



D.C. Criminal Code Reform Commission

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ADVISORY GROUP MEMORANDUM #42

To: Code Revision Advisory Group
From: Criminal Code Reform Commission (CCRC)
Date: March 10, 2021
Re: Supplemental Materials to the First Draft of Report #70

This Advisory Group Memorandum supplements the First Draft of Report #70, *Criminal Code Reform Commission (CCRC) Recommendations for the Council and Mayor (Voting Draft)*.

In addition to a red-ink, marked-up copy of Report #70 (as compared to the most recent RCC draft distributed to the Advisory Group), this memorandum provides the following background materials as appendices to Report #70:

- (1) Appendix A. Table of Correspondence - RCC to Current D.C. Code Statutes;
- (2) Appendix B. Table of Advisory Group Draft Documents;
- (3) Appendix C. Advisory Group Comments on Draft Documents;
- (4) Appendix D. Disposition of Advisory Group Comments & Other Changes From Draft Documents;
- (5) Appendix E. Table of RCC Specific Offense Classifications;
- (6) Appendix F. District Charging and Conviction Data 2010-2019, 2015-2019 and 2018-2019;
- (7) Appendix G. Comparison of RCC Offense Penalties and District Charging and Conviction Data;
- (8) Appendix H. D.C. Voluntary Sentencing Guidelines Rankings;
- (9) Appendix I. Public Opinion Data;
- (10) Appendix J. Research on Other Jurisdictions' Relevant Criminal Code Provisions; and
- (11) Appendix K. Future Issues to be Addressed & Known Conforming Amendments.

APPENDIX A.
TABLE OF CORRESPONDENCE:
RCC TO CURRENT D.C. CODE STATUTES

Appendix A provides readers with a correspondence table between RCC statutes and current D.C. Code statutes. For clarity, D.C. Code general enhancements appear in a separate column from the related D.C. Code statutes.

Appendix A. Table of Correspondence: RCC to Current D.C. Code Statutes

RCC Statute Citation	RCC Statute Name	D.C. Code Closely Related Statute(s) (Not an exhaustive list of all statutes with overlapping elements)	D.C. Code General Enhancements (Excluding statutes with RCC Chapter 6 enhancements: 22-1804, 22-1804a, 22-3703, and 23-1328)
§ 22E-101	Short Title and Effective Date	none	none
§ 22E-102	Rules of Interpretation	none	none
§ 22E-103	Interaction of Title 22E with Other District Laws	none	none
§ 22E-104	Applicability of the General Part	none	none
§ 22E-201	Proof of Offense Elements Beyond a Reasonable Doubt	none	none
§ 22E-202	Conduct Requirement	none	none
§ 22E-203	Voluntariness Requirement	none	none
§ 22E-204	Causation Requirement	none	none
§ 22E-205	Culpable Mental State Requirement	none	none
§ 22E-206	Hierarchy of Culpable Mental States	none	none
§ 22E-207	Rules of Interpretation Applicable to Culpable Mental State Requirement	none	none
§ 22E-208	Principles of Liability Governing Accident, Mistake, and Ignorance	none	none
§ 22E-209	Principles of Liability Governing Intoxication	none	none
§ 22E-210	Accomplice Liability	22-1805	varies by offense
§ 22E-211	Criminal Liability for Conduct by an Innocent or Irresponsible Person	none	none
§ 22E-212	Exclusions from Liability for Conduct of Another Person	none	none
§ 22E-213	Withdrawal Defense to Legal Accountability	none	none
§ 22E-214	Merger of Related Offenses	none	none
§ 22E-215	Judicial Dismissal for Minimal or Unforeseen Harms	none	none
§ 22E-216	Minimum Age for Offense Liability	none	none
§ 22E-301	Criminal Attempt	22-1803	none
§ 22E-302	Criminal Solicitation	22-2107	none
§ 22E-303	Criminal Conspiracy	22-1805a	none
§ 22E-304	Limitation on Vicarious Liability for Conspirators	none	none
§ 22E-305	Exceptions to General Inchoate Liability	none	none
§ 22E-306	Renunciation Defense to Attempt, Conspiracy, and Solicitation	none	none
§ 22E-401	Lesser Harm	none	none
§ 22E-402	Execution of Public Duty	none	none
§ 22E-403	Defense of Self or Another Person	none	none
§ 22E-404	Defense of Property	none	none
§ 22E-408	Special Responsibility for Care, Discipline, or Safety Defenses	none	none
§ 22E-501	Duress	none	none
§ 22E-502	Temporary Possession	none	none
§ 22E-503	Entrapment	none	none
§ 22E-504	Mental Disability Defense	none	none
§ 22E-601	Offense Classifications	none	none
§ 22E-602	Authorized Dispositions	none	none
§ 22E-603	Authorized Terms of Imprisonment	none	none
§ 22E-604	Authorized Fines	22-3571.01; 22-3571.02	none
§ 22E-605	Charging and Proof of Penalty Enhancements	none	none
§ 22E-606	Repeat Offender Penalty Enhancement (Misdemeanor)	22-1804; 22-1804a	none
§ 22E-606	Repeat Offender Penalty Enhancement (Felony)		
§ 22E-607	Pretrial Release Penalty Enhancement	23-1328	none
§ 22E-608	Hate Crime Penalty Enhancement	22-3701; 22-3703	none
§ 22E-609	Hate Crime Penalty Enhancement Civil Provisions	22-3702; 22-3704	none
§ 22E-610	Abuse of Government Power Penalty Enhancement	none	none
§ 22E-701	Generally Applicable Definitions	none	none
§ 22E-1101(a)	Enhanced 1st Murder		
§ 22E-1101(a)	1st Murder	22-2101; 22-2102; 22-2103;	22-851; 22-3601; 22-3602; 22-3611;
§ 22E-1101(b)	Enhanced 2nd Murder	22-2104; 22-2104.01; 22-	22-3751; 22-3751.01; 22-3752; 22-
§ 22E-1101(b)	2nd Murder	2106; 24-403.01(b-2)	4502
§ 22E-1102(a)	Enhanced Voluntary Manslaughter		
§ 22E-1102(a)	Voluntary Manslaughter	22-2105	22-851; 22-3601; 22-3602; 22-3611;
§ 22E-1102(b)	Enhanced Involuntary Manslaughter		22-3751; 22-3751.01; 22-3752; 22-
§ 22E-1102(b)	Involuntary Manslaughter		4502
§ 22E-1103	Negligent Homicide	50-2203.01	none
§ 22E-1201(a)	Enhanced 1st Robbery		
§ 22E-1201(a)	1st Robbery		
§ 22E-1201(b)	Enhanced 2nd Robbery (injury by weapon)	22-2801; 22-2802; 22-2803;	22-851; 22-3601; 22-3602; 22-3611;
§ 22E-1201(b)	Enhanced 2nd Robbery (protected person; weapon but no injury)	24-403.01(b-2), (e)	22-3751; 22-3751.01; 22-3752; 22-
§ 22E-1201(b)	2nd Robbery		4502
§ 22E-1201(c)	Enhanced 3rd Robbery (injury by weapon)		
§ 22E-1201(c)	Enhanced 3rd Robbery (protected person; weapon but no injury)		
§ 22E-1201(c)	3rd Robbery		

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RCC Statute Citation	RCC Statute Name	D.C. Code Closely Related Statute(s) (Not an exhaustive list of all statutes with overlapping elements)	D.C. Code General Enhancements (Excluding statutes with RCC Chapter 6 enhancements: 22-1804, 22-1804a, 22-3703, and 23-1328)
§ 22E-1202(a)	1st Assault	22-401 – 22-405; 22-406; 24-403.01(e), (f)(1)	22-851; 22-3601; 22-3602; 22-3611; 22-3751; 22-3751.01; 22-3752; 22-4502
§ 22E-1202(b)	Enhanced 2nd Assault		
§ 22E-1202(b)	2nd Assault		
§ 22E-1202(c)	Enhanced 3rd Assault (injury by weapon)		
§ 22E-1202(c)	Enhanced 3rd Assault (protected person)		
§ 22E-1202(c)	3rd Assault		
§ 22E-1202(d)	Enhanced 4th Assault (injury by weapon)		
§ 22E-1202(d)	Enhanced 4th Assault (protected person)		
§ 22E-1202(d)	4th Assault	22-402; 22-404; 22-407; 22-1810	22-851; 22-3601; 22-3602; 22-3611; 22-3751; 22-3751.01; 22-3752; 22-4502
§ 22E-1204(a)	Enhanced 1st Criminal Threats		
§ 22E-1204(a)	1st Criminal Threats		
§ 22E-1204(b)	Enhanced 2nd Criminal Threats		
§ 22E-1204(b)	2nd Criminal Threats		
§ 22E-1204(c)	Enhanced 3rd Criminal Threats		
§ 22E-1204(c)	3rd Criminal Threats		
§ 22E-1205(a)	Enhanced 1st Offensive Physical Contact		
§ 22E-1205(a)	1st Offensive Physical Contact		
§ 22E-1205(b)	Enhanced 2nd Offensive Physical Contact		
§ 22E-1205(b)	2nd Offensive Physical Contact		
§ 22E-1301(a)	Enhanced 1st Sexual Assault	22-3002; 22-3003; 22-3004; 22-3005; 22-3007; 22-3018; 22-3019; 24-403.01(b-2), (e)	22-3020; 22-3601; 22-3611; 22-4502
§ 22E-1301(a)	1st Sexual Assault		
§ 22E-1301(b)	Enhanced 2nd Sexual Assault		
§ 22E-1301(b)	2nd Sexual Assault		
§ 22E-1301(c)	Enhanced 3rd Sexual Assault		
§ 22E-1301(c)	3rd Sexual Assault		
§ 22E-1301(d)	Enhanced 4th Sexual Assault		
§ 22E-1301(d)	4th Sexual Assault		
§ 22E-1302(a)	Enhanced 1st Sexual Abuse of a Minor	22-3008; 22-3009; 22-3009.01; 22-3009.02; 22-3011; 22-3012; 22-3018; 22-3019; 24-403.01(b-2), (e)	22-3020; 22-3611; 22-4502
§ 22E-1302(a)	1st Sexual Abuse of a Minor		
§ 22E-1302(b)	Enhanced 2nd Sexual Abuse of a Minor		
§ 22E-1302(b)	2nd Sexual Abuse of a Minor		
§ 22E-1302(c)	Enhanced 3rd Sexual Abuse of a Minor		
§ 22E-1302(c)	3rd Sexual Abuse of a Minor		
§ 22E-1302(d)	Enhanced 4th Sexual Abuse of a Minor		
§ 22E-1302(d)	4th Sexual Abuse of a Minor		
§ 22E-1302(e)	Enhanced 5th Sexual Abuse of a Minor		
§ 22E-1302(e)	5th Sexual Abuse of a Minor		
§ 22E-1302(f)	Enhanced 6th Sexual Abuse of a Minor	22-3009.03; 22-3009.04; 22-3013; 22-3014; 22-3015; 22-3016; 22-3017; 22-3018; 22-3019	22-3020
§ 22E-1303(b)	2nd Sexual Abuse by Exploitation		
§ 22E-1304	Sexually Suggestive Conduct with a Minor	22-3010.01; 22-3011; 22-3018; 22-3019	22-3020
§ 22E-1305	Enticing a Minor into Sexual Conduct	22-1312; 22-3010; 22-3011; 22-3012; 22-3018; 22-3019	22-3020
§ 22E-1306	Arranging for Sexual Conduct with a Minor or Person Incapable of Consenting	22-3010.02; 22-3018; 22-3019	22-3020
§ 22E-1307(a)	1st Nonconsensual Sexual Conduct	22-3006; 22-3007; 22-3018; 22-3019	22-3020
§ 22E-1307(b)	2nd Nonconsensual Sexual Conduct		
§ 22E-1308(a)	1st Incest	22-1901	none
§ 22E-1308(b)	2nd Incest		
§ 22E-1309	Civil Provisions on the Duty to Report a Sex Crime	22-3020.51; 22-3020.52; 22-3020.53; 22-3020.54; 22-3020.55	none
§ 22E-1310	Admission of Evidence in Sexual Assault and Related Cases	22-3021; 22-3022; 22-3023; 22-3024	none
§ 22E-1401(a)	Enhanced 1st Kidnapping	22-2001; 22-2704; 22-2705; 22-2706; 22-2708; 22-2709	22-851; 22-3601; 22-3602; 22-3611; 22-3751; 22-3751.01; 22-3752; 22-4502
§ 22E-1401(a)	1st Kidnapping		
§ 22E-1401(b)	Enhanced 2nd Kidnapping		
§ 22E-1401(b)	2nd Kidnapping		
§ 22E-1402	Enhanced Criminal Restraint	22-2001; 22-2704; 22-2705; 22-2706; 22-2708; 22-2709	22-851; 22-3601; 22-3602; 22-3611; 22-3751; 22-3751.01; 22-3752; 22-4502
§ 22E-1402	Criminal Restraint		
§ 22E-1403	Blackmail	22-3252	none

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§ 22E-1501(a)	1st Criminal Abuse of a Minor	22-1101; 22-1102	22-3611
§ 22E-1501(b)	2nd Criminal Abuse of a Minor		
§ 22E-1501(c)	3rd Criminal Abuse of a Minor		
§ 22E-1502(a)	1st Criminal Neglect of a Minor	22-1101; 22-1102	none
§ 22E-1502(b)	2nd Criminal Neglect of a Minor		
§ 22E-1502(c)	3rd Criminal Neglect of a Minor		
§ 22E-1503(a)	1st Criminal Abuse of a Vulnerable Adult or Elderly Person	22-933; 22-934; 22-935; 22-936	none
§ 22E-1503(b)	2nd Criminal Abuse of a Vulnerable Adult or Elderly Person		
§ 22E-1503(c)	3rd Criminal Abuse of a Vulnerable Adult or Elderly Person		
§ 22E-1504(a)	1st Criminal Neglect of a Vulnerable Adult or Elderly Person	22-933; 22-934; 22-935; 22-936	none
§ 22E-1504(b)	2nd Criminal Neglect of a Vulnerable Adult or Elderly Person		
§ 22E-1504(c)	3rd Criminal Neglect of a Vulnerable Adult or Elderly Person		
§ 22E-1601	Enhanced Forced Labor	22-1832; 22-1837	none
§ 22E-1601	Forced Labor		
§ 22E-1602	Enhanced Forced Commercial Sex	22-2705; 22-2706; 22-2708	none
§ 22E-1602	Forced Commercial Sex		
§ 22E-1603	Enhanced Trafficking in Labor	22-1833; 22-1837	none
§ 22E-1603	Trafficking in Labor		
§ 22E-1604	Enhanced Trafficking in Forced Commercial Sex	22-1833; 22-1837	none
§ 22E-1604	Trafficking in Forced Commercial Sex		
§ 22E-1605	Enhanced Sex Trafficking of a Minor or Adult Incapable of Consenting	22-1834; 22-1837, 22-2704	none
§ 22E-1605	Sex Trafficking of a Minor or Adult Incapable of Consenting		
§ 22E-1606(a)	1st Benefitting from Human Trafficking	22-1836, 22-1837	none
§ 22E-1606(b)	2nd Benefitting from Human Trafficking		
§ 22E-1607(a)	1st Misuse of Documents in Furtherance of Human Trafficking	22-1835; 22-1837	none
§ 22E-1607(b)	2nd Misuse of Documents in Furtherance of Human Trafficking		
§ 22E-1608(a)	1st Commercial Sex with a Trafficked Person	none	none
§ 22E-1608(b)	2nd Commercial Sex with a Trafficked Person		
§ 22E-1609	Forfeiture	22-1838	none
§ 22E-1610	Reputation or Opinion Evidence	22-1839	none
§ 22E-1611	Civil Action	22-1840	none
§ 22E-1612	Limitation on Liabilities and Sentencing for RCC Chapter 16 Offenses	none	none
§ 22E-1613	Civil Forfeiture	22-2723	none
§ 22E-1801	Enhanced Stalking	22-3131 – 3135	none
§ 22E-1801	Stalking		
§ 22E-1802	Enhanced Electronic Stalking	22-3131 – 3135	none
§ 22E-1802	Electronic Stalking		
§ 22E-1803(a)	Enhanced 1st Voyeurism	22-3531	none
§ 22E-1803(a)	1st Voyeurism		
§ 22E-1803(b)	Enhanced 2nd Voyeurism		
§ 22E-1803(b)	2nd Voyeurism		
§ 22E-1804	Enhanced Unauthorized Disclosure of a Sexual Recording	22-3051 – 3057; 22-3531(f)(2)	none
§ 22E-1804	Unauthorized Disclosure of a Sexual Recording		
§ 22E-1805	Distribution of an Obscene Image	22-2201(a)	none
§ 22E-1806	Distribution of an Obscene Image to a Minor	22-2201(b)	none
§ 22E-1807(a)	1st Creating or Trafficking an Obscene Image of a Minor	22-3101 – 3104	none
§ 22E-1807(b)	2nd Creating or Trafficking an Obscene Image of a Minor		
§ 22E-1808(a)	1st Possession of an Obscene Image of a Minor	22-3101 – 3104	none
§ 22E-1808(b)	2nd Possession of an Obscene Image of a Minor		
§ 22E-1809(a)	1st Arranging a Live Sexual Performance of a Minor	22-3101 – 3104	none
§ 22E-1809(b)	2nd Arranging a Live Sexual Performance of a Minor		
§ 22E-1810(a)	1st Attending or Viewing a Live Sexual Performance of a Minor	22-3101 – 3104	none
§ 22E-1810(b)	2nd Attending or Viewing a Live Sexual Performance of a Minor		
§ 22E-2001	Aggregation to Determine Property Offense Grades	22-3202	none
§ 22E-2101(a)	1st Theft	22-601; 22-3211; 22-3212	none
§ 22E-2101(b)	2nd Theft		
§ 22E-2101(c)	3rd Theft		
§ 22E-2101(d)	4th Theft		
§ 22E-2101(e)	5th Theft		
§ 22E-2102	Unauthorized Use of Property	22-3216	none
§ 22E-2103	Unauthorized Use of a Motor Vehicle	22-3215	none
§ 22E-2104	Shoplifting	22-3213	none
§ 22E-2105(a)	1st Unlawful Creation or Possession of a Recording	22-3214	none
§ 22E-2105(b)	2nd Unlawful Creation or Possession of a Recording		
§ 22E-2106	Unlawful Operation of a Recording Device in a Movie Theater	22-3214.02	none

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§ 22E-2201(a)	1st Fraud	22-3221; 22-3222; 22-3224.01	none
§ 22E-2201(b)	2nd Fraud		
§ 22E-2201(c)	3rd Fraud		
§ 22E-2201(d)	4th Fraud		
§ 22E-2201(e)	5th Fraud		
§ 22E-2202(a)	1st Payment Card Fraud	22-3223; 22-3224.01	none
§ 22E-2202(b)	2nd Payment Card Fraud		
§ 22E-2202(c)	3rd Payment Card Fraud		
§ 22E-2202(d)	4th Payment Card Fraud		
§ 22E-2202(e)	5th Payment Card Fraud		
§ 22E-2203(a)	1st Check Fraud	22-1510	none
§ 22E-2203(b)	2nd Check Fraud		
§ 22E-2203(c)	3rd Check Fraud		
§ 22E-2204(a)	1st Forgery	22-3241; 22-3242	none
§ 22E-2204(b)	2nd Forgery		
§ 22E-2204(c)	3rd Forgery		
§ 22E-2205(a)	1st Identity Theft	22-3227.01 - 22-3227.04; 22-3227.06 - 22-3227.08	none
§ 22E-2205(b)	2nd Identity Theft		
§ 22E-2205(c)	3rd Identity Theft		
§ 22E-2205(d)	4th Identity Theft		
§ 22E-2205(e)	5th Identity Theft		
§ 22E-2206	Identity Theft Civil Provisions	22-3227.05	none
§ 22E-2207(a)	1st Unlawful Labeling of a Recording	22-3214.01	none
§ 22E-2207(b)	2nd Unlawful Labeling of a Recording		
§ 22E-2208(a)	1st Financial Exploitation of a Vulnerable Adult or Elderly Person	22-933.01	none
§ 22E-2208(b)	2nd Financial Exploitation of a Vulnerable Adult or Elderly Person		
§ 22E-2208(c)	3rd Financial Exploitation of a Vulnerable Adult or Elderly Person		
§ 22E-2208(d)	4th Financial Exploitation of a Vulnerable Adult or Elderly Person		
§ 22E-2208(e)	5th Financial Exploitation of a Vulnerable Adult or Elderly Person		
§ 22E-2209	Financial Exploitation of a Vulnerable Adult or Elderly Person Civil Provisions	22-937 – 22-938	none
§ 22E-2210(a)	1st Trademark Counterfeiting	22-901 – 902; 22-1502	none
§ 22E-2210(b)	2nd Trademark Counterfeiting		
§ 22E-2301(a)	1st Extortion	22-1402; 22-3251	none
§ 22E-2301(b)	2nd Extortion		
§ 22E-2301(c)	3rd Extortion		
§ 22E-2301(d)	4th Extortion		
§ 22E-2301(e)	5th Extortion		
§ 22E-2401(a)	1st Possession of Stolen Property	22-3232	none
§ 22E-2401(b)	2nd Possession of Stolen Property		
§ 22E-2401(c)	3rd Possession of Stolen Property		
§ 22E-2401(d)	4th Possession of Stolen Property		
§ 22E-2401(e)	5th Possession of Stolen Property		
§ 22E-2402(a)	1st Trafficking of Stolen Property	22-3231	none
§ 22E-2402(b)	2nd Trafficking of Stolen Property		
§ 22E-2402(c)	3rd Trafficking of Stolen Property		
§ 22E-2402(d)	4th Trafficking of Stolen Property		
§ 22E-2402(e)	5th Trafficking of Stolen Property		
§ 22E-2403(a)	1st Alteration of a Motor Vehicle Identification Number	22-3233	none
§ 22E-2403(b)	2nd Alteration of a Motor Vehicle Identification Number		
§ 22E-2404	Alteration of a Bicycle Identification Number	22-3234	none
§ 22E-2501(a)	1st Arson	22-301; 22-302; 22-3305	none
§ 22E-2501(b)	2nd Arson		
§ 22E-2501(c)	3rd Arson		
§ 22E-2502	Reckless Burning	22-301; 22-302; 22-3305	none
§ 22E-2503(a)	1st Criminal Damage to Property	22-303; 22-3305; 22-3307; 22-3309; 22-3310; 22-3312.01; 22-3312.04(a), (c); 22-3312.05; 22-3313; 22-3314	none
§ 22E-2503(b)	2nd Criminal Damage to Property		
§ 22E-2503(c)	3rd Criminal Damage to Property		
§ 22E-2503(d)	4th Criminal Damage to Property		
§ 22E-2503(e)	5th Criminal Damage to Property		
§ 22E-2504	Criminal Graffiti	22-3312.01; 22-3312.04(a), (c), (d), (e); 22-3312.05	none
§ 22E-2601(a)	1st Trespass	22-1341; 22-3301; 22-3302	none
§ 22E-2601(b)	2nd Trespass		
§ 22E-2601(c)	3rd Trespass		

