

6. USAO recommends that, in subsection (a)(4)(A)(i), the word "sexually" be removed.

With USAO's changes, subsection (a)(4)(A)(i) would provide:

"(i) Alarm or ~~sexually~~ abuse, humiliate, harass, or degrade the complainant;"

At the time that the defendant is distributing these photos, the defendant's intent is often not sexual. Rather, their intent is frequently to harass or humiliate the complainant, or to seek revenge. They often do not obtain sexual gratification from disclosure of the image. Although the underlying material is sexual, there should be no requirement that the defendant have a sexual intent when the defendant discloses the material.

7. USAO recommends that subsections (c)(1)(A) and (c)(2)(B) be joined by the word "and."

This is not a substantive change, and clarifies that a defendant must meet the elements in both subsections to claim this defense.

8. USAO recommends that the jurisdictional limitations of this offense be clarified.

USAO relies on the same rationale set forth above with respect to the offense of Electronic Stalking.

E. RCC § 22E-1807. Trafficking an Obscene Image of a Minor.

1. USAO recommends renaming this offense.

The title of this offense is "trafficking," but not all conduct that falls within the offense constitutes "trafficking." "Trafficking" implies some level of distribution. For example, for liability to attach under subsection (a)(1)(A), a person must create an image of a minor engaging in certain activity. There is no requirement under that subsection that the defendant distribute the image or "traffic" it in any way. Thus, to eliminate potential future confusion that all subsections of the offense may require "trafficking" of some sort, USAO recommends renaming this offense.

2. USAO recommends restructuring the gradations of this offense.

USAO recommends that there be gradations of this offense based on the defendant's role in creating and distributing the image. USAO recommends that the most serious gradation be for creating an image (production), then for advertising an image, then for distributing an image, then for possessing an image. This is consistent with the gradations for child pornography under federal law pursuant to 18 U.S.C. §§ 2251 and 2252. A defendant should be penalized more severely for creating an image than for distributing an image.

USAO does not oppose also creating gradations of this offense based on the type of sexual conduct depicted in the image (that is, images of the complainant engaging in or submitting to a sexual act versus sexual contact, etc.).

3. USAO recommends changing the word "obscene" to "sexually explicit" in both § 22E-1807 and § 22E-1808, and removing the affirmative defense in subsection (d)(1)

"Obscene" can be a vague standard, and is famously described as, "I know it when I see it." It is unclear whether certain images that would constitute child pornography would qualify as "obscene." USAO recommends that, instead of using the word "obscene," the RCC use the words "sexually explicit." Federal child pornography law uses the words "sexually explicit," rather than "obscene." *See* 18 U.S.C. § 2251. In addition to creating an analogue with federal law for criminalization of child pornography, this offense could draw on the case law regarding the definition of "sexually explicit" that would help guide interpretations of this statute.

Likewise, USAO recommends removing the affirmative defense in subsection (d)(1). That definition relates to the obscenity definition, and it is hard to imagine an instance in which a sexually explicit image of a minor could have serious literary, artistic, political, or scientific value.

4. USAO recommends that the RCC codify a definition of "derivative image."

Although the words "derivative image" are used throughout these provisions, and are referenced in the Commentary to the definition of "image," USAO believes that it would be helpful to have a separate definition of "derivative image" to limit potential future confusion.

5. In subsections (a)(1)(C) and (b)(1)(C), USAO recommends changing the word "manufactures" to "produces."

It is unclear what the difference is between "manufacturing" and "producing," and both terms are used in this statute. Federal law, by contrast, uses the word "producing." 18 U.S.C. § 2251. This creates consistency within the statute, aligns the statutory wording with federal child pornography law, and allows this offense to draw on the case law regarding "production" to help guide interpretations of this statute.

6. In subsections (a)(1)(E) and (b)(1)(E), USAO recommends changing "Sells or advertises an image" to "Makes, prints, or publishes, or causes to be made, printed or published, any notice or advertisement seeking or offering to receive, exchange, or buy an image of a minor."

This wording is consistent with federal child pornography law. *See* 18 U.S.C. § 2251(d)(1). As described above, it is useful to track federal statutory language in this respect.

7. USAO recommends that the affirmative defense in subsection (d)(3) contain a limit on the number of images that would qualify for this defense.

Under current law, there is a limit of 6 still photographs or 1 motion picture that allow a defendant to invoke this defense. D.C. Code § 22-3104(c). USAO suggests that there be some limit on the amount of images that a person may have to invoke this defense.

F. RCC § 22E-1808. Possession of an Obscene Image of a Minor.

1. USAO recommends changes consistent with the changes suggested for RCC § 22E-1807, Trafficking of an Obscene Image of a Minor.

G. RCC § 22E-1809. Arranging a Live Sexual Performance of a Minor.

1. USAO recommends that subsections (a)(1)(A) and (b)(1)(A) apply to a "live broadcast" in addition to a "live performance."