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§ 22E-2701(a)	Enhanced 1st Burglary	22-801	none
§ 22E-2701(a)	1st Burglary		
§ 22E-2701(b)	Enhanced 2nd Burglary		
§ 22E-2701(b)	2nd Burglary		
§ 22E-2701(c)	Enhanced 3rd Burglary		
§ 22E-2701(c)	3rd Burglary		
§ 22E-2702	Possession of Tools to Commit Property Crime	22-2501; 24-403.01(f)(3)	none
§ 22E-3201(a)	1st Impersonation of an Official	22-1404 – 1406; 22-1409	none
§ 22E-3201(b)	2nd Impersonation of an Official		
§ 22E-3202	Misrepresentation as a District of Columbia Entity	22-3401-3403	none
§ 22E-3401(a)	1st Escape from a Correctional Facility or Officer	22-2601; 10-509.01a	none
§ 22E-3401(b)	2nd Escape from a Correctional Facility or Officer		
§ 22E-3401(c)	3rd Escape from a Correctional Facility or Officer		
§ 22E-3402	Tampering with a Detection Device	22-1211	none
§ 22E-3403(a)	1st Correctional Facility Contraband	22-2603.01 – 22-2603.04	none
§ 22E-3403(b)	2nd Correctional Facility Contraband		
§ 22E-4101(a)	1st Possession of a Prohibited Weapon or Accessory	7-2506.01(a)(3); 7-2506.01(b); 22-4514(a); 22-4515a(a) and (c)	none
§ 22E-4101(b)	2nd Possession of a Prohibited Weapon or Accessory		
§ 22E-4102(a)	1st Carrying a Dangerous Weapon	22-4502.01; 22-4504(a) – (a-1); 22-4504.01	none
§ 22E-4102(b)	2nd Carrying a Dangerous Weapon		
§ 22E-4102(c)	3rd Carrying a Dangerous Weapon		
§ 22E-4103(a)	1st Possession of a Dangerous Weapon with Intent to Commit Crime	22-4514(b); 22-4515a(b)	none
§ 22E-4103(b)	2nd Possession of a Dangerous Weapon with Intent to Commit Crime		
§ 22E-4104(a)	1st Possession of a Dangerous Weapon During a Crime	22-4502; 22-4504(b)	none
§ 22E-4104(b)	2nd Possession of a Dangerous Weapon During a Crime		
§ 22E-4105(a)	1st Possession of a Firearm by an Unauthorized Person	22-4503; 24-403.01(f)(2)	none
§ 22E-4105(b)	2nd Possession of a Firearm by an Unauthorized Person		
§ 22E-4106	Negligent Discharge of Firearm	22-4503.01; 24 DCMR § 2300.1 – 3	none
§ 22E-4107	Alteration of a Firearm Identification Mark	7-2505.03(d); 22-4512	none
§ 22E-4108	Civil Provisions for Prohibitions of Firearms on Public or Private Property	22-4503.02	none
§ 22E-4109	Civil Provisions for Lawful Transportation of a Firearm or Ammunition	22-4504.02	none
§ 22E-4110	Civil Provisions for Issuance of a License to Carry a Pistol	22-4506	none
§ 22E-4111	Unlawful Sale of a Pistol	22-4507	none
§ 22E-4112	Unlawful Transfer of a Firearm	22-4508	none
§ 22E-4113	Sale of a Firearm Without a License	22-4509	none
§ 22E-4114	Civil Provisions for Licenses of Firearms Dealers	22-4510	none
§ 22E-4115	Unlawful Sale of a Firearm by a Licensed Dealer	22-4510	none
§ 22E-4116	Use of False Information for Purchase or Licensure of a Firearm	22-4511	none
§ 22E-4117	Civil Provisions for Taking and Destruction of Dangerous Articles	22-4517	none
§ 22E-4118	Exclusions from Liability for Weapon Offenses	22-4504.01; 22-4505	none
§ 22E-4119	Merger of Related Weapon Offenses	none	none
§ 22E-4120	Endangerment with a Firearm	none	none
§ 22E-4201	Disorderly Conduct	22-1301; 22-1321; 22-1809	none
§ 22E-4202	Public Nuisance	22-1321	none
§ 22E-4203	Blocking a Public Way	22-1307; 22-1318; 22-1323; 22-3319; 22-3321; 22-3322	none
§ 22E-4204	Unlawful Demonstration	10-503.17; 22-1307	none
§ 22E-4205	Breach of Home Privacy	22-1321(f)	none
§ 22E-4206(a)	1st Indecent Exposure	22-1312	none
§ 22E-4206(b)	2nd Indecent Exposure		
§ 22E-4301	Rioting	22-1322	none
§ 22E-4302	Failure to Disperse	none	none
§ 22E-4401	Prostitution	22-2701; 22-2701.01; 22-2703; 22-2713 – 22-2720; 22-2724; 22-2725	none
§ 22E-4402	Enhanced Patronizing Prostitution	22-2701; 22-2701.01; 22-2703; 22-2713 – 22-2720; 22-2724; 22-2725	none
§ 22E-4402	Patronizing Prostitution		
§ 22E-4403	Enhanced Trafficking in Commercial Sex	22-2701.01; 22-2705; 22-2707; 22-2710; 22-2711; 22-2712; 22-2713 – 22-2720; 22-2722; 22-2724; 22-2725	none
§ 22E-4403	Trafficking in Commercial Sex		
§ 22E-4404	Civil Forfeiture	22-2723; 22-2724; 22-2725	none
§ 22E-4601	Contributing to the Delinquency of a Minor	22-811	none

Appendix A. Table of Correspondence: RCC to Current D.C. Code Statutes

RCC Statute Citation	RCC Statute Name	D.C. Code Closely Related Statute(s) (Not an exhaustive list of all statutes with overlapping elements)	D.C. Code General Enhancements (Excluding statutes with RCC Chapter 6 enhancements: 22-1804, 22-1804a, 22-3703, and 23-1328)
§ 7-2502.01A(a)	1st Possession of an Unregistered Firearm, Destructive Device, or Ammunition	7-2502.01(a); 7-2506.01(a); 7-2507.06(a)(2) – (4) and (b); 24 DCMR § 2343.2	none
§ 7-2502.01A(b)	2nd Possession of an Unregistered Firearm, Destructive Device, or Ammunition		
§ 7-2502.15	Possession of a Stun Gun	7-2502.15; 7-2507.06(b)(1)(E)	none
§ 7-2502.17	Carrying an Air or Spring Gun	24 DCMR § 2301	none
§ 7-2507.02A	Enhanced Unlawful Storage of a Firearm	7-2507.02; 24 DCMR § 2348	none
§ 7-2507.02A	Unlawful Storage of a Firearm		
§ 7-2509.06A	Carrying a Pistol in an Unlawful Manner	24 DCMR §§ 2343.1; 2344	none
§ 16-705	Jury trial; trial by court	16-705	none
§ 16-1005A	Criminal Contempt for Violation of a Civil Protection Order	16-1005(f) – (i)	none
§ 16-1021	Parental Kidnapping Definitions	16-1021	none
§ 16-1022(a)	1st Parental Kidnapping	16-1022-1025	none
§ 16-1022(b)	2nd Parental Kidnapping		
§ 16-1022(c)	3rd Parental Kidnapping		
§ 16-1022(d)	4th Parental Kidnapping		
§ 16-1023	Protective Custody and Return of Child	16-1023	none
§ 16-1024	Expungement of Parental Kidnapping Conviction	16-1026	none
§ 23-586(a)	1st Failure to Appear after Release on Citation or Bench Warrant Bond	23-585(b)	none
§ 23-586(b)	2nd Failure to Appear after Release on Citation or Bench Warrant Bond		
§ 23-1327(a)	1st Failure to Appear in Violation of a Court Order	23-1327	none
§ 23-1327(b)	2nd Failure to Appear in Violation of a Court Order		
§ 23-1329A	Criminal Contempt for Violation of a Release Condition	23-1329(a-1) and (c)	none
§ 24-241.05A	Violation of Work Release	24-241.05(b)	none
§ 24-403.01	Sentencing, supervised release, and good time credit for felonies committed on or after August 5, 2000.	§ 24-403.01	none
§ 24-403.03	Modification of an imposed term of imprisonment	§ 24-403.03	none
§ 25-1001	Possession of an Open Container or Consumption of Alcohol in a Motor Vehicle	25-1001	none
§ 48-904.01a(a)	1st Possession of a Controlled Substance	48-904.01(d)(1); 48-904.08; 48-904.09	none
§ 48-904.01a(b)	2nd Possession of a Controlled Substance		
§ 48-904.01b(a)	Enhanced 1st Trafficking of a Controlled Substance	48-904.01(a)(1); 48-904.06; 48-904.07; 48-904.07a; 48-904.08; 48-904.09	none
§ 48-904.01b(a)	1st Trafficking of a Controlled Substance		
§ 48-904.01b(b)	Enhanced 2nd Trafficking of a Controlled Substance		
§ 48-904.01b(b)	2nd Trafficking of a Controlled Substance		
§ 48-904.01b(c)	Enhanced 3rd Trafficking of a Controlled Substance		
§ 48-904.01b(c)	3rd Trafficking of a Controlled Substance		
§ 48-904.01b(d)	Enhanced 4th Trafficking of a Controlled Substance		
§ 48-904.01b(d)	4th Trafficking of a Controlled Substance		
§ 48-904.01b(e)	Enhanced 5th Trafficking of a Controlled Substance		
§ 48-904.01b(e)	5th Trafficking of a Controlled Substance		
§ 48-904.01c(a)	Enhanced 1st Trafficking of a Counterfeit Substance	48-904.01(b)(1); 48-904.08; 48-904.09	none
§ 48-904.01c(a)	1st Trafficking of a Counterfeit Substance		
§ 48-904.01c(b)	Enhanced 2nd Trafficking of a Counterfeit Substance		
§ 48-904.01c(b)	2nd Trafficking of a Counterfeit Substance		
§ 48-904.01c(c)	Enhanced 3rd Trafficking of a Counterfeit Substance		
§ 48-904.01c(c)	3rd Trafficking of a Counterfeit Substance		
§ 48-904.01c(d)	Enhanced 4th Trafficking of a Counterfeit Substance		
§ 48-904.01c(d)	4th Trafficking of a Counterfeit Substance		
§ 48-904.01c(e)	Enhanced 5th Trafficking of a Counterfeit Substance		
§ 48-904.01c(e)	5th Trafficking of a Counterfeit Substance		
§ 48-904.10	Possession of Drug Manufacturing Paraphernalia	48-904.10; 48-1102; § 48-1101(3); 48-1103(a)(1)	none
§ 48-904.11	Trafficking of Drug Paraphernalia	48-1102; 48-1103(b)(1)	none
§ 48-904.12	Maintaining Methamphetamine Production	48-904.03a	none

APPENDIX B.

TABLE OF ADVISORY GROUP DRAFT DOCUMENTS

Appendix B presents a table of all Advisory Group draft documents organized by Report or Memorandum number and name, date issued to the Advisory Group, and, for reports only, the date CCRC received comments. Reports contain draft recommendations for reform of criminal statutes. Memoranda contain background information only, no draft recommendations.

Table of CCRC Reports to the Advisory Group

(Containing Draft Recommendations for Reform of Criminal Statutes)

Report (Draft)	Issued to Group	Comments Received	Title
1	3/3/17	Vote 4/5/17	Enactment of D.C. Code Title 22 and Other Changes to Criminal Statutes; Approved Recommendations Issued to Council and Mayor 5/5/17
2 (1 st)	12/21/16	2/15/17	Basic Requirements of Offense Liability
3 (1 st)	3/13/17	4/27/17	Mistake, Deliberate Ignorance, and Intoxication
4 (1 st)	3/13/17	4/24/17	Preliminary Provisions
5 (1 st)	5/5/17	6/16/17	Offense Classes & Penalties
2 (2 nd)	5/5/17	6/16/17	Basic Requirements of Offense Liability
6 (1 st)	6/7/17	7/21/17	Penalty Enhancements
7 (1 st)	6/7/17	7/21/17	Definition of a Criminal Attempt
8 (1 st)	8/11/17	11/3/17	Property Offense Definitions, Aggregation, and Multiple Convictions
9 (1 st)	8/11/17	11/3/17	Theft and Damage to Property Offenses
10 (1 st)	8/11/17	11/3/17	Fraud and Stolen Property Offenses
11 (1 st)	8/11/17	11/3/17	Extortion, Trespass, and Burglary Offenses
12 (1 st)	11/6/17	12/11/17	Definition of a Criminal Conspiracy
2 (3 rd)	12/21/17	3/2/18	Basic Requirements of Offense Liability
13 (1 st)	12/21/17	3/2/18	Penalties for Criminal Attempts
14 (1 st)	12/21/17	3/2/18	Definitions for Offenses Against Persons
15 (1 st)	12/21/17	3/2/18	Assault & Offensive Physical Contact Offenses
16 (1 st)	12/21/17	3/2/18	Robbery
17 (1 st)	12/21/17	3/2/18	Criminal Menace & Criminal Threat Offenses
14 (2 nd)	3/16/18	5/11/18	Definitions for Offenses Against Persons
18 (1 st)	3/16/18	5/11/18	Solicitation and Renunciation
19 (1 st)	3/16/18	5/11/18	Homicide
20 (1 st)	3/16/18	5/11/18	Abuse & Neglect of Children, Elderly, and Vulnerable Adults
21 (1 st)	5/18/18	7/13/18	Kidnapping and Related Offenses
22 (1 st)	5/18/18	7/13/18	Accomplice Liability and Related Provisions
23 (1 st)	7/20/18	9/14/18	Disorderly Conduct and Public Nuisance
24 (1 st)	7/20/18	9/14/18	Failure to Disperse and Rioting
25 (1 st)	7/20/18	9/14/18	Merger
26 (1 st)	9/26/18	12/19/18	Sexual Assault and Related Provisions
27 (1 st)	9/26/18	12/19/18	Human Trafficking and Related Statutes
28 (1 st)	9/26/18	12/19/18	Stalking
29 (1 st)	9/26/18	12/19/18	Failure to Arrest
30 (1 st)	9/26/18	12/19/18	Withdrawal Defense & Exceptions to Legal Accountability and General Inchoate Liability
31 (1 st)	12/28/18	3/1/19	Escape from Institution or Officer
32 (1 st)	12/28/18	3/1/19	Tampering with a Detection Device
33 (1 st)	12/28/18	3/1/19	Correctional Facility Contraband
34 (1 st)	12/28/18	3/1/19	De Minimis Defense
9 (2 nd)	12/28/18	3/1/19	Theft and Damage to Property Offenses
35 (1 st)	3/12/19	4/12/19	Cumulative Update to Sections 201-213 of the RCC

Appendix B. Table of Advisory Group Draft Documents

36 (1 st)	4/15/19	5/13/19 & 7/8/19	Cumulative Update to Chapters 3, 7 and the Special Part of the RCC
37 (1 st)	7/12/19	9/16/19	Controlled Substance and Related Offenses
38 (1 st)	7/12/19	9/16/19	Enlistment of Minors & Maintaining Location to Distribute or Manufacture Controlled Substances
39 (1 st)	8/5/19	9/30/19	Weapon Offenses and Related Provisions
40 (1 st)	8/5/19	9/30/19	Self-Defense Sprays
41 (1 st)	10/3/19	11/15/19	Ordinal Ranking of Maximum Imprisonment Penalties
42 (1 st)	11/20/19	1/15/20	Obscenity, Privacy, and Related Offenses
43 (1 st)	11/20/19	1/15/20	Blackmail
44 (1 st)	11/20/19	1/15/20	Trademark Counterfeiting
45 (1 st)	11/20/19	1/15/20	Fraudulent Advertising and Fraudulent Registration
46 (1 st)	11/20/19	1/15/20	Possession of an Open Container of Alcohol
47 (1 st)	11/20/19	1/15/20	Illegal Vending
48 (1 st)	11/20/19	1/15/20	Incest
49 (1 st)	11/20/19	1/15/20	Parental Kidnapping
50 (1 st)	2/19/20	5/1/20	Cumulative Update to the RCC Other than Chapter 6
41 (2 nd)	2/19/20	5/15/20	Ordinal Ranking of Maximum Imprisonment Penalties
51 (1 st)	2/25/20	5/15/20	Jury Demandable Offenses
52 (1 st)	3/20/20	5/15/20	Cumulative Update to the RCC Chapter 6
53 (1 st)	5/18/20	6/19/20	Pinkerton Liability
54 (1 st)	5/18/20	6/19/20	Prostitution and Related Statutes
55 (1 st)	5/18/20	6/19/20	Failure to Appear and Violation of Conditions of Release Offenses
56 (1 st)	5/18/20	6/19/20	Panhandling
57 (1 st)	5/18/20	6/19/20	Second Look
58 (1 st)	5/18/20	6/19/20	Developmental Incapacity Defense
59 (1 st)	5/18/20	6/19/20	Endangerment with a Firearm
19 (2 nd)	5/18/20	6/19/20	Homicide Offenses
27 (2 nd)	5/18/20	6/19/20	Human Trafficking and Related Statutes
35 (2 nd)	5/18/20	6/19/20	Cumulative Update to Sections 201 – 213 of the RCC
41 (3 rd)	5/18/20	6/19/20	Ordinal Ranking of Maximum Imprisonment Penalties
60 (1 st)	6/19/20	7/20/20	Execution of Public Duty, Lesser Harm, and Temporary Possession Defenses
61 (1 st)	6/19/20	7/20/20	Abuse of Government Power General Enhancement
62 (1 st)	6/19/20	7/20/20	Impersonation of a District Official
63 (1 st)	9/28/20	11/9/20	Misrepresentation as a District of Columbia Entity
64 (1 st)	9/28/20	11/9/20	Allowing Dogs To Go At Large
65 (1 st)	9/28/20	11/9/20	Contributing to the Delinquency of a Minor
66 (1 st)	9/28/20	11/9/20	Defense of Self, Others, or Property
67 (1 st)	9/28/20	11/9/20	Entrapment, Duress, and Mental Disease or Defect Defenses
68 (1 st)	12/24/20	1/29/21	December 2020 RCC Cumulative Update
69 (1 st)	1/15/21	2/15/21	Cumulative Update to Class Imprisonment Terms and Classification of RCC Offenses
70 (1 st)	3/10/21	NA	CCRC Recommendations for the Council and Mayor

Table of CCRC Memoranda to the Advisory Group

(No Draft Recommendations, Background Only)

Memo	Issued	Title
1	11/2/16	Overview of CCRC and CRAG Draft Work Plan
2	12/21/16	Adoption of a Comprehensive General Part in the Revised Criminal Code
3	1/13/17	Copy of D.C. Sentencing Commission’s Relevant Draft Statutory Language on Liability Requirements
4	1/25/17	Changes for Second Draft of Report #1 (Recommendations for Enactment of D.C. Code Title 22 and Other Changes to Criminal Statutes).
5	3/3/17	Changes for Voting Draft of Report #1 (Recommendations for Enactment of D.C. Code Title 22 and Other Changes to Criminal Statutes).
6	3/13/17	Copy of D.C. Sentencing Commission Draft Language on Preliminary Provisions, Mistake & Intoxication
7	3/13/17	Compilation of CCRC Recommendations Under Development—Statutory Text Only
8	5/5/17	Changes for Second Draft of Report No. 2
9	5/5/17	Offense Classes & Penalties
10	6/7/17	Penalty Enhancements
10C	6/7/17	Penalty Enhancements Appendix C
10D	6/7/17	Penalty Enhancements Appendix D
11	6/7/17	Definition of a Criminal Attempt
12	8/11/17	Property Offense Supplementary Materials
13r	11/6/17	Definition of a Criminal Conspiracy
14	12/21/17	Third Draft of Report #2
15	12/21/17	Supplementary Materials to the First Drafts of Reports #13-17
16	3/16/18	Supplemental Materials to the First Draft of Report #18
17	3/16/18	Supplemental Materials to the First Draft of Reports #19-20
18	5/18/18	Supplemental Materials to the First Draft of Report #21
19	5/18/18	Supplemental Materials to the First Draft of Report #22
20	9/26/18	Supplemental Materials to the First Drafts of Reports #26-30
21	3/12/19	Supplemental Materials to the First Draft of Report # 35
22	4/15/19	Supplemental Materials to the First Draft of Report # 36
23	7/12/19	Supplemental Materials to the First Draft of Report #37
24	8/5/19	Supplemental Materials to the First Draft of Report #39
25	9/23/19	“Second Look” and Related Provisions in Other Jurisdictions
26	10/3/19	D.C. Code Statutory Penalties and Voluntary Sentencing Guidelines
27	10/10/19	Public Opinion Surveys on Ordinal Ranking of Offenses
28	10/21/19	Statistics on District Adult Criminal Charges and Convictions
29	11/20/19	Supplemental Materials to the First Draft of Report #42
30	2/19/20	Supplemental Materials to the First Draft of Report #50
31	2/25/20	Supplemental Materials to the First Draft of Report #51
32	3/20/20	Supplemental Materials to the First Draft of Report #52
33	5/18/20	Supplemental Materials to the First Draft of Report #53 and the Second Draft of Report #19

Appendix B. Table of Advisory Group Draft Documents

34	5/18/20	Supplemental Materials to the Second Draft of Report #27
35	5/18/20	Supplemental Materials to the Second Draft of Report #35
36	5/18/20	Supplemental Materials to the First Draft of Report #54
37	5/18/20	Supplemental Materials to the First Draft of Report #58
38	7/31/20	Statistics on District Adult Criminal Charges and Convictions
39	12/24/20	Supplemental Materials to the First Draft of Report #68
40	12/31/20	Statistics on District Adult Criminal Charges and Convictions
41	1/15/21	Supplemental Materials to the First Draft of Report #69
42	3/10/21	Supplemental Materials to the First Draft of Report #70

APPENDIX C.
ADVISORY GROUP COMMENTS ON DRAFT DOCUMENTS

Appendix C includes all written comments by Advisory Group members on the CCRC draft reports containing reform recommendations. The comments are organized by date received, ending with the most recent comments. This Appendix does not include any responses CCRC had to the comments.

**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.
- 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 fourth 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 Provisions¹

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.

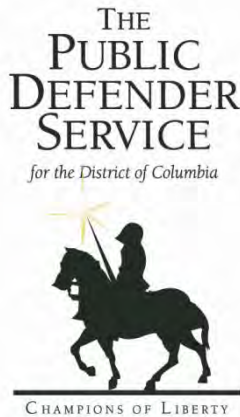
plain meaning of that provision shall be examined first. If necessary to determine legislative intent, the structure, purpose, and history of the provision also may be examined.”

§ 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



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 not self-induced.

Specifically, PDS recommends the following definition:

“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.

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 existed 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 existed 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. See *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."

²D.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.

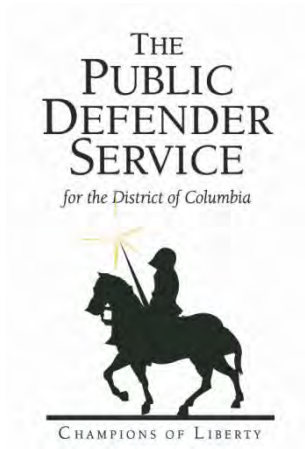
Second, § 22A-804 (d) limits the court’s ability to “double the applicable amount under subsection (a) of this section.” This paragraph does not address the courts authority to double fines for organizational defendants when the underlining fine is established in the individual offense, as an exception 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



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 phase 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

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 accommodate 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 Constitution⁹ 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 penalties¹⁵ 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 States*, 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:

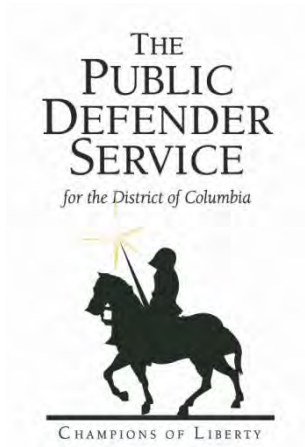
A hate crime penalty enhancement applies to an offense when the offender commits the offense with intent to injure or intimidate another person because of prejudice against that person’s perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, 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



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.

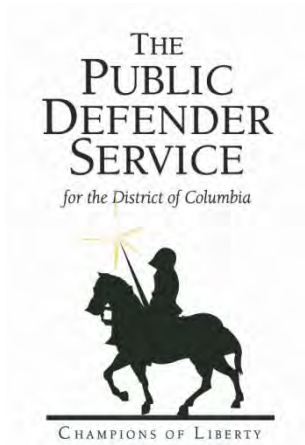
¹⁵ The RCC § 22A-806(e) provides for at least the possibility of mandatory minimum sentences for the commission of repeat offenses. PDS understands that sentencing will be fully considered by the Commission at a later time.

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



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’s conduct is either:

(A) Reasonably adapted to and dangerously close to the accomplishment of that offense; or

(B) Would be dangerously close to the accomplishment of that offense if the situation was as the person perceived it, provided that the person’s conduct is reasonably adapted to the accomplishment of 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 influence³, believe that they have exercised 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 undue 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 Offenses¹

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) where 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 justice⁸ 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 adult¹⁰ 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 or elderly person. All of the evidence concerning the person's belief are peculiarly within that person's 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 REPORT²

RCC § 22A-2603. Criminal Obstruction of a Public Way³

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

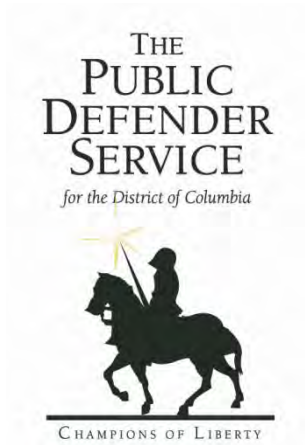
Paragraph (a) states:

- (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



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”?

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, debtsincluding, 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 vehicle¹⁵ 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 theft¹⁹ 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). $\$325 \times 8 = \$2,600$. 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 \times 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 \times 8 = \120 . Stealing a full days’ work at the top minimum wage rate is two 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. ($325 \div 12.50 = 26$.) 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; or
- (2) the property, in fact, is labor, and the amount of labor is 2080 hours²² or more.

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 hours²³ 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 hours²⁴ 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 hours²⁵ 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 shoplifts²⁹ 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 appears³⁰ 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, in fact, is a cemetery, grave, or other place for the internment of human remains,⁴⁴ or that, in fact, is

⁴¹ RCC § 22A-2502.

⁴² RCC § 22A-2503.

⁴³ PDS would also accept a knowing mental state plus 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 cotenant 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:

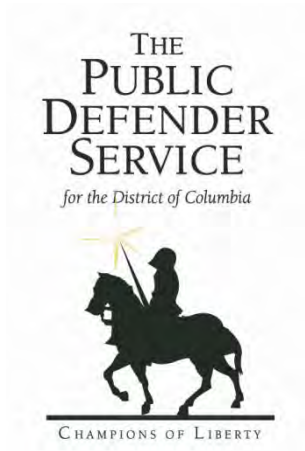
Without the effective consent of ~~the~~ an occupant, or if there is no occupant, ~~the~~ an owner.

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



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 circumstance⁸ 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. Assault²

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).

M E M O R A N D U M

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 concedes¹ 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

Report # 15: Recommendations for Assault & Offensive Physical Contact Offenses

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;

(i)(II) Public safety employee;

...

(i)(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 property²¹ – 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 12³⁰ 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 unreasonable belief that the use of deadly force was necessary...” [emphasis added] Our understanding is that this was intentional, and wasn’t meant to say “reasonable.” 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 a reasonable 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 notwithstanding 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.

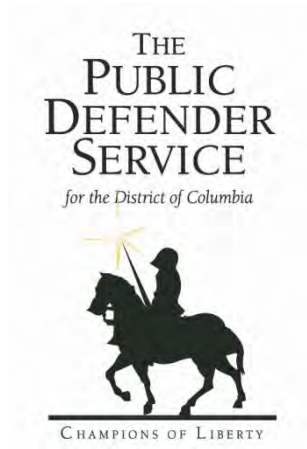
In establishing the offense degree, the Child abuse statute utilizes the terms “serious bodily injury” and “significant bodily injury” that were developed to distinguish between the various degrees of offenses against persons. While those definitions may be appropriate when distinguishing between injuries 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 choking 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 degree 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 blood flow to the brain or extremities.

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 injury.

MEMORANDUM



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,

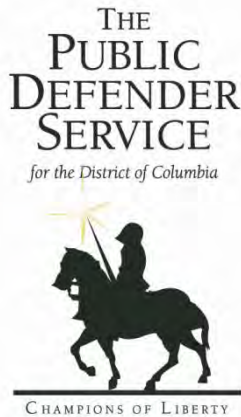
¹ Report #18, pages 47- 48.

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



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 2016¹, 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 another³ 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 duties⁵, 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 perpetrated 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 some evidence of mitigation, however weak, is present at trial, the government must prove the absence of such circumstances beyond a reasonable doubt.

9. Manslaughter

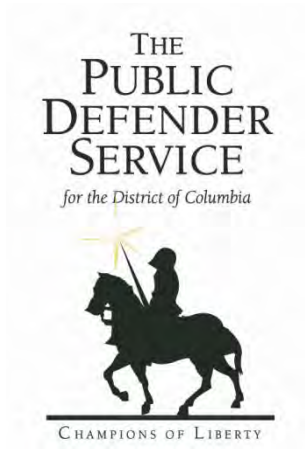
For clarity and consistency, PDS recommends that the RCC eliminate the offense of aggravated manslaughter, RCC § 22A-1102(a) and group status based aggravators where the decedent is, for instance a law enforcement officer or public safety employee, in a separate aggravator statute.

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



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 some evidence, however weak, 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. Merger Provision

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, except in the exercise of parental discipline by a parent, legal guardian, or person who

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 than the phrase “bodily injury” which is contained in the definition of the underlined 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.

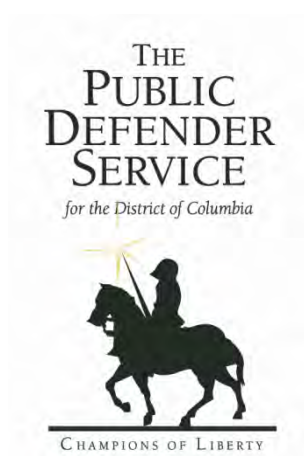
RCC § 22A-211 (a) is titled, “USING ANOTHER PERSON TO COMMIT AN OFFENSE.” [emphasis in original] The title is misleading. As drafted, it implies that the person acted with some intentionality in causing another person to act. As the Commentary makes clear, however, a person is legally accountable for 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



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 conduct¹ and public nuisance² 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 property⁶ 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.

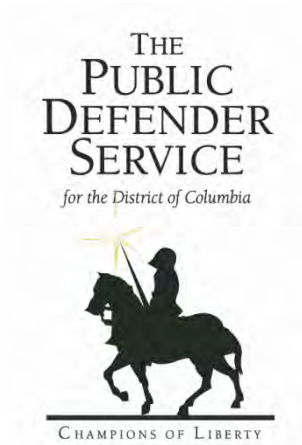
¹⁰ See RCC § 22A-4002(c)(4).

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



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 disperse 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 disperse 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.”

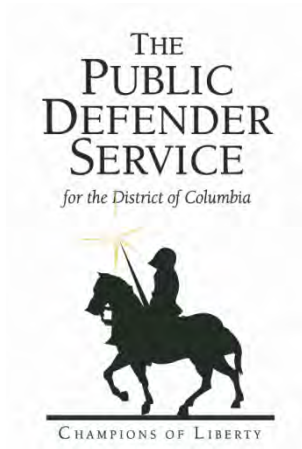
The possession of a dangerous weapon², such as false knuckles³ or a knife with a blade over three inches in length, in a pocket, purse, or backpack while committing the offense of disorderly conduct does not increase danger to the community or elevate the fear experienced by bystanders. The possession 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



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-4001² 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) the 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 were 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 offense 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 than 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.

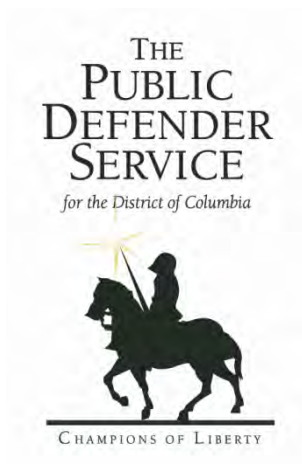
³ Footnote 27 states, "The most serious offense will typically be the offense that is subject to the highest offense classification; however, if two or more offenses are both subject to the same classification, but one offense is subject to a higher statutory maximum, then that higher penalized offense 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



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 an 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.

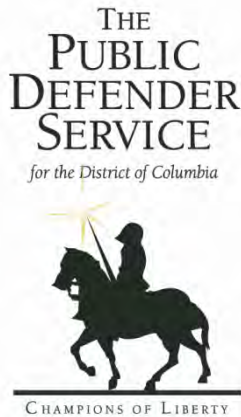
- 5. PDS recommends a minor modification to RCC § 22A-1303. RCC § 22A-1303(a)(C)(i) prohibits administering an intoxicant without the claimant's effective consent "with intent to impair the complainant's ability to express unwillingness." The RCC should explicitly add: "with intent to impair the complainant's 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 of a third person in the sight of the complainant.” 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 ~~complainant~~ 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



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.

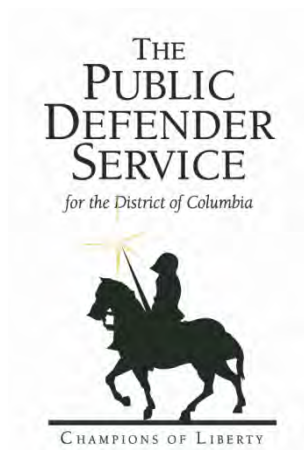
Second and third degree sex trafficking patronage should be rewritten similarly.

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



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 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 it 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 180 days, 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 lose 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

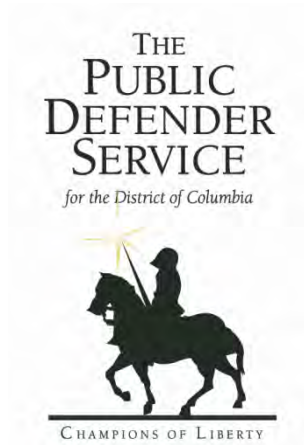
a defendant terminates his or her efforts to promote or facilitate commission of an offense before it has been committed, and either:

- (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



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.

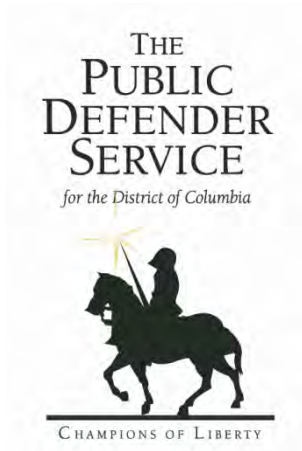
⁷ Report #31 does not explain what it means to “serve a sentence” and therefore leaves open the possibility that a person who was “sentenced” to probation would be considered to be “serving a sentence” when he encounters a police officer on the street. *Veney v. United States*, 738 A.2d 1185 (D.C. 1999), 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 eustody;
 - (B) Fails to return to confinement eustody; ~~or~~
 - (C) Fails to report to confinement eustody; 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



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 when done purposely, meaning with the conscious desire to interfere with the operation of the device.

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. Tampering with a Detection Device.

(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 pursuant to a D.C. Code offense or order issued by a judge of the Superior Court of the District of Columbia while:

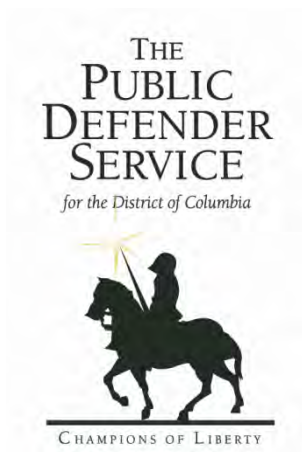
- (A) Subject to a protection order;
- (B) On pretrial release;
- (C) On presentence or predisposition release;

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~~ 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



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, 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.

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 rationale for them, the Commission's mandate to use language in the recommendations that are clear and plain⁵, 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 of bringing contraband 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

³OAG 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

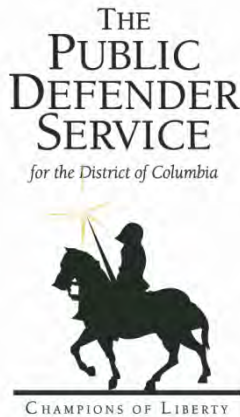
RCC § 22E-2101, Theft

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



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~~ unforeseeable 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 Act⁴), 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. USAO recommends that, in subsection (e)(2), the words “has been decided” be replaced with the words “becomes final.”

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. RCC § 22E-301—Criminal Attempt

1. 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.

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 5³ 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 the like 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.”

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-Christian 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 AGE¹⁴

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. KIDNAPPING¹⁵

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.

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 there¹⁶.

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. After all, 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 misled 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 consent²³ of an owner or by undue influence.

RCC § 22E-2501. ARSON²⁴

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 BURNING²⁵

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

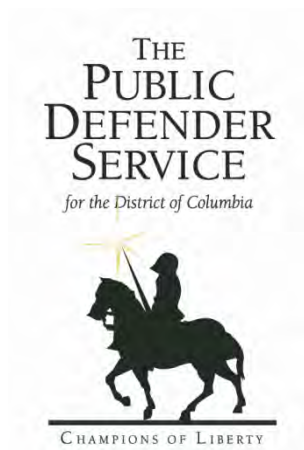
²⁹ A person who is blocking the entrance of the drug store from inside the store, on private property, is committing trespass, under RCC § 22E-2601, once they are asked to leave the store. (i.e. When their privilege to remain in the store is revoked.)

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



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 only 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 only include threats to expose the types of secrets or assert facts that would have traditionally 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

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 ridicule, 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 un rebuttable 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 threatened 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. 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.

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. 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.”

With USAO’s changes, subsection (D) would provide:

“(D) Any employee, contractor, 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. USAO recommends that the definition of “Serious bodily injury” include the provision “or protracted loss of consciousness.”

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. 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.”

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, or a laceration for which the complainant required or received stitches, sutures, staples, or closed-skin adhesives; a burn of at least second degree severity”

As the Commentary cites (RCC Commentary at 268 & n.690), under current law, lacerations requiring stitches 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 use 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. USAO recommends removing the requirement that the lethal act be committed in furtherance of the underlying enumerated felony in a Felony Murder charge.

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. 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.

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. USAO recommends that a person who is guilty of Felony Murder should be held responsible for the killing of his/her accomplice.

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. USAO recommends removing voluntary intoxication from Chapter 11.

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. 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.

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 Premeditated 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]nowingly 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. USAO recommends creating a separate statutory provision for Carjacking, instead of subsuming Carjacking within Robbery.

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 of 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 separately 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. 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).

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, regardless of whether the arrest, stop, or detention was lawful;”

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 misdemeanor 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 created 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 exist 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 overcomes, restrains, or causes 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. USAO recommends removing the recklessness language and the age differential language in subsection (g)(4).

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, in fact, was under 18 years of age, that and 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, in fact, 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, in fact, 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 of 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. USAO recommends adding the words “medical or therapeutic” to subsections (a)(2)(C)(i) and (b)(2)(C)(i).

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, medical, or therapeutic 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. USAO recommends adding a provision stating that consent is not a defense.

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 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.”

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 statute is unclear as to whether each occasion 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 barring 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 rationale 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 present⁴. 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 building⁵, 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.0.016.5399j1j7&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 older⁸; 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

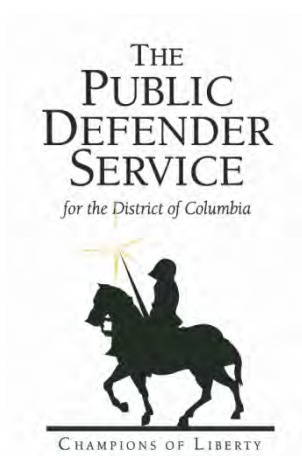
Given the dangerousness associated with methamphetamine production, OAG suggests that the RCC contain a provision which makes it an offence for a person to knowingly use a building, vehicle, or watercraft with the intent to manufacture methamphetamine therein.

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



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 measurable 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:

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.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 item 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 diagnosis⁴, 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. 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.

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 § 7-2502.01 (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 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 bullet³) 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 § 7-2502.01 (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)(1)(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)(1)(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)(1) has the same exclusions from liability as RCC § 22E-4101(e)(1) and for the same reasons we propose that paragraph (d)(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

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-4105(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/dictionary/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)(1)(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-

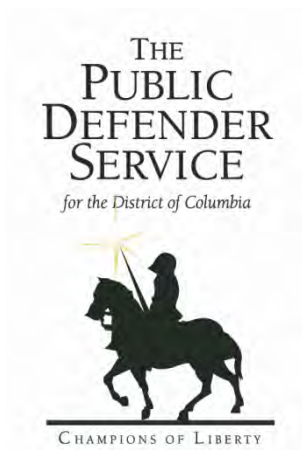
¹ This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may 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 its use.”³

³ The additional language is modeled on D.C. Code § 7-2502.13(a).

MEMORANDUM



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 PENALTIES²

- 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 Fraudⁱⁱⁱ 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 1 month/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.

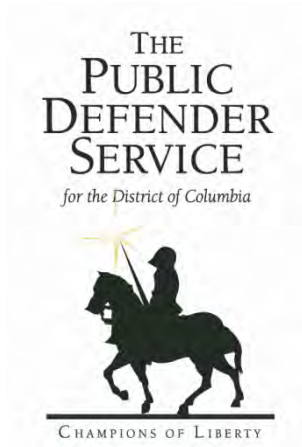
- (c) *Third Degree*. An actor commits third degree burglary when that actor:
- (1) Knowingly and fully enters or surreptitiously remains in:
 - (A) A building or business yard, or part thereof, without a privilege or license to do so under civil law;
 - (B) That is not open to the general public at 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.