"Live performance" is defined in RCC § 22E-701 as a "play, dance, or other visual presentation or exhibition for an audience."[4] "Live broadcast" is defined in RCC § 22E-701 as "a streaming video, or any other electronically transmitted image for viewing by an audience." It is equally culpable for a person to arrange a live performance as to arrange a live broadcast. If, for example, a defendant creates a chatroom, and livestreams to that chatroom a video of a child engaging in a sexual act, that defendant should be held liable for the more serious offense of arranging a live sexual performance of a minor. The other individuals in the chatroom who watch the video would be held liable for attending or viewing a live sexual performance of a minor.

2. USAO recommends changing the word "obscene" to "sexually explicit" in both § 22E-1809 and § 22E-1810, and removing the affirmative defense in subsection (d)(1)

USAO relies on the same rationale as set forth above.

H. RCC § 22E-4206. Indecent Exposure.

1. USAO recommends, in subsection (a)(2)(C), removing the word "sexually."

With USAO's changes, subsection (a)(2)(C) would provide:

"(C) Is with the purpose of alarming or ~~sexually~~ abusing, humiliating, harassing or degrading the complainant."

This is consistent with USAO's recommendations above regarding the definition of "sexual act" and "sexual contact."

2. USAO recommends removing subsection (b)(3).

Liability for indecent exposure should not turn on what the complainant actually observed, or how the defendant's actions affected the complainant. It should turn on what actions the defendant engaged in. This is true for both theoretical and practical reasons. As a theoretical

[4] USAO suggested above clarifications to the definition of "audience."

matter, it is the defendant's actions, rather than the impact of the defendant's actions, that should create liability for this offense. As a practical matter, it may be impossible for the government to prove that the conduct was visible to a complainant, that the complainant did not consent the conduct, and/or that the complainant was alarmed or humiliated, etc. For example, if a defendant exposed his genitalia in the middle of a metro car to multiple people, multiple people could have been alarmed or humiliated. But if this incident happened during rush hour when people were rushing to work, it is possible that no one will report this to law enforcement, or that an individual will make an anonymous report to law enforcement, or that an individual will make a report with law enforcement but neglect to provide accurate contact information for follow-up investigation. In that case, law enforcement will have no complainant to speak with about whether they actually observed this behavior or how it made them feel. Rather, surveillance video from the metro could show the defendant's actions. As currently drafted, with only this surveillance video clearly showing the defendant exposing his genitals in a public conveyance, the government would be unable to prove that the defendant engaged in an indecent exposure. USAO therefore recommends removing this provision from the statute.

Comments on Draft Report #43—Blackmail

1. USAO recommends that, consistent with current law, liability attach if a person purposely causes *or intends to cause* another person to do or refrain from doing any act.

   With USAO's changes, subsection (a)(1) would provide:

   "(1) Purposely causes or intends to cause another person to do or refrain from doing any act."

Under current law, a defendant is liable for blackmail if the defendant makes a specified threat, intending to cause another to do or refrain from doing any act. D.C Code § 22-3252. The RCC's rationale for a change from current law is that it improves the proportionality of the RCC and is consistent with the RCC extortion offense. (Commentary at 6.) The RCC provides that attempt liability "may apply depending on the specific facts of the case" if "the accused fails to compel the other person to act or refrain from acting." (Commentary at 6 n.34.) The focus, however, should be on the defendant's intent and actions, rather than what those actions actually cause a complainant to do. Take, for example, a case in which a defendant threatens a complainant not to call the police following the defendant assaulting the complainant, threatening that the defendant will distribute photos of the complainant engaged in an affair. If, following the threat, the complainant were to refrain entirely from calling the police, then that would clearly constitute blackmail under the RCC proposal. But what if the complainant were to hesitate for just a moment as a result of the defendant's threat, and then call police, or if the complainant were to wait an hour or a day to call police as a result of the defendant's actions. Those would all constitute the defendant causing the complainant to "refrain" from doing an act due to a threat. It would not be proportionate for blackmail liability to attach if the defendant's threat caused the complainant to hesitate for a moment before calling police, and for only attempted blackmail liability to attach if the defendant's threat did not cause the complainant to hesitate before calling police. Rather, the defendant's intent in making the threat should be the guiding factor in whether blackmail liability attaches.

2. USAO recommends that subsection (a)(2)(E) be modified to include non-deceased persons.

   With USAO's changes, subsection (a)(2)(E) would provide:

   "Impair the reputation of another person, including a deceased person;"

Under current law, a person is liable for blackmail if, among other things, they threaten to "[i]mpair the reputation of another person, including a deceased person." D.C. Code § 22-3252(a)(3). It is unclear why this change was made, and USAO believes that it is appropriate for liability to attach when a person threatens to impair the reputation of any other person, whether alive or deceased.