M E M O R A N D U M



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 months² 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 disparity] 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
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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.

"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.

"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.

"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.

"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.

"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 accept 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. USAO recommends increasing the proposed penalties for Manslaughter.

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. USAO opposes decreasing penalties for firearms offenses from those in current law.

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. USAO recommends that all gradations of Trafficking of a Controlled Substance and Trafficking of a Counterfeit Substances be felony offenses.

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. USAO recommends increasing the proposed penalties for Robbery.

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 where 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 images 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 MINOR⁷

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 threats³, 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

³RCC § 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.

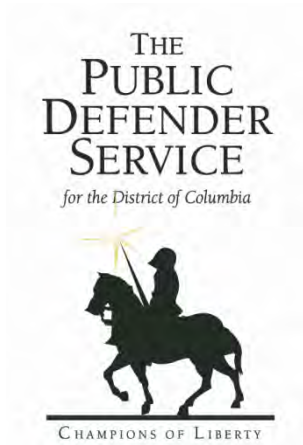
For subsequent cases where the Court of Appeals recognized OAG’s authority to prosecute cases, see *In re Hall*, 31 A.3d 453, 456 (D.C. 2011) and *In re Prosecution of Nicco Settles*, 218 A.3d 235 (D.C. 2019). None of the distinctions made in those cases for why the Council had authority to designate OAG as the prosecutorial agency apply to parental kidnapping. Because parental kidnapping does not fall into one of the exceptions noted in *Crawley*, 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



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 code¹ and the RCC² 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 other cultural institution;
- (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 his 17 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 with the purpose of avoiding detection; 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 with the purpose of avoiding detection; 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 with the purpose of avoiding detection;
- (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) Purposely³, ~~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 mean 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 an ~~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.

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, 2020

SUBJECT: First Draft of Report #50, Cumulative Update to the Revised Criminal Code Other than Chapter 6

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #50, Cumulative Update to the Revised Criminal Code Other than Chapter 6.¹

In drafting this review, OAG is attempting to abide by the request in Advisory Group Memorandum #30 to “Please refrain from repeating prior comments that were not incorporated in this Report; all prior comments have been preserved in the record that will be presented to the Council and Mayor.”

COMMENTS ON THE DRAFT REPORT

RCC § 22E-102. RULES OF INTERPRETATION

Paragraph (a) states:

Generally. To interpret a statutory provision of this title, the 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.

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.

To clarify what function the review of structure, purpose, and history serves, we recommend that it be reformulated as:

Generally. To interpret a statutory provision of this title, the plain meaning of that provision shall be examined first. To the extent necessary to resolve ambiguities in the plain statutory text, the structure, purpose, and history of the provision also may be examined.

RCC § 22E-303. CRIMINAL CONSPIRACY

Paragraph (d) states:

Jurisdiction when object of conspiracy is to engage in conduct outside the District. When the object of a conspiracy formed inside the District is to engage in conduct outside the District, the conspiracy is a violation of this section only if:

- (1) The conduct would constitute a criminal offense under the statutory laws of the District if performed in the District; and
- (2) The conduct would constitute a criminal offense under:
 - (A) The statutory laws of the other jurisdiction if performed in that jurisdiction; or
 - (B) The statutory laws of the District even if performed outside the District.

It is unclear when the situation anticipated by (d)(1) and (d)(2)(B) would occur. In other words, when would “The conduct ... constitute a criminal offense under the statutory laws of the District if performed in the District and the conduct ... constitute a criminal offense under ... the statutory laws of the District even if performed outside of the District”? The Commentary does not shed light on this issue. OAG recommends that to clarify what is meant here, the Commentary should contrast two examples. The first would be a scenario that demonstrates (d)(1) and (d)(2)(A) and the second that demonstrates (d)(1) and (d)(2)(B).

RCC § 22E-701. GENERALLY APPLICABLE DEFINITIONS

This provision defines “debt bondage.” It states, “‘Debt bondage’ means the status or condition of a person who provides labor, services, or commercial sex acts, for a real or alleged debt, where:

- (A) The value of the labor, services, or commercial sex acts, as reasonably assessed, is not applied toward the liquidation of the debt; [or]
- (B) The length and nature of the labor, services, or commercial sex acts are not respectively limited and defined...

The word “labor” is not needed in these provisions because the word “services” as defined later in RCC § 22E-701 includes labor.²

² RCC § 22E-701 states, “‘Services’ includes...Labor, whether professional or nonprofessional...”

This provision defines “Coercive threat.” It states, in relevant part, “‘ Coercive threat’ means a threat that, unless the complainant complies, any person will do any of the following:

- (A) Engage in conduct that, in fact, constitutes:
 - (1) An offense against persons as defined in subtitle II of RCC Title 22E; or
 - (2) A property offense as defined in subtitle III of RCC Title 22E;³ [emphasis added]”

The reference to the RCC is not needed. Once enacted, the RCC would be a title under the Code. Therefore, the provision should state:

- (A) Engage in conduct that, in fact, constitutes:
 - (1) An offense against persons as defined in subtitle II of this title; or
 - (2) A property offense as defined in subtitle III of this title;³ [emphasis added]

This provision defines “community based organization.” It states:

“Community based organization” means an organization that provides services, including medical care, counseling, homeless services, or drug treatment, to individuals and communities impacted by drug use. The term "community-based organization" includes all organizations currently participating in the Needle Exchange Program with the Department of Human Services under § 48-1103.01. [emphasis added]

For clarity, to make the two sentences parallel, and to be consistent with other definitions, OAG recommends reformulating this definition to read as follows:

- “Community-based organization”
- (A) Means an organization that provides services, including medical care, counseling, homeless services, or drug treatment, to individuals and communities impacted by drug use; and
 - (B) Includes any organization currently participating in the Needle Exchange Program with the Department of Human Services under § 48-1103.01.³

³ In the proposed language OAG converted subparagraph (B) to the singular to match subparagraph (A). We also added a hyphen to the first iteration of the phrase “Community-Based organization” to match its formulation in RCC § 48-904.11, Trafficking of Drug Paraphernalia.

OAG recommends reformulating the definition of “deceive and “deception” similar to our recommendation concerning the definition of “community-based organization. In the RCC definition, paragraph (E) does not flow from the lead in language. The RCC definition is:

“Deceive” and “deception” mean:

- (A) Creating or reinforcing a false impression as to a material fact, including false impressions as to intention to perform future actions;
- (B) Preventing another person from acquiring material information;
- (C) Failing to correct a false impression as to a material fact, including false impressions as to intention, which the person previously created or reinforced, or which the deceiver knows to be influencing another to whom he or she stands in a fiduciary or confidential relationship; or
- (D) For offenses against property in Subtitle III of this title, failing to disclose a known lien, adverse claim, or other legal impediment to the enjoyment of property which he or she transfers or encumbers in consideration for property, whether or not it is a matter of official record.
- (E) The terms “deceive” and “deception” do not include puffing statements unlikely to deceive ordinary persons, and deception as to a person’s intention to perform a future act shall not be inferred from the fact alone that he or she did not subsequently perform the act.

OAG recommends reformulating this definition to read as follows:

“Deceive” and “deception”:

(A) Mean:

- (1) Creating or reinforcing a false impression as to a material fact, including false impressions as to intention to perform future actions, provided, that deception as to a person’s intention to perform a future act shall not be inferred solely from the fact that he or she did not subsequently perform the act;
 - (2) Preventing another person from acquiring material information;
 - (3) Failing to correct a false impression as to a material fact, including false impressions as to intention, which the person previously created or reinforced, or which the deceiver knows to be influencing another to whom he or she stands in a fiduciary or confidential relationship; or
 - (4) For offenses against property in Subtitle III of this title, failing to disclose a known lien, adverse claim, or other legal impediment to the enjoyment of property which he or she transfers or encumbers in consideration for property, whether or not it is a matter of official record;
- and

(B) Does not mean puffing statements unlikely to deceive ordinary persons.

Note that in OAG’s reformulated provision, in subparagraph (A)(1) we used the phrase “solely from the fact” instead of “inferred from the fact alone.” We believe that this formulation is clearer.

The definition of law enforcement officer includes “a licensed special police officer.”⁴ This phrase is used approximately 60 times in the draft RRC, contained in the First Draft of Report 50. For example, it is both used in the definition of who is a “protected person” in RCC § 22E-701 and the substantive offense and the limitation on justification and excuse defenses, in the assault on a law enforcement officer offense, found in RCC § 22E-1202. A licensed special police officer serves a similar role to campus police officers. See D.C. Code § 5-129.02 and the rules promulgated under that section. In recognition of the role that campus police officers play, OAG recommends that the definition of “law enforcement officer” be expanded to include them.⁵ One way that this can be done is to amend this definition to say, “a campus police officer and licensed special police officer.”⁶

⁴ The entire definition of “law enforcement officer” is:

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

⁵ If campus police officers are not defined as law enforcement then there could be potentially dangerous situations for which they could not intervene. For example, RCC § 22E-4201(a)(2) (D) makes it an offense when a person “Knowingly continues or resumes fighting with another person after receiving a law enforcement officer’s order to stop.” So campus police would not be able to stop an affray at a college because the combatants would not be committing an offense until MPD or some other law enforcement agency came to the campus and made the order.

⁶ OAG recommends that they be listed in this order because if it were written as “a licensed special police officer and a campus police officer” argument could be made that the term “licensed” also applied to campus police officers.

RCC § 22E-1101. MURDER

Paragraph (c) deals with voluntary intoxication in the murder context. It states, “A person shall be deemed to have consciously disregarded the risk required to prove that the person acted with extreme indifference to human life in paragraph (b)(1) if the person, is unaware of the risk due to self-induced intoxication, but would have been aware had the person been sober. [emphasis added] As most of the sentence is in the past tense and to avoid confusion, OAG believes that that the underlined word should also be in the past tense. So, it should read “A person shall be deemed to have consciously disregarded the risk required to prove that the person acted with extreme indifference to human life in paragraph (b)(1) if the person, was unaware of the risk due to self-induced intoxication, but would have been aware had the person been sober. [emphasis added]”⁷

RCC § 22E-1301. SEXUAL ASSAULT

This offense now reads:

- (a) *First degree.* An actor commits first degree sexual assault when that actor:
- (1) Knowingly engages in a sexual act with the complainant or causes the complainant to engage in or submit to a sexual act;
 - (2) In one or more of the following ways:
 - (A) By using physical force that causes bodily injury to, overcomes, or restrains any person;
 - (B) By threatening, explicitly or implicitly, to kill, kidnap, or cause bodily injury to any person, or to commit a sexual act against any person...

The previous draft of this offense included “by using a weapon.” In Appendix D1, on page App. D1 148, the CCRC explains why it deleted the reference to the use of a weapon. While OAG does not object to the deletion of this phrase from the statutory text, we believe that the Commentary should make clear that an actor who uses a weapon to cause the complainant to engage in or submit to a sexual act has threatened the complainant and would, therefore, have liability under (a)(2)(B). OAG recommends that the same comment should be made in the Commentary for third degree sexual assault.

There is an affirmative offense for this offense. Paragraph (e) states:

Affirmative defenses. It is an affirmative defense to liability under this section that, in fact:

⁷ Subparagraph (d)(3)(I) contains a typo. It is missing the phrase “the decedent.” The following is the subparagraph with the underlined phrase added. “Commits the murder with the purpose of harming the decedent because the decedent was or had been a witness in any criminal investigation or judicial proceeding, or the decedent was capable of providing or had provided assistance in any criminal investigation or judicial proceeding.”

- (1) The actor has the complainant's effective consent to the actor's conduct, or the actor reasonably believes that the actor has the complainant's effective consent to the actor's conduct;
- (2) The actor's conduct does not inflict significant bodily injury or serious bodily injury, or involve the use of a dangerous weapon;
- (3) The actor is not at least 4 years older than a complainant who is under 16 years of age; and
- (4) The actor is not in a position of trust with or authority over the complainant, is not at least 18 years of age, and is not at least 4 years older than the complainant who is under 18 years of age.

The previous version of this defense was also contained in paragraph (e) and stated:

- (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.

While OAG does not object to the recasting of the effective consent defense as an affirmative defense, we do believe that the proposed version can be redrafted to have more clarity. The proposed version, unlike the previous version, lists what qualifies as an affirmative defense on the same paragraph level as what excludes an actor from utilizing an affirmative defense. We believe that this structure can be confusing to the reader. The potential confusion lie in that paragraph (1) is written in the positive, whereas paragraphs (2) through (4) contains the word "not" and so is written in the negative. OAG believes that recasting paragraphs (2) through (4) in the positive will make this provision more easily understood by the lay reader. and therefore recommend that it be redrafted as follows:

Affirmative defense. (1) It is an affirmative defense to liability under this section that the actor, in fact, has the complainant's effective consent to the actor's conduct, or the actor reasonably believes that the actor has the complainant's effective consent to the actor's conduct.

(2) The affirmative defense is not available when, in fact:

- (A) The actor's conduct inflicts significant bodily injury or serious bodily injury, or involves the use of a dangerous weapon;

- (B) The actor is at least 4 years older than a complainant who is under 16 years of age; or
- (C) The actor is in a position of trust with or authority over the complainant, is not at least 18 years of age, and is not at least 4 years older than the complainant who is under 18 years of age.

RCC § 22E-1303. SEXUAL EXPLOITATION OF AN ADULT

In addition to other actors, for the first degree version of this offense, RCC § 22E-1303 (a)(2)(C) applies when, “The actor is, or purports to be, a healthcare provider, a health professional, or a religious leader described in D.C. Code § 14-309...” The Commentary to this provision states, “A ‘religious leader described in D.C. Code § 14-309’ is a “priest, clergyman, rabbi, or other duly licensed, ordained, or consecrated minister of a religion authorized to perform a marriage ceremony in the District of Columbia or duly accredited practitioner of Christian Science.” Because D.C. Code § 14-309 goes on to discuss the specific circumstances for when clergy cannot be examined in a court proceedings, OAG recommends that the Commentary be expanded to make clear that those circumstances are irrelevant for the purposes of determining which religious leaders are subject to this offense.⁸ We suggest that this portion of the Commentary be redrafted to state, “The actor is, or purports to be, a healthcare provider; a health professional; or a religious leader described in D.C. Code § 14-309, regardless of whether the religious leader hears confessions or receives other communications.”⁹

RCC § 22E-1307. NONCONSENSUAL SEXUAL CONDUCT

RCC § 22E-1307 (c) states the exclusions from liability for this offense. It states, “An actor does not commit an offense under this section for deception that induces the complainant to consent to the sexual act or sexual contact.” This statement appears to be unambiguous. However, the Commentary states, “The use of deception as to the nature of the sexual act or sexual contact remains a possible basis for liability if the use of deception as to the nature of the sexual act or sexual contact negates the complainant’s effective consent. Footnote 6 goes on to explain

⁸ D.C. Code § 14-309 states that religious figures may not be examined in court with respect to any – “(1) confession, or communication, made to him, in his professional capacity in the course of discipline enjoined by the church or other religious body to which he belongs, without the consent of the person making the confession or communication; or

(2) communication made to him, in his professional capacity in the course of giving religious or spiritual advice, without the consent of the person seeking the advice; or

(3)(A) communication made to him, in his professional capacity, by either spouse or domestic partner, in connection with an effort to reconcile estranged spouses or domestic partners, without the consent of the spouse or domestic partner making the communication.”

⁹ This language should also be applied to the corresponding portion of the Commentary pertaining to the second degree version of this offense and to 22E-1309.

“Examples of deception as to the nature of the sexual act or sexual contact include deceptions as to: the object or body part that is used to penetrate the other person; a person’s current use of birth control (e.g. use of a condom or IUD); and a person’s health status (e.g. having a sexually transmitted disease).” Because the Commentary can be read to be at odds with the statutory text, for clarity and to avoid litigation, OAG recommends that paragraph (c) be redrafted to include this exception and that the footnote 6 be elevated to the main text of the Commentary. We suggest that paragraph (c) be redrafted to state, “An actor does not commit an offense under this section for deception that induces the complainant to consent to the sexual act or sexual contact, unless the deception is to the nature of the sexual act or sexual conduct.”

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.

Notwithstanding that the current Code provisions requiring reporting of child sexual abuse offenses has the offense and the penalty clause separated into two Code provisions, DC Code §§ 22-3020.52 and 22-3020.54 respectively, OAG suggests that the RCC have the offense and the penalty clause in in the same provision. The current structure of the RCC for other offenses has the penalty in the same provision as the offense. That is where people will look for it.

RCC § 22E-1312. INCEST

RCC § 22E-1312 provides, in relevant part, that “An actor commits incest when that actor [k]nowingly engages in a sexual act with a person who is related as a ... [a] step-sibling, while the marriage creating the relationship exists; [a] stepchild or step-grandchild, while the marriage creating the relationship exists; or [a] stepparent or step-grandparent, while the marriage creating the relationship exists. In the rest of Chapter 13 marriages and domestic partnerships are treated the same.¹⁰ Given the practical similarities between marriages and domestic partnerships, there is no reason why it should be an offense for step relatives to be guilty of incest while the marriage creating the relationship exists but step relatives not be guilty of incest while the domestic partnership creating the relationship exists. OAG suggests that subparagraphs (a)(2)(E), (F), and (G) be redrafted as follows:

- (E) A step-sibling, while the marriage or domestic partnership creating the relationship exists;
- (F) A stepchild or step-grandchild, while the marriage or domestic partnership creating the relationship exists; or
- (G) A stepparent or step-grandparent, while the marriage or domestic partnership creating the relationship exists.

¹⁰ See for example, the definition of “Position of trust with or authority over” and the affirmative defenses for many of the other Chapter 13 offenses.

RCC § 22E-1611. CIVIL ACTION

The damages provision in paragraph (b) includes that “Treble damages shall be awarded on proof of actual damages where a defendant’s acts were willful and malicious.” The term “malicious” is not defined and the Commentary does not focus on it. Given the complexity of the case law concerning this term, OAG suggests that either another term be used or the term “malicious” be defined in this provision.

Paragraph (c) states, “If a person entitled to sue is imprisoned, insane, or similarly incapacitated at the time the cause of action accrues, so that it is impossible or impracticable for him or her to bring an action, then the time of the incapacity is not part of the time limited for the commencement of the action.” [emphasis added] Because imprisonment and insanity are not similar conditions (though they are both types of incapacitation), OAG suggests that the word “otherwise” provides more clarity. Therefore, OAG proposes that the paragraph read “If a person entitled to sue is imprisoned, insane, or otherwise incapacitated at the time the cause of action accrues...”

RCC § 22E-1801. STALKING

Paragraph (b) provides for exclusions from liability. It states in relevant part that “A person does not commit an offense ... when that person is... expressing an opinion on a political or public matter.”¹¹ Neither the RCC nor the Commentary define the phrase “public matter” and the Commentary does explain this phrase nor does it give examples of what is and is not a public matter. Take for example, neighbor A who walks her dog three times a day. Neighbor B is angry that her property is the repository for neighbor A’s dog’s refuse. Neighbor B follows neighbor A every time neighbor A leaves her house and yells at her negligently causing neighbor A to suffer significant emotional distress. When neighbor A’s husband asks neighbor B to stop stalking his wife, neighbor B says that failing to clean up after your dog is a matter of public concern. It is unclear under this example, if neighbor B is guilty of stalking because of her behavior towards Neighbor A, this being a private matter between two neighbors, or if this is a public matter, because that is how neighbor B interprets her actions.

RCC § 22E-1803. VOYEURISM

The elements of second degree voyeurism include when the actor “Knowingly observes directly” certain activities under prescribed conditions. The term “directly” is not defined, and the Commentary does not address its meaning. To avoid any arguments that the term is limited to observations made by the naked eye, OAG recommends that the Commentary affirmative state that a person has committed this offense even when they use items to enhance their ability to see the victim.¹²

¹¹ See RCC § 22E-1801 (b)(1).

¹² For example, the Commentary could state that this element is satisfied when an actor observes the victim by using binoculars, a telescope, or any nonrecording electronic device.

RCC § 22E-2205. IDENTITY THEFT

The Commentary for this offense notes:

Third, the revised statute extends jurisdiction for identity theft only to instances where some aspect of the crime occurs in the District. Current D.C. Code § 22-3227.06 states that jurisdiction extends to cases in which “The person whose personal identifying information is improperly obtained, created, possessed, or used is a resident of, or located in, the District of Columbia[.]” The revised statute does not extend jurisdiction to cases in which all relevant conduct occurs outside the District, even though the complainant is a District resident, or was located in the District at the time the identity theft occurred.¹⁶ Authority to exercise jurisdiction over acts that occur outside the District’s physical borders has traditionally been limited to acts that occur in, or are intended to have, and actually do have, a detrimental effect within the District.

Footnote 16 of the Commentary states, “For example, person A resides in Florida, and while on vacation in the District, a person in Florida uses A’s personal identifying information to fraudulently purchase items from a store in Florida without A’s permission. Under the revised statute, District courts would not have jurisdiction in this case.”

This fact scenario should be distinguished from the following. Person A resides and remains in the District, and, without permission, a person in Florida obtains Person A’s personal identifying information over the internet and uses that information to fraudulently purchase items from a store in Florida. In that situation, the District resident has suffered harm, and therefore, there was a detrimental effect within the District. The District resident who has had his or her identity stolen and has been forced to try and recoup losses, fix their credit score, and incur other expenses, should not have to rely, in this example, on Florida law enforcement, prosecutors, and court actions to aid an out-of-state victim. OAG, therefore, recommends that the identity theft provision apply to District residents who have suffered actual harm because of out-of-state activities.

RCC § 22E-2206. IDENTITY THEFT CIVIL PROVISIONS

Paragraph (a) states, “When a person is convicted, adjudicated delinquent, or found not guilty by reason of insanity of identity theft, the court may issue such orders as are necessary to correct any District of Columbia public record that contains false information as a result of a violation of RCC § 22E-2205.” While OAG agrees with this provision and recognizes that it is identical to D.C. Code § 22-3227.05, we recommend that it be expanded to include where a court, in a competency hearing, has found that “There is no substantial probability that he or she will attain competence or make substantial progress toward that goal in the foreseeable future.” See D.C. Code § 24-531.06 (c)(1)(B)(ii).¹³ As to the victim, there is no difference if a defendant is not

¹³ D.C. Code § 24-531.06 (c)(4) states, “If the court finds the defendant is incompetent pursuant to paragraph (1)(B)(ii) of this subsection, the court shall either order the release of the defendant or, where appropriate, enter an order for treatment pursuant to [§ 24-531.05\(a\)](#) for up to 30 days

convicted by reason of insanity or because the person is incompetent to stand trial. In this situation, the court should also be empowered to issue such orders as are necessary to correct District public records.¹⁴

RCC § 22E-2207. UNLAWFUL LABELING OF A RECORDING

Subparagraph (c)(2) states, “Transfers any sounds or images recorded on a sound recording or audiovisual recording, in his or her own home for his or her own personal use.” At first glance it appears that “in his or her own home” is a dangling modifier such that it is unclear if it is intended to modify “transfers” or “recorded.” The Commentary makes it clear that it is the former. It states, “or transfers recordings at home for personal use.” To clarify this provision, OAG recommends that subparagraph (c)(2) be redrafted to say, “Transfers, in his or her own home for his or her own personal use, any sounds or images recorded on a sound recording or audiovisual recording.”

RCC § 22E-2208. FINANCIAL EXPLOITATION OF A VULNERABLE ADULT OR ELDERLY PERSON

The first through fourth degree versions of this offense are built upon the fifth degree version. That version states:

A person commits fifth degree financial exploitation of a vulnerable adult or elderly person when that person:

- (1) Knowingly takes, obtains, transfers, or exercises control over property of another;
 - (A) With consent of an owner obtained by undue influence;
 - (B) With recklessness as to the fact that the owner is a vulnerable adult or elderly person; and
 - (C) With intent to deprive an owner of the property; or
- (2) Commits theft, extortion, forgery, fraud, payment card fraud, check fraud, or identity theft with recklessness that the complainant is a vulnerable adult or elderly person. [emphasis added]

OAG has three suggestions to improve the clarity of this provision. First, subparagraphs (1)(A) – (C) refer to “an owner.” But to clarify that the owner mentioned in these provisions are all the same vulnerable adult or elderly person, this phrase should be replaced with “the owner” in all three sentences. OAG also notes that subparagraph (1)(B) uses the phrase “as to the fact” after the term “recklessness” whereas subparagraph (C) does not. The Commentary does not explain this variance. To avoid needless

pending the filing of a petition for civil commitment pursuant to subchapter IV of Chapter 5 of Title 21 or subchapter IV of Chapter 13 of Title 7. The court also may order treatment pursuant to [§ 24-531.07\(a\)\(2\)](#) for such period as is necessary for the completion of the civil commitment proceedings.”

¹⁴OAG also recommends that D.C. Code § 22-3227.05, the corresponding identity theft corrections of police records statute, be amended to be consistent with this recommendation.

litigation over how to interpret the variance, OAG suggests either making these two provisions parallel or clearly explaining in the Commentary the significance of the variation. Finally, subparagraphs (1)(A) – (C) refer to the “owner” whereas subparagraph (2) refers to the “complainant.” OAG recommends that subparagraph (2) be redrafted to state the “owner.”

RCC § 22E-2209. FINANCIAL EXPLOITATION OF A VULNERABLE ADULT OR ELDERLY PERSON CIVIL PROVISIONS.

RCC § 22E-2209 (a) is entitled “Additional Civil Penalties.” Subparagraphs (a)(1)-(3) deal with fines, revocations of payments, and injunctions. However, subparagraph (a)(4) is not an additional penalty. Rather it is restatement of the restitution priority that is already stated in RCC § 22E-2208 (g). As such, OAG recommends striking it from RCC § 22E-2209.

RCC § 22E-2501. ARSON

The affirmative defense provision, in paragraph (d) states, “It is an affirmative defense to liability under subsection (c) of this section that the person, in fact, has a valid blasting permit issued by the District of Columbia Fire and Emergency Medical Services Department, and complied with all the rules and regulations governing the use of such a permit.” Because of the way that the sentence is structured, it is not clear whether the “in fact” mental state applies to the compliance with the rules and regulations. To avoid litigation about whether “in fact” applies or the court should use the default mental state, OAG recommends that this defense be clarified by affirmatively stating, “It is an affirmative defense to liability under subsection (c) of this section that the person, in fact, has a valid blasting permit issued by the District of Columbia Fire and Emergency Medical Services Department, and that the person, in fact, complied with all the rules and regulations governing the use of such a permit.”

RCC § 22E-2503. CRIMINAL DAMAGE TO PROPERTY

Paragraph (e) states:

Fifth degree. A person commits fifth degree criminal damage to property when that person:

- (1) Recklessly damages or destroys property;
- (2) Knowing that it is the property of another;
- (3) Without the effective consent of an owner; and
- (4) In fact, there is damage to the property.

OAG believes that subparagraph (4) needs to be amended. As drafted, subparagraph (4) is duplicative to subparagraph (1) because if someone recklessly damages or destroys property then there had to, in fact, be damage to property. The Commentary states, “Paragraph (e)(4) requires that the amount of damage to the property for fifth degree CDP is ‘any amount’.” OAG believes that the Commission meant to say in subparagraph (4), “The amount of damage is, in fact, any amount.”

RCC § 22E-3401. ESCAPE FROM A CORRECTIONAL FACILITY OR OFFICER

Paragraph (b) establishes the second degree offense. It states:

Second degree. A person commits second degree escape from an institution or officer when that person:

- (1) In fact, 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 law enforcement officer, leaves custody.

OAG believes that (b)(2) would more clearly express the drafter's intent if it was reworded to state, "Knowingly leaves custody without the effective consent of the law enforcement officer." Paragraph (d) contains the exclusions from liability. It states, "A person does not commit an offense under subsection (b) of this section when that person is within a correctional facility, juvenile detention facility, or halfway house." While OAG believes that the drafters meant that a person has not committed the offense if they had never left the facility, we are concerned that it could be argued that the provision can be read to apply to someone who left a facility and then came back sometime later. Therefore OAG recommends that this paragraph be redrafted to say, "A person does not commit an offense under subsection (b) of this section if that person has not left the correctional facility, juvenile detention facility, or halfway house."¹⁵

RCC § 22E-3403. CORRECTIONAL FACILITY CONTRABAND

As noted in the Commentary, subparagraphs (a)(1)(A), (a)(2)(A), (b)(1)(A), and (b)(2)(A) specify that one way of committing correctional facility contraband is by bringing a prohibited item to a correctional facility or secure juvenile detention facility. The term "bringing", however, is not a defined term. Among the definitions of the word "bring" in Webster's Dictionary are "to convey, lead, carry, or cause to come along with one toward the place from which the action is being regarded" and "to cause to exist or occur." OAG is aware of situations where persons have lobbed tennis balls containing drugs and other items over the fence at DYRS facilities. To avoid litigation over whether this offense applies to a person who delivered the contraband other than by personally sneaking it into a facility, OAG recommends that the Commentary clarify what is meant by the term "bringing" by using the tennis ball example as an example of what constitutes this offense.

Paragraphs (d) states, that the director of a facility may detain the person for not more than 2 hours when there is probable cause to suspect that the person committed this offense. OAG concurs that this two hour limitation is appropriate for facilities that are located in the District. However, New Beginnings is located in Laurel, Maryland. In order to get to that facility MPD must travel along highways that often have bumper-to-bumper traffic. Recognizing that MPD

¹⁵ While both the RCC version and OAG's proposal refers to subsection (b), we believe that the Commission meant to cite to subsection (a). Subsection (a) refers to knowingly leaving a facility. Whereas subsection (b) refers to leaving the custody of a law enforcement officer.

may be impeded by traffic, OAG recommends that paragraph (d) be amended to allow the director of New Beginnings to detain a person for up to three hours.

RCC § 22E-4114. CIVIL PROVISIONS FOR LICENSES OF FIREARMS DEALERS

Paragraph (b) sets out the licensees' requirements. Subparagraph (5) states, "A true record shall be made in a book kept for that purpose, the form of which may be prescribed by the Mayor, of all firearms in the possession of the licensee. The record shall contain the date of purchase, the caliber, make, model, and manufacturer's number of each weapon, to which shall be added, when sold, the date of sale." While OAG agrees generally with this statement, we are concerned that in an electronic age, the use of the term "book" in this statement may be viewed as prohibiting the Mayor from requiring that the information be kept in electronic form. To give the Mayor more flexibility, OAG recommends that subparagraph (5) be redrafted to say, "A true record shall be made of all firearms in the possession of the licensee in a form prescribed by the Mayor. The record shall contain the date of purchase, the caliber, make, model, and manufacturer's number of each weapon, to which shall be added, when sold, the date of sale."

RCC § 22E-4117. CIVIL PROVISIONS FOR TAKING AND DESTRUCTION OF DANGEROUS ARTICLES

Paragraph (c)(5) states that "The Property Clerk shall make no disposition of a dangerous article under this section, whether in accordance with their own decision or in accordance with the judgment of the court, until the United States Attorney for the District of Columbia certifies to the Property Clerk that the dangerous article will not be needed as evidence." OAG recognizes that this paragraph tracks the current language in D.C. § 22-5417 (d)(5). However, because the OAG Juvenile Section has jurisdiction to prosecute youth for all offenses for which USAO prosecutes adults and OAG's Criminal Section prosecutes unregistered firearm, no potential evidence should be destroyed unless OAG is also consulted. Therefore, OAG proposes that that paragraph (c)(5) be redrafted to say, "The Property Clerk shall make no disposition of a dangerous article under this section, whether in accordance with their own decision or in accordance with the judgment of the court, until the United States Attorney for the District of Columbia and the Office of the Attorney General for the District of Columbia certifies to the Property Clerk that the dangerous article will not be needed as evidence."

Paragraph (d) states:

A person claiming a dangerous article shall be entitled to its possession only if:

- (1) The claimant shows, on satisfactory evidence, that the person is the owner of the dangerous article or is the accredited representative of the owner, and that the ownership is lawful;
- (2) The claimant 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 their knowledge or consent; and

- (3) The receipt of possession by the claimant does not cause the article to be a nuisance. A representative is accredited if the claimant has a power of attorney from the owner.

While subparagraphs (1), (2), and the first sentence in (3) flow from the lead in language in (a), the second sentence in subparagraph (3) does not. To improve clarity, OAG recommends restructuring paragraph as follows:

- (d) A person claiming a dangerous article shall be entitled to its possession only if:
 - (1) The claimant shows, on satisfactory evidence, that the ownership is lawful and:
 - i. the person is the owner of the dangerous article or
 - ii. is the accredited representative of the owner and has a power of attorney from the owner;
 - (2) The claimant 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 their knowledge or consent; and
 - (3) The receipt of possession by the claimant does not cause the article to be a nuisance.

The last sentence in paragraph (e) states “An agency receiving a dangerous article under this section shall establish property responsibility and records.” Because the Council lacks authority to regulate federal agencies, OAG recommends that this sentence be redrafted to state, “A District government agency receiving a dangerous article under this section shall establish property responsibility and records.”¹⁶

RCC § 22E-4202. PUBLIC NUISANCE

RCC § 22E-4202 (a) states, “A person commits public nuisance when that person purposely causes significant interruption to... A person’s reasonable, quiet enjoyment of their dwelling, between 10:00 p.m. and 7:00 a.m., and continues or resumes the conduct after receiving oral or written notice to stop.” As noted in the Commentary, the notice requirement would be a change to District law. Unlike in the disorderly conduct provision, there is no requirement that the notice come from a law enforcement officer.¹⁷ Because of this distinction, and to avoid unnecessary litigation, OAG recommends that the Commentary reiterate that the notice to stop may be given by any person and give the following example. At 1:00 in the morning a person plays the drums in his or her house. The noise wakes the neighbors and their children. The neighbor calls the person and tells them that the drumming is too loud and then asks them to stop

¹⁶ The phrase “law-enforcing agency” appears in the sentence just preceding the last sentence. OAG recommends replacing it with the phrase “law enforcement agency.”

¹⁷ RCC § 22E-4201 (a)(2)(D) makes it a disorderly conduct when a person “Knowingly continues or resumes fighting with another person after receiving a law enforcement officer’s order to stop.” RCC §§ 22E-4203 and 22E-4304 also require that notice be given by a law enforcement officer.

playing. If the person continues to play the drums, the person has resumed the conduct after receiving oral notice to stop and has committed a public nuisance.

RCC § 22E-4205. BREACH OF HOME PRIVACY

Paragraph (a) of this offense states:

Offense. An actor commits breach of home privacy when that actor:

- (1) Knowingly and surreptitiously observes inside a dwelling, by any means;
and
- (2) In fact, an occupant of the dwelling would have a reasonable expectation of privacy.

The Commentary states that “The dwelling may be occupied or unoccupied at the time of the offense.” This statement is consistent with D.C. Code § 22-1321 (f). There it states, in relevant part, “It is not necessary that the dwelling be occupied at the time the person looks into the window or other opening.” Because of the importance of this statement and to make the provision understandable to a lay person, OAG recommends that a statement to that effect be incorporated into the substantive offense as a new paragraph (b) and that the remaining paragraphs be renumbered to accommodate it. The new paragraph (b) could state, “It is not necessary that the dwelling be occupied at the time the person makes the observation.”

RCC § 22E-4206. INDECENT EXPOSURE

Paragraph (d) states the prosecutorial authority. The Commentary states, “Subsection (d) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.” However, the substantive provision states, “The Attorney General shall prosecute violations of this section, except as otherwise provided in D.C. Code § 23-101.” The Commentary does not explain why the substantive provision includes a reference to D.C. Code § 23-101. OAG recommends striking the reference.

RCC § 7-2502.15. POSSESSION OF A STUN GUN

Pursuant to paragraph (a) “An actor commits possession of a stun gun when that actor knowingly possesses a stun gun and is... [u]nder 18 years of age...” Paragraph (e) states:

- (1) Possession of a stun gun is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (2) *Administrative Disposition.* The Attorney General for the District of Columbia may, in its discretion, offer an administrative disposition under D.C. Code § 5-335.01 et seq. for a violation of this section.

However, a person who is under 18 and commits this offense must be prosecuted as a child in the juvenile justice system for that delinquent act. See D.C. Code § 16-2301 (3) and (7). The court’s disposition options are stated in D.C. Code § 16-2320. Neither of the RCC proposed

penalties are stated in that provision. Therefore, OAG recommends that the penalty clause in paragraph (e) state, “The penalty for violation of this offense is governed by D.C. Official Code § 16-2320.”

RCC § 48-904.01a. POSSESSION OF A CONTROLLED SUBSTANCE

Paragraph (g) provides for “dismissal of proceedings.”¹⁸ Subparagraph (g)(1) states, in relevant part:

Discharge and dismissal under this subsection shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, such person qualifies under this subsection.

This paragraph permits the retention of a nonpublic reference to be retained solely for the purpose of use by the courts. It does not, on its face, permit a prosecutor from retaining a copy of the record as a check on the court. In contrast, D.C. Code § 16-803, the District’s sealing statute, addresses practical issues concerning the sealing of records and recognizes that law enforcement and prosecutors also need to view nonpublic sealed records. D.C. Code § 16-803 (l) states:

If the Court grants the motion to seal:

(1) (A) The Court shall order the prosecutor, any law enforcement agency, and any pretrial, corrections, or community supervision agency to remove from their publicly available records all references that identify the movant as having been arrested, prosecuted, or convicted.

(B) The prosecutor’s office and agencies shall be entitled to retain any and all records relating to the movant’s arrest and conviction in a nonpublic file.

(C) The prosecutor, any law enforcement agency, and any pretrial, corrections, or community supervision agency office shall file a certification with the Court within 90 days that, to the best of its knowledge and belief, all references that identify the movant as having been arrested, prosecuted, or convicted have been removed from its publicly available records.

(2) (A) The Court shall order the Clerk to remove or eliminate all publicly available Court records that identify the movant as having been arrested, prosecuted, or convicted.

(B) The Clerk shall be entitled to retain any and all records relating to the movant’s arrest, related court proceedings, or conviction in a nonpublic file.

¹⁸ It appears that this provision is akin to what in some jurisdictions is referred to probation before judgment.

(3) (A) In a case involving co-defendants in which the Court orders the movant's records sealed, the Court may order that only those records, or portions thereof, relating solely to the movant be redacted.

(B) The Court need not order the redaction of references to the movant that appear in a transcript of court proceedings involving co-defendants.

(4) The Court shall not order the redaction of the movant's name from any published opinion of the trial or appellate courts that refer to the movant.

(5) Unless otherwise ordered by the Court, the Clerk and any other agency shall reply in response to inquiries from the public concerning the existence of records which have been sealed pursuant to this chapter that no records are available.

OAG recommends that the quoted language from subparagraph (g)(1), above, be redrafted to say, "Discharge and dismissal under this subsection shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained. The sealing of the nonpublic record shall be in accordance to, and subject to the limitations, of D.C. Code § 16-803 (l)."

Subparagraph (g)(2) states:

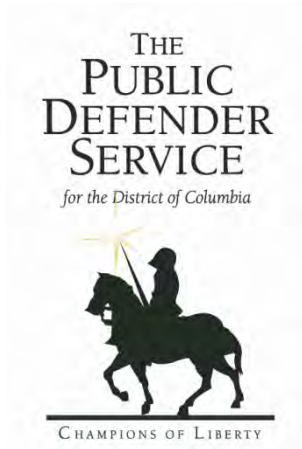
Upon the dismissal of such person and discharge of the proceedings against him under paragraph (1) of this subsection, such person may apply to the court for an order to expunge from all official records (other than the nonpublic records to be retained under paragraph (1) of this subsection) all recordation relating to his or her arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this subsection. If the court determines, after hearing, that such person was dismissed and the proceedings against him or her discharged, it shall enter such order. The effect of such order shall be to restore such person, in the contemplation of this law, to the status he or she occupied before such arrest or indictment or information. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of failure to recite or acknowledge such arrest, or indictment, or trial in response to any inquiry made of him or her for any purpose. [emphasis added]

OAG has two recommendations. First, the reference to "him" in the first line should be replaced by the phrase "him or her." Second, the sentence "any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of failure to recite or acknowledge such arrest, or indictment, or trial in response to any inquiry made of him or her for any purpose" be amended to say, "Except as otherwise provided by federal law, any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of failure to recite or acknowledge such arrest, or indictment, or trial in response to any inquiry made of him or her for any purpose." OAG recommends this change because this prohibition cannot apply with respect to statements to federal law enforcement, including USAO.

RCC § 48-904.10. POSSESSION OF DRUG MANUFACTURING PARAPHERNALIA

Paragraph (b) states, “Exclusions to liability. A person does commit an offense under this section...” The sentence left out the word “not.” It should read “A person does not commit an offense under this section...”

MEMORANDUM



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

From: Laura E. Hankins, General Counsel

Date: May 1, 2020

Re: Comments on First Draft of Report No. 50,
Cumulative Update to the Revised Criminal
Code Other than Chapter 6

PDS submits the following comments on Report #50 for consideration.

1. RCC § 22E-1101, Murder. RCC § 22E-1101(d)(3) provides for enhanced penalties for murder when a person commits first or second degree murder and the “murder was a drive-by or random shooting.” The commentary describes that: “the term ‘drive-by shooting’ is intended to cover murders committed by firing shots from a motor vehicle while it is being operated. Random shootings are intended to include murders in which the actor did not have a target in mind, or in which the shooting was committed in a manner that indiscriminately endangered bystanders.” The CCRC states that this change was made to improve the proportionality of the revised statute.

PDS recommends that the RCC clarify the drive-by shooting aggravating circumstance and remove random shooting as an aggravating circumstance. PDS recommends defining “drive-by shooting” as a “shooting committed from a vehicle that is being driven at the time of the shooting.” The chief harm that the enhancement apparently seeks to address is the indiscriminate shooting of individuals from a moving vehicle and the resulting danger posed to all individuals in the vicinity. Shooting from a parked vehicle that is turned on but not being driven¹ could fall within the scope of the current version of the enhancement while presenting no additional danger beyond that posed by an individual who is on foot and shooting from the sidewalk.

PDS also recommends striking “random shooting” from the statute and striking the accompanying commentary that defines a random shooting as one “in which the actor did not have a target in mind.” PDS proposes CCRC amend sentencing enhancement and

¹ PDS specifically recommends using the phrase “being driven” rather than “being operated” because there is still some question about what it means “to operate” a motor vehicle. *See e.g.*, Report #50, App. D1 at page 430.

accompanying commentary to create an enhancement when “the shooting was committed in a manner that indiscriminately endangered bystanders.” It is not clear what the RCC means when it describes a random shooting as one where the actor does not have a target in mind. If the language is meant to describe indiscriminately shooting into a crowd, then it is covered by the language “the shooting was committed in a manner that indiscriminately endangered bystanders.” If the language is meant to address a shooting that occurs without a reason, for instance an actor decided to kill someone but not anyone in particular, it is not clear how this is more blameworthy than the premeditated murder of a particular individual because of a conflict. PDS is also concerned that “not having a target in mind” could water down the requirement that the murder be a premeditated and deliberated killing and could be charged when law enforcement does not know, or does not put on evidence of, the reason the decedent was the target. It could put the defense in the impossible position of defending against the enhancement by putting forth evidence that the killing was in fact targeted, which would lessen the government’s burden of proving beyond a reasonable doubt that the killing was with premeditation and deliberation. By removing the language about a “random shooting” and retaining language that the shooting was committed in a way that indiscriminately endangered bystanders, the CCRC still addresses the concerns raised in the comments submitted by the United States Attorney’s Office and improves the clarity of the offense.

PDS recommends rewriting the enhanced penalty circumstance as follows: “(H) the murder was a drive-by shooting or a shooting that was committed in a manner that indiscriminately endangered bystanders.”

2. RCC § 22E-1301, Sexual Assault. RCC § 22E-1301(e) lists the affirmative defense of consent for first, second, third, and fourth degree sexual abuse. The RCC requires for a defense of consent that the actor’s conduct does not in fact cause significant bodily injury or serious bodily injury, or involve the use of a dangerous weapon.² While the infliction of any injury will carry great weight for a jury’s consideration of whether a complainant gave effective consent to sexual conduct, the RCC should not legislate specific parameters for consent. Consent is an expansive and fact-driven determination that is already amply defined at RCC § 22E-701. A jury should determine, based on all of the evidence, whether the complainant gave effective consent to the conduct rather than evaluating whether a particular level of injury, over which there may be separate debate, precludes the consideration of the defense altogether. Further, as drafted, it is not clear how to consider effective consent when the parties argue that the sexual contact was consensual but that there was a separate assault or use or display of a weapon following the consensual sexual conduct. In instances where the timing of an assault or the gravity of an assault are in dispute, RCC § 22E-1301(e) unnecessarily limits the role of the jury to viewing effective consent as an element test rather than considering it holistically. If the inclusion of RCC §

² Per the rules of interpretation in RCC § 22E-207, “in fact” applies to every element that follows unless a culpable mental state is specified. Here, “in fact” applies to paragraphs (e)(1), (e)(2), (e)(3), and (e)(4), and there is no culpable mental state requirement for any of the elements in these paragraphs.

22E-1301(e) is driven by the fact that an individual cannot consent to being threatened with a weapon or to an assault that causes significant bodily injury or serious bodily injury, that limitation is unnecessary. An actor who also causes significant bodily injury or who displays a weapon will also be charged with assault and weapon offenses for which there is no defense of consent.

PDS also recommends removing (e)(4) from the definition of consent. Consent should be a defense to RCC § 22E-1301(a)-(d) when the complainant is age 16 or older but the actor is more than 4 years older than the complainant and is in a significant relationship with the defendant. By precluding a defense of consent in those instances, a defendant will be limited to presenting evidence that refutes the element of force or coercion but will not be able to present the complete factual scenario that shows a consensual relationship.

Given the seriousness of the charges and that the greatest penalty should be reserved for non-consensual sexual assault involving force or other forms of first degree sexual abuse, defendants should be permitted to present a defense of consent when the complainant is legally capable of consent but where the circumstances of the relationship bar consent. Prohibiting the use of a consent defense in these instances would create potentially disparate sentences where individuals are subjected to long terms of incarceration and lifelong collateral consequences for conduct that a jury would consider to be consensual if presented with a complete view of the circumstances. In such instances, the jury would still evaluate where there was in fact effective consent and would convict the defendant of RCC § 22E-1302, sexual abuse of a minor, where consent is not a defense.

PDS recommends the following amendment:

(e) Affirmative defenses. It is an affirmative defense to liability under this section that, in fact:

- (1) The actor has the complainant's effective consent to the actor's conduct, or the actor reasonably believes that the actor has the complainant's effective consent to the actor's conduct;
- ~~(2) The actor's conduct does not inflict significant bodily injury or serious bodily injury, or involve the use of a dangerous weapon;~~
- (3) The actor is not at least 4 years older than a complainant who is under 16 years of age; and
- ~~(4) The actor is not in a position of trust with or authority over the complainant, is not at least 18 years of age, and is not at least 4 years older than the complainant who is under 18 years of age~~

3. RCC § 22E-1302, Sexual Abuse of a Minor. PDS recommends that the mistake of age affirmative defense allow situations where the actor reasonably believes the complainant knows that another person has made an oral or written statement about the complainant's age and the complainant did not contradict the statement. The importance that the actor's reasonable, but mistaken, belief about the complainant's age be based on a representation by the complainant is

preserved by the requirement that the actor reasonably believed the complainant knew of the statement and assented to it. The proposed expansion is a modest one.

PDS poses three scenarios. (1) The defendant meets the complainant at a bar and asks, “You’re 21?” The complainant answers that she is. (2) The defendant meets the complainant at a bar and asks, “You’re 21?” The complainant’s friend, who is standing right next to the complainant answers, “Yes, we’re here celebrating her 21st birthday!” The complainant smiles but says nothing. (3) The defendant meets the complainant at a bar and says, “You look 21 to me.” The complainant smiles but says nothing. As currently written, the reasonable mistake of age defense is only allowed for the first scenario. The second scenario should also be recognized as a reasonable mistake of age. This is particularly fair because it is an affirmative defense and the offense requires no mental state with respect to the age of the complainant. As the Commission notes in Appendix D1 to Report #50, the American Law Institute’s recent draft of this same offense requires that the government prove that the defendant was reckless as to the complainant’s age.³ Despite the general reluctance in American jurisprudence to allow a criminal conviction based on strict liability, the Commission chose to apply that standard for the age circumstance element for this offense. PDS is not now objecting to this severe standard in the offense. PDS is merely asking that the affirmative defense allow for a common situation where the actor’s reasonable belief is still based on conduct of the complainant (not correcting the statement made by another).

PDS notes that it is not requesting the Commission to rewrite the affirmative defense to include the third scenario. Further, PDS’s proposal includes the requirements that the actor reasonably believe that the complainant knew the statement was made and that the complainant did not object to or correct the statement. It would not be sufficient, for example, for the actor’s mistaken belief to be based on the friend’s statement that the complainant was 21 in a scenario where the complainant was on the other side of a loud bar. It is certainly a valid argument, given the totality of the circumstances in that loud bar scenario, that the actor’s mistake about the complainant’s age was reasonable. However, PDS makes a more modest proposal, one that is very much in alignment with the policy position the Commission has taken with respect to this defense.

PDS proposes rewriting §22E-1302(g)(2)(B) and (g)(3)(B) as follows:

- (B) Such reasonable belief is based on an oral or written statement about the complainant’s age made to the actor:
 - (i) by the complainant; or
 - (ii)(I) by another person;
 - (II) the actor reasonably believed the complainant knew the statement had been made to the actor; and
 - (III) the complainant did not object to or correct the statement.

³ Report #50, Appendix D1 at page 173.

4. RCC § 22E-1303, Sexual Abuse by Exploitation. PDS recommends rewriting element (a)(2)(D) and element (b)(2)(D) to clarify that the complainant must be a ward, patient, client, or prisoner of the same institution as the actor. Currently, that element requires that the actor must knowingly work at a hospital, treatment facility, etc., and recklessly disregard that the complainant is a ward, patient, etc. “at *such* an institution.”⁴ Thus, the following scenario would be first degree sexual abuse by exploitation, a class 7 offense: The actor works at the Central Detention Facility (also known as the D.C. Jail). She engages in an otherwise consensual sexual act with her fiancée who has earned a weekend pass from the psychiatric treatment facility to which he has been confined. The crux of this offense is the inherent coerciveness given the actor’s employment position in relation to the position of the complainant as a person who is not free to leave the actor’s place of employment. The element should be rewritten to more clearly require that relationship between the actor and complainant. PDS proposes rewriting the final phrase: “...and recklessly disregards that the complainant is a ward, patient, client, or prisoner at that institution.”

5. RCC § 22E-1306, Arranging for Sexual Conduct with a Minor. With the most recent revision of the offense, the Commission made the offense so broad that it criminalizes responsible parenting. For example, a parent (“a person with responsibility under civil law for the health, welfare, or supervision of the complainant”) knowingly gives effective consent for her 17-year-old daughter to engage in or submit to a sexual act or contact with the teenager’s boyfriend when she hands her daughter a package of condoms and lectures her about safe sex. PDS proposes the following instead:
 - (a) An actor commits arranging for sexual conduct with a minor when that actor:
 - (1) Knowingly:
 - (A) As a person with a responsibility under civil law for the health, welfare, or supervision of the complainant;
 - (B) Gives effective consent for the complainant to engage in or submit to a sexual act or sexual contact with or for the arousal or gratification of another person;⁵
 - (2) The actor and the other person, in fact, are at least 18 years of age and at least 4 years older than the complainant; and
 - (3)(A) The actor was reckless as to the fact that the complainant is under 16 years of age; or

⁴ Emphasis added.

⁵ This phrasing is to make clear that the conduct of the complainant masturbating for the gratification or arousal of another person is criminalized by this element. Some have expressed concern that it is not clear that masturbation would be criminalized if the element were worded simply to require that the sexual act or contact be *with* another person.

(B) The actor:

- (i) Was reckless as to the fact that complainant is under 18 years of age; and
- (ii) Knows that the other person is in a position of trust with or authority over the complainant.

6. RCC § 22E-1602, Forced Commercial Sex. In Report #50, CCRC changed the language of the first element of the forced commercial sex offense from “knowingly causes the complainant to engage in a commercial sex act with another person” to “knowingly causes the complainant to engage in a commercial sex act other than with the actor.”⁶ CCRC explained that it intended the change to be clarificatory because the prior language could be interpreted to exclude masturbation. PDS does not object to rewriting the offense so there is no risk of confusion that that it covers masturbation. To be clear, masturbation is already either a “sexual act” or a “sexual contact” as those terms are currently defined. To the extent the prior phrasing of the forced commercial sex act was unclear or confusing, it was the preposition “with” that created the issue; whether it can be said that compelling a person to masturbate for someone else’s gratification is engaging in a sexual act or sexual contact *with* that other person. The problem with the “person other than the actor” phrasing is that it allows the actor to be held liable for forced commercial sex for conduct involving only the actor and the complainant if masturbation is included. The idea that the commercial sex act must involve another person is lost. According to Polaris, an organization dedicated to ending sex and labor trafficking in North America, “Sex trafficking is the crime of using force, fraud or coercion to induce another individual *to sell* sex.”⁷ To both be clear that masturbation is covered conduct and to be clear that the offense is the forced *selling* of sex, PDS proposes rewriting the first element of § 22E-1602 as follows: “Knowingly causes the complainant to engage in a commercial sex act with or for the gratification or arousal another person.”
7. RCC § 22E-4103, Possession of a Dangerous Weapon with Intent to Commit Crime. PDS objects to the elimination of the provision that excluded liability for an attempt to commit this offense. CCRC made the change on the recommendation of the USAO which posited a hypothetical where the actor engaged in the prohibited conduct with what the actor believed was a dangerous weapon, but which was not, in fact, a “dangerous weapon.”⁸ Allowing liability for that situation can be achieved other than by deleting the “no attempt offense” subsection and PDS strongly recommends that CCRC do so. Allowing attempt liability generally for this offense creates a double inchoate crime. Possession of a dangerous weapon *with intent to commit a crime* is already an inchoate crime. The harm being discouraged by this offense is the commission of a crime against a person using a dangerous weapon. To discourage the harm of the completed armed crime, the offenses punishes the risk of that harm that is created when the actor possesses a dangerous weapon with the intent to commit a crime against a person. To allow

⁶ See Report #50, App. A at page 79.

⁷ <https://polarisproject.org/human-trafficking/> (emphasis added).

⁸ See Report #50, App. D at page 371.

attempt liability would then allow punishment of the risk of the risk of the completed offense. Imagine the actor tells his confederate to meet him at their favorite bar and bring him a pair of brass knuckles because the actor plans to hurt X when X gets back in town next week. Actor goes to the bar. Unbeknownst to the actor, the confederate is an undercover officer, who will not be bringing the actor a pair of brass knuckles. Assume *arguendo* that that is sufficient conduct for the offense of attempt to possess a dangerous weapon with intent to commit a crime. At this point, there is no crime of assault using a dangerous weapon. There is not even an attempt assault using a dangerous weapon. There is only a risk that the actor will possess a dangerous weapon, which will create the risk that the actor will use that weapon during the assault the actor intends to commit. The law should not punish that level of remove from the harm; this is particularly so in a jurisdiction that is careful enough to constrain inchoate liability such that it has rejected the substantial step test in favor of the more stringent dangerously close to completion test.

To achieve the objective of the CCRC to hold liable the actor who engages in the prohibited conduct of possessing what he intends to be a dangerous weapon but which in fact is not a dangerous weapon without creating a double inchoate crime, PDS recommends excluding liability for an attempt to commit this offense by reinserting the “no attempt offense” subsection. PDS then recommends rewriting the offense to include as a possible means of committing the crime that the actor possessed an object with the intent that it be a dangerous weapon.⁹ Generally speaking, the structure would be as follows:

An actor commits possession of a dangerous weapon with intent to commit crime when that actor:

- (1) Knowingly possesses
 - (A) A dangerous weapon; or
 - (B) An object with intent that the object be a dangerous weapon;
- (2) With intent to use the dangerous weapon or object to commit a criminal harm ...

8. RCC § 22E-4104, Possession of a Dangerous Weapon During a Crime. PDS makes the same objection to the elimination of the “No attempt offense” subsection and makes same language proposal with respect to this offense that it made with respect to RCC §22E-4103. Society has an interest in criminalizing the conduct of possessing a dangerous weapon during a crime because the presence of a weapon may make the crime more likely to succeed and creates a risk that someone will be seriously injured. However, committing a crime not actually possessing a dangerous weapon but only attempting to possess such a weapon does not make the offense more likely to succeed or more dangerous. The actor in a fight who yells to the surrounding crowd, “someone give me a knife!” but who never receives a knife (assuming *arguendo* that such conduct would meet the statutory requirements of criminal attempt) is not more likely to succeed in the fight (an assault) than had he never wished for a knife, nor is that actor more dangerous for

⁹ This construction is modeled on the Possession of Stolen Property offense, which requires in part that the actor knowingly buy or possess property, with intent that the property be stolen. See RCC § 22E-2401.

having wished for a knife. The RCC should not allowing criminal liability for this level of remove from the harm society seeks to punish. As we propose above, PDS proposes reinserting the “no attempt offense” subsection and proposes rewriting the offense to allow as a mean of committing the offense that the actor possessed an object with intent that the object be a dangerous weapon.

9. RCC § 22E-4119, Limitation on Convictions for Multiple Related Weapon Offenses. PDS recommends that the commentary for this statute, and all other merger statutes in the RCC, clarify that the limitation applies to convictions for the enumerated offenses without regard to the theory of liability under which the conviction was obtained. For example, while it is clear that RCC § 22E-4119 would prevent a court from entering judgments of conviction for both possession of a dangerous weapon during a crime and for the crime of first degree robbery if the convictions are based on the same act or course of conduct, the commentary should make clear that the limitation would also prevent the court from entering judgments of conviction for possession of a dangerous weapon during a crime and for *attempt* first degree robbery.

10. RCC §48-904.01a. RCC 48-904.01(g) allows the court to place an individual on probation, defer the proceedings, and later dismiss the proceedings. The dismissal is then sealed and is not considered a conviction for any purpose. PDS previously commented that this option should be available to the judge on more than one occasion given that desistance from drug abuse is not immediate and may involve relapse. In addition to renewing its proposal for the expansion of this section, PDS recommends that the CCRC consider creating a general provision that allows for the judicial dismissal of proceedings for all offenses up to a certain class. In many instances, there is little difference between the capacity for rehabilitation of someone convicted of, for example, a shoplifting offense and someone convicted of a possessory drug offense. Both individuals would benefit greatly from the opportunity to have the case dismissed. The dismissal could prevent collateral consequences in education, housing, and employment. Without a judicial dismissal provision, case dismissal rests entirely on the discretionary decisions of prosecutors. It makes good sense to expand this option of dismissal and allow dismissal when a judge who is familiar with the facts of the offense and with the defendant think it is warranted. Without an expanded dismissal provision, defendants are left to struggle with a record sealing process through which there is an eight-year waiting period to seal an eligible misdemeanor conviction.¹⁰ Given that first time drug offenses are not that different from other offenses other than for the perception of the demographics of the persons who commit these offenses, this provision should be expanded or repeated elsewhere in the RCC to allow for judicial dismissal of all offenses of equivalent or similar grading.

11. RCC § 48-904.01c. Trafficking of a Counterfeit Substance. Because this offense, like the offense of Trafficking of a Controlled Substance, is graded based on weight and on compounds and mixtures, it should have a subsection that mirrors § 48-904.01b(g), Weight of Mixtures and Compounds not to Include Edible Products or Non-Consumable Containers.

¹⁰ D.C. Code § 16-803(c)(1).

Memorandum

Timothy J. Shea
United States Attorney
District of Columbia



Subject: Comments to D.C. Criminal Code
Reform Commission for First Draft of Report
#50

Date: May 1, 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 Report #50. USAO reviewed this document and makes the recommendations noted below.¹

Comments on First Draft of Report #50—Cumulative Update to the Revised Criminal Code Other than Chapter 6

RCC § 22E-214. Merger of Related Offenses.

1. USAO recommends that the CCRC retain an elements-based approach as the basis for determining merger, rather than adopt an additional fact-based approach to merger.

USAO previously made several recommendations regarding merger, which the CCRC did not accept. (App. D1 at 21–23.) The CCRC essentially states a policy disagreement with the non-merger outcomes that the *Blockburger* test permits. To avoid those outcomes, the CCRC proposes to adopt, among other options, a fact-based analysis. The CCRC, however, overstates the supposed difficulty in applying the *Blockburger* elements test, while understating the difficulty in applying a fact-based test. It is relatively easy to compare elements of offenses, which are not in any way dependent upon the facts of a particular case. It is even easier to do so under the new RCC, which defines the elements of criminal offenses with greater precision than before. By contrast, the CCRC's proposal would require extensive litigation to identify a (necessarily fact-based) course of conduct, and would apply several merger theories. The first of those theories, set forth in subsection (a)(1), is the same *Blockburger* test that the CCRC also deems problematic. The effect of applying multiple merger theories is that the *Blockburger* test will only be retained to the extent that it benefits defendants. As previously stated by USAO, the standard proposed in subsection (a)(4) is vague, and will therefore contribute to needless

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.

litigation and arbitrary outcomes. As USAO also previously noted, defendants will likely invoke the Rule of Lenity in seeking to interpret such vague provisions favorably to themselves.

In short, we remain of the view that adopting a fact-based overlay to the *Blockburger* elements test would confuse rather than clarify merger doctrine. In *United States v. Dixon*, 509 U.S. 688 (1993), the Supreme Court (in considering whether consecutive prosecutions violated the Double Jeopardy Clause) overruled the fact-based “same conduct” overlay that it had added to the *Blockburger* elements test only three years earlier in *Grady v. Corbin*, 495 U.S. 508 (1990). *Dixon* explained that:

Unlike *Blockburger* analysis, whose definition of what prevents two crimes from being the “same offence,” U.S. Const., Amdt. 5, has deep historical roots and has been accepted in numerous precedents of this Court, *Grady* lacks constitutional roots. The “same-conduct” rule it announced is wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy.

Dixon, 509 U.S. at 704. *Dixon* further explained, “But *Grady* was not only wrong in principle; it has already proved unstable in application,” and “is a continuing source of confusion.” *Id.* at 709–10. Although these concerns would not bar a legislative change to the District’s merger rules, the practical criticism in *Dixon* would be just as applicable here. The CCRC proposal might be even less susceptible to principled, consistent application, in that after engaging in the “unstable” and confusing process of deciding what course of conduct proved which offense, the court would be required to merge offenses if, in the judge’s subjective, fact-based opinion, “One offense reasonably accounts for the other offense, given the harm or wrong, culpability, and penalty proscribed by each.” RCC § 22E-214(a)(4). Such amorphous terms will lead to confusion, and extensive litigation, as to how much “harm” or “wrong” was suffered, the “culpability” of the actor, whether the penalty is sufficiently similar as to weigh on one side of the scale or another, whether (and if so, to what degree) any other factors might influence the analysis, and ultimately, when one offense “reasonably accounts” for another.

Moreover, the CCRC notes in Appendix D1 that it has alleviated many USAO concerns by incorporating a greater number of offense-specific merger rules. (App. D1 at 21.) The only RCC statute that appears to have an offense-specific merger rule, however, is RCC § 22E-4101(e)(3) (Possession of a Prohibited Weapon or Accessory). Kidnapping (RCC § 22E-1401) and Criminal Restraint (RCC § 22E-1402) also provide for merger of convictions in certain circumstances, as discussed in more detail below. Assuming that the CCRC intends to incorporate a greater number of offense-specific merger rules into a later draft, USAO requests an opportunity to review and comment on those draft provisions, as well as to propose additional offenses that should have offense-specific merger rules that were not included in this draft.

RCC § 22E-215. De Minimis Defense.1. USAO recommends deleting § 22E-215.

USAO recommends deleting § 22E-215 (De Minimis Defense) in its entirety. USAO objects to the creation of a de minimis defense in the District of Columbia. There is no such defense under current D.C. law, and as the DCCA has recognized, the defense has been adopted by only a “very limited” number of other jurisdictions. *See Dunn v. United States*, 976 A.2d 217, 223 (D.C. 2009) (“a few other states have adopted [de minimis] provisions based on Model Penal Code § 2.12 (2001), which ‘authorizes courts to exercise a power inherent in other agencies of criminal justice to ignore merely technical violations of law.’ *Id.*, Explanatory Note; *see* Stanislaw Pomorski, *On Multiculturalism, Concepts of Crime, and the ‘De Minimis’ Defense*, 1997 B.Y.U. L. Rev. 51 & n. 2; *see, e.g.*, N.J. Stat. Ann. 2C:2–11 (2005); Me. Rev. Stat. Ann. 17–A, § 12 (2006); 18 Pa. Cons. Stat. § 312 (1998). The D.C. Council, however, has not joined ranks with the ‘very limited’ number of states that have adopted the defense. Pomorski, 1997 B.Y.U. L. Rev. 51.”). Instead, USAO believes that, as is currently the case, any characterization of the offense as “de minimis” may be considered at the sentencing phase (e.g., as supporting an argument for leniency at sentencing) rather than the guilt phase of the proceedings.

RCC § 22E-701. Generally Applicable Definitions.1. USAO recommends that the CCRC rephrase the definition of “debt bondage.”

With USAO’s changes, the definition of “debt bondage” would provide:

“ ‘Debt bondage’ means the status of condition of a person who provides forced labor, services, or commercial sex acts, for a real or alleged debt, ~~where:~~

- ~~(A) The value of the labor, services, or commercial sex acts, as reasonably assessed, is not applied toward the liquidation of the debt;~~
- ~~(B) The length and nature of the labor, services, or commercial sex acts are not respectively limited and defined; or~~
- ~~(C) The amount of the debt does not reasonably reflect the value of the items or services for which the debt was incurred.”~~

Take, for example, a victim who is told that she can come to the U.S. to work as a housekeeper. The victim is told that that she will have to work in exchange for \$1,000 in fees that she will incur. In reality, the fees for the victim to come to the U.S. end up being \$20,000, which reasonably account for the fees that actually had to be incurred. In this situation, the value of the victim’s labor is being applied toward the liquidation of the debt, so subsection (A) does not apply. The length of the labor may have been specified as being a housekeeper for a period of 1 year to satisfy the debt, so subsection (B) does not apply. There was actually and reasonably \$20,000 incurred that the victim now owes, so subsection (C) does not apply. But the victim is being forced to work to pay a debt, which should constitute a debt bondage. (This hypothetical is applicable regardless of whether the victim originally believed she would incur \$1,000 in fees or \$20,000 in fees.) A person may have a debt of \$20,000 that they are obligated to repay, and may repay that debt by engaging in labor. Indeed, virtually all people have some debt, whether in

the form of a mortgage, student loan, etc. Rather, what distinguishes a debt bondage from a regular debt is that the person is forced to engage in labor, services, or commercial sex acts to repay that debt. The provisions in subsections (A)–(C) are examples of a debt bondage, but do not represent the crux of a debt bondage. Rather, being forced to engage in labor, services, or commercial sex is the crux of a debt bondage.

2. USAO recommends, in the definition of “labor,” removing the words “other than a commercial sex act.”

With USAO’s changes, the definition of “labor” would provide:

“ ‘Labor’ means work that has economic or financial value, ~~other than a commercial sex act.~~”

Limiting “labor” to exclude commercial sex acts limits the offenses of Forced Labor or Services under RCC § 22E-1601 and Trafficking Labor or Services under RCC § 22E-1603 too narrowly, and creates a gap in liability. Take, for example, a person who is smuggled into the United States, put in a brothel, and told she has to repay her loan by engaging in commercial sex acts. She is a victim of sex trafficking, because she is being compelled to engage in commercial sex acts, but she is also a victim of labor trafficking, because she is being forced to earn money by means of a debt bondage. Moreover, if the trafficking or forced labor is a more complex scheme, there could be layers of liability. Defendant A could be a person who is forcing the victim to engage in some form of labor to earn money to repay an alleged debt, but does not specify the type of work that the victim must engage in. Defendant B could be a person who is specifically forcing the victim to engage in commercial sex acts to repay that debt. If labor is defined to exclude commercial sex acts, then Defendant A will have no liability for either forced labor or forced commercial sex, as Defendant A did not knowingly force the victim to engage in commercial sex acts. Rather, Defendant A forced the victim to engage in any form of work that would result in money to repay the alleged debt, but did not specify the type of work. Defendant A is compelling some type of labor, but is not knowingly causing the complainant to engage in a commercial sex act. Defendant A may be recklessly or negligently causing the complainant to engage in a commercial sex act, but those mental states are insufficient for liability under RCC § 22E-1602, which requires knowledge.

3. USAO recommends that, in subsection (D) of the definition of “position of trust with or authority over,” the CCRC remove the words “that has significant contact with the complainant or exercises supervisory or disciplinary authority over the complainant.”

The RCC acknowledges that this is a possible change to law, and it should be rejected. The change would result in an unjustified exemption to certain liability and increased penalties for individuals in very powerful positions of authority with a victim, by virtue of the amount of time they interacted with the victim before the abuse and/or the scope of their duties. Such an exemption is counterintuitive and inconsistent with the reality of abuse by many individuals in positions of authority. For example, a priest at a church, or another religious figure, rarely has supervisory or disciplinary authority over a child, but should fall within the definition of “position of trust with or authority over.” That religious figure should be subject to enhanced

penalties, and to the provisions of third and sixth degree sexual abuse of a minor, as well as other applicable provisions. The purpose of making this relationship subject to enhanced penalties is to show that there are certain members of the community that the public should be able to trust with their children, such as members of religious establishments, and that the harm to the community is particularly potent when a child is abused by a person that their caretakers and the community should be able to trust. This is true regardless of whether their job responsibilities include supervision and discipline. Similarly, for the victim, the religious or educational figure holds, by nature of his/her employment status, a position of trust and authority over him/her and others within the abuser's scope of responsibilities, regardless of the nature and extent of professional contact the victim has with the abuser. Depending on factors such as the size of the community, the demeanor of the victim, and the extent of involvement in the community by the victim's family, the victim may or may not have had any, let alone "significant," contact with the abuser. Nevertheless, the victim is keenly aware of the abuser's title and position, and the relationship is naturally and inherently impacted by the position alone.

Further, the words "significant contact" are very vague. Would the contact need to take place before the sexual abuse began? How much contact would be deemed "significant"? What if they only met on one occasion before the abuse began? What if the abuse took place at their first meeting? Could grooming behavior constitute "significant contact"? Could the abuse itself constitute "significant contact" if it lasted a long time? Finally, must the contact be physical contact, or is an interaction sufficient?

The title of this definition, "position of trust with or authority over," is an apt descriptor of the relationships that should be included here. A position of trust is the heart of what this definition encompasses, and it should not be further limited by requirements that may be applied in a way that would limit individuals that would be generally considered to be in a position of trust with respect to the complainant.

RCC § 22E-1101. Murder²

1. Defining Felony Murder as Second Degree Murder Does Not Adequately Address the Seriousness of Such Offenses.

USAO continues to believe that the CCRC minimizes the seriousness of felony murder by classifying felony murder as second degree—as opposed to first degree—murder.³ This minimization seriously undermines the CCRC's expressed interest in improving the proportionality of the statutory scheme for homicide offenses.

² USAO continues to urge CCRC to adopt the recommendations concerning the proposed homicide statutes set out in USAO's July 8, 2019 comments on CCRC's First Draft of Report #36, as well as all other recommendations set out in previous comments.

³ For all of the reasons set out below, USAO also opposes defining voluntary manslaughter to include felony murder. Such a statutory change would permit a jury to find voluntary manslaughter as a lesser included offense in a felony murder case. Such a result does not adequately take into consideration the seriousness of felony murder offenses and further undermines the proportionality of the statutory scheme.

All felony murders involve some degree of preparation and planning that is not present in second degree murder. Although this level of planning does not need to entail the premeditation and deliberation required for first degree murder, a perpetrator of a felony murder (involving an enumerated felony) has chosen to engage in felony conduct that exposes the victim to an unacceptably high risk of death. The perpetrator has thus engaged in far more culpable conduct than a person who commits second degree murder, which may be the result of an instantaneous decision. By contrast, a perpetrator who commits a sexual assault or armed robbery has almost always planned his conduct, and cares little that his conduct creates an extraordinarily heightened risk of death for his victim.

A review of published felony murder cases from the DCCA over the past twenty years demonstrates that felony murders are among the most heinous offenses that can be committed. Although perhaps they do not rise to the culpability level of a gangland style execution, these homicides are precisely the type of crimes that a civilized society cannot tolerate. Categorizing them as second degree murder does not adequately reflect their seriousness.

Furthermore, by categorizing these crimes as second degree murder, CCRC's proposal would remove many of the strongest disincentives present in current law to discourage perpetrators of sexual assaults, child abuse, kidnappings, arsons, and robberies from committing these crimes because they may result in the death of the victim. This will inevitably lead to an increase in the number of sexual assaults, incidents of child abuse, kidnappings, arsons, and robberies, and the deaths that will inexorably flow from some of them.

Felony Murders Involving Sexual Assault

Perhaps most disturbing are those felony murders where the victim is first sexually assaulted by the perpetrator. In committing such a crime, the perpetrator's primary purpose is not to kill the victim. Nevertheless, the person who commits such a sexual assault can be utterly indifferent to the risk of death that his conduct causes.

In *Ingram v. United States*, 40 A.3d 887 (D.C. 2012), defendants Raq Baxter, Darion Ingram, and Kevin Dobbins killed decedent Kenneth Muldrow by viciously beating and sexually assaulting him on the night of December 8, 2000. "Muldrow was 19 years old, a special needs student who had recently been hospitalized for head trauma." *Id.* at 890. Baxter started the assault by approaching the victim, accusing him of stealing his stash, and telling him that he would have to pay him or fight him. *Id.* "Muldrow, distressed, confused, and unable to speak coherently, responded that he did not know what Baxter was talking about." *Id.* Baxter then struck the victim in the head with a bottle and punched him in the face when he fell to the ground. Witnesses saw others also kicking and punching the victim. *Id.* One witness stated that the force of the beating was causing a nearby air-conditioning unit to vibrate. *Id.*

Baxter then stated "where was the pole at...he was going to show people how he do [with] people who fuck with his stash and his money." *Id.* "A few seconds of silence followed and [the witness] heard 'the boy say 'Oh God' and take his last breath.'" *Id.* Baxter then said "'[I]t's up in there, joint up in there' and then 'let me wipe this pole off.'" *Id.* Police arrived shortly thereafter, finding the victim's bloodied body with a pole sticking out of his anus. *Id.*

Baxter testified in his own defense, and while admitting to punching the victim, he denied that he hit him with a bottle, jumped or stomped on him, or assaulted him with a pole.

Baxter and his co-defendants were indicted for first degree sexual abuse while armed, first degree felony murder while armed, and first degree premeditated murder while armed. *Id.* at 889, n.1. Notably, the jury acquitted Baxter of first degree premeditated murder while armed, and instead convicted him of the lesser included offense of second degree murder while armed. *Id.* at 894. The jury also convicted Baxter of first degree felony murder while armed and first degree sexual abuse while armed. *Id.* Baxter's co-defendants were found guilty of second degree murder. Baxter died while his case was on appeal. *Id.* at 889, n.1.

Under the CCRC's proposal, Baxter would have been convicted of second degree murder, the same offense his co-defendants were convicted of. Although the co-defendants were involved in kicking and stomping on the defendant, their conduct was substantially less culpable than that of Baxter. Moreover, the jury *acquitted* Baxter of first degree premeditated murder. Although it is unclear why they did so, a likely reason was that the jury believed that the government's evidence failed to adequately show premeditation and deliberation beyond a reasonable doubt.

In *Jones v. United States*, 828 A.2d 169 (D.C. 2003), police arrived at the apartment of victim Darcie Silver, finding her dead. An autopsy determined that the cause of death was asphyxia by strangulation and found burns near her genital area and pieces of burned newspaper near her crotch. *Id.* at 172. A vaginal swab found the presence of male DNA that was later matched to the defendant, who was one of the victim's co-workers. *Id.*

Two neighbors told police that they saw a man matching the defendant's description knocking on the front door of the apartment building. *Id.* They heard him interacting with the building intercom by stating the victim's name and stating that he had locked himself out and needed to borrow a telephone. *Id.* He was buzzed in and headed in the direction of the victim's apartment. *Id.* Fifteen minutes later, one neighbor heard a "crash" coming from the victim's apartment, and the other neighbor heard a loud "thump." *Id.*

It is unclear from the reported case as to whether the defendant was charged with first degree murder. The jury did return a verdict for second degree murder, first degree sexual abuse, first degree felony murder, and first degree burglary. *Id.* at 171. Perhaps because of the circumstantial nature of the evidence in this case, a jury would have great difficulty in finding that the defendant acted with premeditation and deliberation. More likely, the defendant's motivation was to commit a sexual assault and the murder was simply a sequel to the initially intended crime. Indeed, the jury's guilty verdict for first degree burglary suggests that is what the jury concluded. But again, categorizing this home invasion and rape resulting in the victim's death by strangulation as merely a second degree murder does not adequately reflect the seriousness of the perpetrator's conduct.

Felony Murders Involving Child Abuse

Another area where the CCRC's proposal seems to understate the seriousness of the offense conduct is in child abuse cases resulting in death. Often in such cases, the defendant's intention at the outset of the abuse is not to kill the child. However, the defendant's conduct escalates, resulting in the victim's death. Just as in the sexual assault context, the defendant engages in a series of actions (often over a substantial period of time) that expose the victim to an unacceptably high risk of death.

In *Austin v. United States*, 64 A.3d 413 (D.C. 2013), the defendant was convicted of first degree felony murder for the death of 21-month-old Ronjai Butler, his girlfriend's son. The girlfriend left the defendant at home with Ronjai, who appeared fine when she left. *Id.* at 416. An hour later, when she returned, the child was crying and struggling to breathe. *Id.* The defendant suggested placing Ronjai in a tub of cold water, where he struggled to stand. *Id.* The girlfriend "saw bruises on the child's face, arms, chest, legs, and stomach." *Id.* Shortly thereafter, his breathing stopped. *Id.*

Following an autopsy, the medical examiner determined that the child had bruises to his forehead and skull that occurred three or four hours before the child was pronounced dead at the hospital and numerous abrasions less than twenty-four hours old. *Id.* at 417. She also concluded that the victim died from complex fractures of the skull that caused his brain to swell and his breathing to stop. *Id.* The child also suffered from rib fractures and lacerations to the spleen and liver. *Id.*

Under the CCRC's proposal, the defendant would be guilty of no more than second degree murder. The government's case was circumstantial and based on the fact that the child's injuries occurred when only the defendant had access to him. This is routinely the case in child abuse homicides. There is little evidence in this case that could lead a jury to determine—beyond a reasonable doubt—that the defendant acted with premeditation and deliberation. Nevertheless, the pattern of injuries demonstrates that the victim was subject to a vicious beating that must have taken some time to administer. The first blow may have been a minor one, but it was followed by many more, leading to rib fractures, lacerations to the spleen and liver, and skull fractures that resulted in brain swelling and then death. This offense conduct is substantially more serious than conduct that would otherwise qualify as second degree murder, where conduct can be the result of an instantaneous decision.

Felony Murders Involving Kidnapping

Another scenario that involves substantial planning and preparation, but not necessarily premeditation and deliberation, is kidnappings resulting in death. The perpetrator of such a kidnapping may not be motivated by a desire to kill the victim, but nevertheless sets in motion a sequence of events that may lead to the victim's death. These types of cases also involve far more serious offense conduct than a typical second degree murder case.

In *Benn v. United States*, 801 A.2d 132 (D.C. 2002), the evidence established that two individuals forcibly brought decedent Charles Williams to his fiancée’s apartment.⁴ “After searching for money, the two men forced the decedent out of the house and into a waiting car.” *Id.* at 134. The next morning, his bullet-ridden body was found behind an elementary school. *Id.*

The government argued to the jury that the two men who brought the decedent to his fiancée’s apartment were the men who murdered him, and that defendant Benn was the taller of those two men. *Id.* The government presented the testimony of five witnesses that the defendant had entered the apartment. *Id.* However, the government could not offer any physical evidence linking him to the homicide and presented no evidence of motive. *Id.* Witnesses saw Benn holding the decedent by his clothing, although he assured one witness that no harm would come to the decedent. *Id.* at 135.

The victim’s body was found approximately seven to eight hours later. *Id.* There was duct tape around his wrists and mouth and \$45 was sticking out of his pants pocket. *Id.* Four live rounds of ammunition were found near the body, and one spent shell casing. *Id.* The autopsy found two gunshot wounds, although it is unclear if those wounds could have been caused by the same projectile. *Id.* The jury convicted Benn of first degree felony murder while armed and related kidnapping, assault, and weapons charges. *Id.* at 133-34.

Again, because the government’s case was circumstantial, it would be very difficult to prove that the defendant acted with premeditation and deliberation. Obviously, there was planning and preparation for the kidnapping, but it is a matter for speculation as to whether the defendants actually wanted the decedent dead. In fact, their conduct suggested that what they really wanted from the victim was money, which they did not succeed in obtaining. The unfired cartridge casings found near the body are consistent with the perpetrators cycling rounds through a firearm, which would have created a terrifying clicking sound as each new round was chambered—and likely new demands were made. The firing of the ultimate fatal round may have been a spontaneous decision by the perpetrators. Nevertheless, this is a horrifying crime, and classifying it as second degree murder does not adequately take into account the seriousness of the conduct.⁵

Similar factual circumstances were presented by *Ashby v. United States*, 199 A.3d 634 (D.C. 2019). Victim Carnell Bolden was dropped off by his girlfriend, Danielle Daniels, at a house on W Street, N.W. at six in the evening. *Id.* at 640. When the decedent did not come back within ten minutes, she got out of the car and began walking up and down the street attempting to call him. *Id.* at 641. She returned to her car, and later saw a dark figure wearing a black hooded sweatshirt firing at the car. *Id.* Ms. Daniels survived the shooting, but was very seriously injured. *Id.* She spent three months in the hospital and suffered permanent nerve damage and the loss of use of her left hand. *Id.*

⁴ Benn’s conviction was reversed because of the trial court’s error in applying the rule on witnesses to the defendant’s mother, who would have retaken the stand in support of her son’s alibi defense. The defendant was later retried and convicted a second time. *See Benn v. United States*, 978 A.2d 1257 (D.C. 2009).

⁵ As discussed below, *Benn* and *Ashby* also show the danger in eliminating accomplice liability for felony murder, as the CCRC proposes.

The following morning, police found her boyfriend's body in a different quadrant of the city. *Id.* The body appeared to have been dragged to the location and had suffered two gunshots to the face that had been fired at close range. *Id.* Duct tape covered the victim's eyes and mouth and his feet were bound by duct and packing tape and an electrical cord from a television set. *Id.*

Police then searched the house on W Street, and found a coat with the decedent's blood on it and a television set missing its electrical cord. *Id.* Police also found the decedent's blood in a vehicle that one of the defendants had access to. *Id.* As a result, police concluded that the victim had been killed in the home and then transported to where his body was found. *Id.*

The jury was presented evidence that the defendants had a connection to the house on W Street, and that Defendant Keith Logan had spoken by phone with the decedent twice in the time leading up to his appearance with his girlfriend at the house. *Id.* Phone records also showed communication between two of the defendants on the day of the murder, and cell site data for one defendant (Paul Ashby) showing his phone had traveled in the direction of where the body was found on the night of the murder. *Id.* at 642. Defendant Keith Logan had previously suggested to another acquaintance that they rob and kill the decedent, but the acquaintance turned down the offer. Defendant Paul Ashby later admitted his role in the murder to an acquaintance. *Id.*

The defendants were charged with both first degree premeditated murder while armed and first degree felony murder while armed, as well as a slew of other offenses, including kidnapping. *Id.* The jury convicted Paul Ashby of both first degree premeditated murder while armed and first degree felony murder while armed. The other two defendants were convicted of first degree felony murder while armed but acquitted of first degree premeditated murder while armed. The difference appears to be that Ashby admitted his role in the kidnapping and murder, while the involvement of the other two defendants was established circumstantially. In any event, this is yet another horrifying crime that should not be classified as second degree murder, as it would have been for the defendants acquitted of first degree premeditated murder.

Felony Murders Involving Arson

Felony murders involving arson are somewhat uncommon, but are emblematic of felony murder because the perpetrator exposes numerous victims to an unacceptably high risk of death. Two somewhat older cases are illustrative and again show offense conduct that is far more serious than the typical second degree murder.

In *Bonhart v. United States*, 691 A2d 160 (D.C. 1997), the defendant had a dispute with the victim and his partner over a small, unpaid drug debt of \$30. When the victim and his partner were slow to repay, the defendant threatened, "If I don't get my money, I'm going to burn this motherfucker down." *Id.* at 162. Shortly thereafter—as the victim's partner tried to borrow money from a neighbor to pay the debt—witnesses observed the defendant carrying a container that smelled of gasoline, and the victim's partner then saw the defendant near the door of the victim's apartment making a motion like striking a match. *Id.* The apartment was soon engulfed in flames. *Id.* The defense proffered evidence that the victim had escaped his apartment, but had

reentered to rescue his dog. *Id.* The victim did not survive the fire, which destroyed his apartment. *Id.* The jury convicted the defendant of felony murder and second degree murder. *Id.* at 161. It is not clear from the opinion if the defendant was also charged with first degree premeditated murder.

In *Peoples v. United States*, 640 A.2d 1047 (D.C. 1994), the defendant had a long-term relationship with his girlfriend, with whom he shared a son. The relationship deteriorated, and the defendant was seen twisting a rag outside the girlfriend's home, which she shared with multiple family members. *Id.* at 1050. Moments later, there was an explosion at the house, which killed the girlfriend's mother and left five other family members with severe burns. *Id.* at 1051. The girlfriend was not present in the home at the time of the fire. *See Id.* Several of the victims required multiple surgeries, and all suffered permanent scarring and varying degrees of life-long disability. *Id.* at 1051–52. The jury convicted the defendant of felony murder, but acquitted him of first degree premeditated murder. *Id.* at 1049.

Both of these cases are typical of a defendant's state of mind in a felony murder case. The defendant may not have a specific intent to kill, or have premeditated or deliberated. Nevertheless, planning is required to start the fire, and the fire exposes numerous individuals to a very substantial risk of death. “ ‘An arsonist is bound to know the perils and natural results of a fire which are reasonably foreseeable according to the common experience of mankind, and in particular to know that an occupant of the building, set on fire, an accomplice, a fireman and the public who are likely to come to watch the fire, may die in or as a natural proximate result of the fire.’ ” *Bonhart*, 691 A.2d at 163 (quoting *Commonwealth v. Bolish*, 113 A.2d 464, 474 (Pa. 1955)). Such offenses are again substantially more serious than those involved in the common second degree murder fact pattern.

Felony Murders Involving Robberies

The same phenomenon is often seen with robberies that result in the death of a victim, which is likely the most prevalent type of felony murder. Here too, the defendant or defendants engage in far more extensive planning and preparation than is seen with second degree murder. Moreover, the goal is never to kill the victim. The goal is to rob the victim, and the death of the victim is an unfortunate outcome of the robbery. But nevertheless, the defendant in such a case willingly exposes his victim to an unacceptably high risk of death.

In *Taylor v. United States*, 138 A.3d 1171 (D.C. 2016), the defendant committed an armed robbery where the two owners of a market were killed. The defendant entered the market with his gun drawn, and demanded money. *Id.* at 1173. Owner Li Jen Chih refused, leading the defendant to fire near him, but not hitting him. *Id.* They then scuffled over the gun, and the owner jumped over the counter to begin fighting the defendant. *Id.* More shots were fired, and Li Jen Chih fell to the ground. *Id.* at 1173–74. The other owner—Ming Kun Chih, who was also Li Jen Chih's father—grabbed a pole and rushed at the defendant and was himself shot. *Id.* at 1174. The defendant was seen fleeing the store in his mother's car, and the defendant's DNA was found on two bags found inside the store. *Id.* Both victims died from their injuries.

Taylor shows just how dangerous armed robberies can be. It is virtually certain that the defendant would have preferred that Li Jen Chih had simply given him cash, but instead, the victim struggled with the defendant, which in turn led to his father attempting to intervene, leading to both of their deaths. By categorizing such a crime as second degree murder, the CCRC's proposal changes our present statutory scheme whereby the perpetrator of an armed robbery bears the legal risk that the robbery will be botched and that someone will be killed as a result. Unlike in a typical second degree murder, a perpetrator of an armed robbery should expect that his actions may result in the death of an innocent party, but is indifferent to this actual risk that he imposes on others.

In *Trotter v. United States*, 40 A.3d 121 (D.C. 2015), co-defendants Gregory Trotter and Ernest Pee committed an armed robbery of a check cashing store on Benning Road, N.E. The robbers entered the store wearing masks. *Id.* at 45. The taller of the two (who resembled Trotter) held a revolver in his right hand, while the shorter and stockier robber held a semi-automatic handgun in his left hand. *Id.* The two assaulted one of the shopkeepers (Prithvi Singh), hitting him with their guns, and knocking out some of his teeth. *Id.* The shopkeeper's son (Prabhjhot Singh) then emerged from a back room and began to struggle with Trotter, pushing him into the street. *Id.* The two grappled with each other until Trotter shot him in the head, killing him. *Id.*

Witnesses then saw the two robbers flee in a golden Kia with Maryland tags. *Id.* One witness was able to obtain a partial tag number. *Id.* An acquaintance of the robbers testified that he had driven Trotter to the store to case it before the robbery and that Trotter had later admitted to robbing the store and shooting one of the shopkeepers when he had struggled with him. *Id.* A baseball hat and cellular phone were found inside of the store. The hat contained Trotter's DNA, and the phone belonged to Trotter and showed numerous calls between he and Pee in the hours leading up to the robbery. *Id.* The golden Kia was tracked to a woman that Pee was living with, and she testified that Pee had access to the keys and that she did not use the vehicle on the day of the murder. *Id.*

This case is another good example of the tremendous risk to which armed robbers expose their victims. The goal of the robbers was to obtain money, and they in fact did obtain \$40,000 in cash. *Id.* What they likely did not anticipate was that a second shopkeeper would emerge from another room and attempt to struggle with one of the robbers and that during that struggle, the robber would shoot and kill the shopkeeper. Armed robberies often generate these deadly consequences, because victims and onlookers to an armed robbery may react in unpredictable ways—especially when they feel their lives or livelihoods are at risk.

In this case, the victim chose to struggle with Trotter, but he could have just as easily chosen Pee to struggle with, and Pee may have then shot and killed him while they struggled. Nevertheless, *both* of the defendants exposed the victim to a heightened risk of death by choosing to rob the store after extensive planning, and thus *both* should be held responsible for the consequences of their joint decision.

The Strong Contrast with Second Degree Murders Under Existing Law

The above-referenced offenses are far more serious offense conduct than what can constitute second degree murder under existing law. Although the taking of any human life is always a terrible tragedy, homicidal criminal conduct nevertheless exists on a spectrum from most to least serious, and categorizing felony murder as second degree murder inappropriately lumps felony murder cases with less serious second degree murder cases.

Second degree murder convictions can result from:

- A tempestuous and dysfunctional domestic relationship where a girlfriend ultimately stabs her boyfriend to death, allegedly in self-defense, but where the jury did not accept the claim of self-defense. *See Bassil v. United States*, 147 A.3d 303 (D.C. 2016).
- An argument in a barbershop that takes a sudden, deadly turn when the defendant pulls out a gun and shoots the decedent. *See Holmes v. United States*, 143 A.3d 60 (D.C. 2016).
- An argument and struggle at a bus stop stemming from the report of a previously stolen gun that ended when the defendant shot and killed the victim. *See Smith v. United States*, 26 A.3d 248 (D.C. 2011).
- An assailant attacked a group of men with a bat, who then struggled with the assailant, causing him to fall down. The defendant, one of the members of the group of men who was attacked, then picked up the bat and stuck the assailant several times, killing him. *See Melendez v. United States*, 10 A.3d 147 (D.C. 2010).

Although each of these crimes are terrible tragedies, they involve conduct that is less culpable than that of a perpetrator who seeks to commit a sexual assault, kidnapping, arson, or robbery and willingly imposes the risk that his actions will result in the death of the victim. By defining felony murder as second degree murder, the CCRC improperly groups two quite different categories of homicides.

2. Eliminating accomplice liability for felony murder cases will cause some of the most terrible murders to go unpunished and will lead to an increase in violence committed by groups of individuals.

USAO continues to oppose CCRC's recommendation that no person shall be guilty as an accomplice under a felony murder theory. If that recommendation were enacted, some of the murders described above would go unpunished because, although it is possible to prove the identity of the perpetrators of the offense, it is not possible to identify the specific offender who "commit[ed] the lethal act."

This is true for both of the felony murder cases involving kidnappings discussed above. In *Benn v. United States*, 801 A.2d 132 (D.C. 2002), the defendant's body was found behind an elementary school seven to eight hours after he was abducted. He had been shot and his mouth and hands were duct taped. There were no eyewitnesses to the commission of the lethal act.

Instead, the evidence showed that the defendants were with the victim seven to eight hours later and that he was clearly being held hostage.

There were no direct eyewitnesses to the murder itself and no physical evidence tying the defendants to the murder. Accordingly, if the law required proof of which specific individual actually fired the fatal shot, no one would be held accountable for murder for this crime.

Similarly, in *Ashby v. United States*, 199 A.3d 634 (D.C. 2019), the evidence did not establish which defendant committed the lethal act. The identity of the perpetrators was established circumstantially, but it was impossible to know which of the defendants committed the lethal act. The victim's bound body was found the next day with two gunshot wounds to the head. Here too, absent the felony murder rule, no one would be held accountable for this awful crime.

Felony murders committed by two or more perpetrators involving other enumerated felonies could lead to the same result in a number of different, yet highly plausible scenarios:

- A gang rape perpetrated by two or more individuals that resulted in the victim's death may result in no liability for murder, as it may not be possible to determine which defendant committed the lethal act.
- A case where both a father and mother systematically abused their child, resulting in the child's death.
- Witnesses observe two robbers enter a liquor store, both armed with firearms. There is no surveillance video inside the store, and only a single clerk is working there. Witnesses hear the sound of a single shot and see both robbers leaving with cash. When police arrive, there are signs of a struggle within the store. A single cartridge casing is found inside the establishment, but is never linked to a firearm.

In each of these cases, it is impossible to prove the identity of the individual who committed the lethal act or a specific intent to kill by any of the perpetrators. Accordingly, none of these defendants would be liable for murder.

By eliminating accomplice liability for felony murder, not only does the CCRC's proposal make certain murders impossible to prove, it encourages perpetrators to plan and structure their actions in a way that will bring other individuals into the crime in an attempt to shield each member from individual liability.

The proposal will also encourage perpetrators of violent crimes to include some of the weakest and least advantaged members of our society into their criminal endeavors. Juveniles, individuals with cognitive or developmental disabilities, and other members of disadvantaged groups may be purposefully included for purposes of "committing the lethal act," thereby leaving the masterminds of the crime without criminal liability.⁶

⁶ Such an effect has been seen for many years in drug distribution offenses where it is common practice for a dealer to use a "go-between" to obtain money from the customer and then to return to the customer with the drugs. The dealer is often practically shielded from criminal liability by this arrangement, but the

CCRC's Commentary confusingly notes that the elimination of accomplice liability in felony murder cases "improves the proportionality of the offense insofar as it is disproportionately severe to punish a person for murder when another person commits the lethal act (assuming no accessory or conspiracy liability)." (Commentary at 28.) A footnote further explains: "This limitation of the felony murder rule does not preclude murder liability anytime a non-participant's voluntary act contributes to the death of another." (Commentary at 28 n.180.) The Commentary also mistakenly states that "DCCA case law do[es] not clarify whether a person can be convicted of felony murder when someone other than the accused committed the lethal act." (Commentary at 28.)

These comments appear to show CCRC's misunderstanding of the felony murder doctrine and existing case law. In a felony murder case, an accomplice (under an aiding and abetting theory) must exhibit the same *mens rea* as the principal for the underlying predicate felony. For enumerated felonies, the commission of the enumerated felony *itself* exposes the victim to a heightened risk of death, such that it is reasonably foreseeable that death may result, as the CCRC appears to acknowledge. (See Commentary at 28 n.176 ("These enumerated felonies in almost all cases create a substantial risk of death, and constitute a gross deviation from the ordinary standard of care.")) Accordingly, the accomplice's "voluntary act" *does* "contribute[] to the death of another."

Under existing law, it is the felony murder doctrine that supplies the accessory liability for non-principal offenders if the predicate offense is an enumerated felony.

As explained by the DCCA in *Wilson-Bey*:

It is true, in a felony murder case, that an accomplice does not escape liability for a foreseeable death merely because he or she neither intended to kill nor pulled the trigger. *To hold otherwise would be to reject the underlying purpose of the felony murder doctrine, which is designed to deter the commission of certain especially dangerous felonies because these particular crimes create an unacceptably high risk of death, and which permits the conviction of the defendant, whether she is a principal or accomplice, without any showing that she intentionally or knowingly caused the decedent's death.*

Wilson-Bey v. United States, 903 A.2d 818, 835 (D.C. 2006) (emphasis added). Thus, existing case law is quite clear that an accomplice in a felony murder case is liable even if he has not "commit[ed] the lethal act."

By altering liability for accomplices under a felony murder theory, CCRC's proposal would effectively decriminalize certain homicides committed by groups of perpetrators and would create perverse incentives for perpetrators to commit inherently dangerous offenses in groups in an attempt to individually shield themselves from criminal liability.

go-between is not. Go-betweens are generally older drug addicts who provide this service to dealers in exchange for small amounts of drugs at the end of the day to satisfy their addiction.

RCC § 22E-1201. Robbery.

1. USAO recommends that the Commentary be revised to state that physical force that “overpowers” the complainant is sufficient for liability under subsection (e)(4)(D), and that the force need not be “significant.”

On page 51 of the Commentary, the RCC states: “The phrase ‘physical force that overpowers’ is intended to include significant uses of force and incidental jostling or touching does not satisfy this element.” The footnote to this Commentary, however, provides that “[e]xamples may include pushes, pulling, and holds if the facts of the case show that such conduct overwhelmed the complainant.” (Commentary at 51 n.21.) The word “significant” is a term of art used in other RCC provisions, and its use here lends confusion to this Commentary. It is unclear what would constitute a “significant” use of force that would not also “overpower” the complainant. Based on the examples provided in the Commentary, the distinction is based on the defendant’s intent, and whether the defendant’s actions actually overpowered the complainant. Given that this element requires that the defendant “knowingly” used physical force, incidental jostling or touching would be accidental and would not satisfy this “knowingly” standard. Thus, requiring that the force be “significant” is confusing and should be removed from the Commentary. Rather, the plain language of the statute suffices.

2. USAO recommends that the Commentary clarify that a complainant’s injury need not actually be caused by the dangerous weapon or imitation dangerous weapon.

On page 54 of the Commentary, the CCRC states: “This subparagraph requires that the defendant actually used the dangerous weapon or imitation dangerous weapon to cause the significant bodily injury.” The footnote to that provision, however, states: “It is insufficient if the defendant causes serious bodily injury by some other means, while merely possessing, but not displaying or using, a dangerous weapon or imitation dangerous weapon. *However, this element may be satisfied if the person displays a weapon in order to frighten or incapacitate the other person, and then uses other means to cause the bodily injury.*” (Commentary at 54 n.35 (emphasis added).) These provisions are confusing. The CCRC should clarify in the Commentary that a defendant must display or use a dangerous weapon or imitation dangerous weapon, and that the person must suffer bodily injury as a result, but that the weapon itself need not actually cause the injury—that is, if a defendant displays a gun as part of a robbery, a complainant could suffer an injury other than a gunshot injury that would satisfy this element. For example, if the complainant fell and suffered an injury from the fall after the defendant threatened the complainant with a gun, that injury would suffice for liability. USAO makes the same recommendation for other references to this same language throughout the Commentary for this and other offenses.

Chapter 13. Sexual Assault and Related Provisions.

1. USAO opposes creating an element requiring proof of the defendant's recklessness as to the complainant's age in any of the sex offenses involving minors.

As detailed in prior comments, USAO strongly opposes any creation of a reasonable mistake of age defense for child sexual abuse. USAO also opposes, however, a dichotomy between a reasonable mistake of age affirmative defense for Sexual Abuse of a Minor under RCC § 22E-1302, and an element requiring proof of the defendant's recklessness as to the complainant's age under RCC §§ 22E-1303(a)(2)(A) and (b)(2)(A) (Sexual Abuse by Exploitation, as applied to abuse of secondary school students); § 22E-1304 (Sexually Suggestive Conduct with a Minor); § 22E-1305 (Enticing a Minor into Sexual Conduct); and § 22E-1306 (Arranging for Sexual Conduct with a Minor). Although USAO strongly believes that the RCC should remove both a reasonable mistake of age defense and requirement of recklessness as to the child's age for all child sexual abuse provisions, at a bare minimum, the provisions should align to create the same reasonable mistake of age affirmative defense for all provisions.

Notably, the reasonable mistake of age defense in RCC § 22E-1302(g) has been narrowed by the RCC in subsequent drafts to require that (1) the defendant reasonably believe the complainant to be of a consenting age, (2) that reasonable belief be based on an oral or written statement that the complainant made to the defendant about the complainant's age, and (3) that the complainant be 14 or older (in the context of what is currently penalized as child sexual abuse), or 16 or older (in the context of what is currently penalized as sexual abuse of a minor). By contrast, in the other child sexual abuse provisions, it is not only the government's burden to prove that the defendant was reckless as to the complainant's age, but, in addition, there are no limitations on what that recklessness must be based on, and no minimum age of a complainant to which it would apply. Although Sexual Abuse of a Minor at § 22E-1302 is a more serious offense that carries more serious penalties than the other offenses listed above, the same logic should apply to all sex offenses involving minors. Even when less serious conduct is involved, the government has identical concerns about rape shield laws being implicated, and in reality, creating a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws. This evidence would be argued to be "relevant" in the same way for all of the child sexual abuse provisions, and complainants should be treated the same and have the same protections, regardless of the perceived gravity of the offense.

2. USAO reiterates its recommendation that the sex offense enhancements currently located in D.C. Code § 22-3020 be applied to all sex offenses.

USAO previously made this same recommendation. The CCRC accepted this recommendation in part, applying these enhancements to the Sexual Abuse of a Minor offense at RCC § 22E-1302(h)(7), in addition to where it had already applied the enhancements for Sexual Assault at RCC § 22E-1301(f)(5). USAO continues to believe that the enhancements should apply to all sex offenses. For example, the complainant's young age is an element of RCC § 22E-1302, and is an enhancement in RCC § 22E-1301. The complainant's young age (under

age 12) should be an enhancement to the other sex offense provisions as well. Although they may involve less serious sexual acts than the sexual acts required by RCC § 22E-1301 or § 1302, it should be, for example, more severely punished to engage in sexually suggestive conduct with a 9-year-old child than to engage in sexually suggestive conduct with a 15-year-old child under RCC § 22E-1307. This logic applies similarly to other sex offenses that necessarily involve minors—such as enticing and arranging—or that could involve minors—such as nonconsensual sexual conduct. This same logic also applies to an enhancement for the defendant being in a position of trust or authority over the complainant. This enhancement should apply to all offenses that could involve minor victims, as it is more serious and egregious to engage in sexual conduct when this relationship exists. For example, a defendant who is a child’s biological parent who engages in sexually suggestive conduct under § 22E-1307 should be subject to a higher penalty than a defendant who engages in sexually suggest conduct with a person where there is no significant relationship. Likewise, if a defendant acts with one or more accomplices for any sex offense, this behavior should be subject to an enhancement. This applies to all sex offenses involving minors, regardless of the perceived gravity of the offense, as well as to all sex offenses involving adult victims. For example, under RCC § 22E-1303, if a group of doctors commit a sex offense against a patient, or if a group of prison guards commit a sex offense against an inmate, they should be more severely punished than a single defendant who commits that offense alone; therefore, an accomplice enhancement should apply to this and other sections.

USAO also reiterates its recommendation that a sex offense specific repeat offender enhancement should apply to all sex offenses. The general repeat offender enhancement provision in RCC § 22E-606 only applies to prior *convictions*, and does not account for multiple victims within the same case. A multiple victim enhancement recognizes that a defendant who commits sex offenses against multiple victims should be treated more severely than a defendant who commits sex offenses against a single victim. A defendant who is engaging or has engaged in sex offenses against multiple victims is engaging in more predatory behavior that is more dangerous and that should be penalized accordingly.

The CCRC notes that “[t]he USAO recommendations significantly expand the scope of the current D.C. Code sexual abuse aggravators, which do not contain an aggravator for only one prior conviction and require crimes be committed ‘against’ 2 or more victims.” (App. D1 at 166–67.) It is unclear, however, how the USAO recommendations would expand current law. Current law provides that 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). For this enhancement to apply, the defendant must have been found guilty of committing at least one offense involving at least one victim in the current case; if there is no finding of guilt on the underlying offense, there could be no finding of guilt on the enhancement. At the time of a finding of guilt in the current case, the defendant therefore “is” guilty of committing a sex offense in the current case. If the defendant has one prior conviction for a sex offense, the defendant “has been” found guilty of a sex offense in a prior case. Thus, at the time of a finding of guilt in the current case, the defendant “is or has been” found guilty of committing sex offenses against 2 or more victims. Moreover, if there are two victims in a single case, then, if the defendant is found guilty of committing offenses against both victims, the defendant “is guilty” of committing sex offenses against 2 or more victims. The

statute clarifies that these findings of guilt can be either in one proceeding or in multiple proceedings.

The CCRC also notes that, based on the limited available statistical evidence, between 2009 and 2015, there were only five instances where an aggravating factor for a sex offense resulted in a sentence higher than the otherwise-authorized statutory maximum, and all of those instances involved an aggravator for a significant relationship, not priors or multiple victims. (App. D1 at 167.) Just because an aggravator may not raise a sentence above the otherwise-authorized statutory maximum, however, does not mean that it is an irrelevant aggravator. First, even if an aggravator results in no change to a sentence, it can help represent more fully the nature of the defendant’s conduct. Second, the CCRC noted that the aggravators did not result in a sentence higher than the otherwise-authorized statutory maximum, but did not note (and, indeed, likely does not have access to information regarding) whether the aggravators resulted in a sentence higher than the top of the otherwise-authorized sentencing guidelines range. An aggravator has the effect of both increasing the statutory maximum, and increasing the top of the sentencing guidelines range. A sentence may, therefore, be increased above the otherwise-applicable top of the sentencing guidelines range, even if is below the otherwise-authorized statutory maximum. Third, even if the aggravator does not result in a sentence that exceeds either the otherwise-authorized statutory maximum or otherwise-authorized top of the sentencing guidelines range, it allows USAO to request a higher sentence, which may ultimately result in the judge imposing a higher sentence than the judge would have imposed otherwise. For example, a judge who may have sentenced the defendant to the mid-range of a sentencing guideline range may, after considering the aggravator, sentence the defendant to the top of the sentencing guideline range. This nuance would be difficult to observe in statistical court data.

RCC § 22E-1302. Sexual Abuse of a Minor.

1. USAO recommends that the *mens rea* for whether the defendant is in a position of trust with or authority over the complainant be changed from requiring “knowledge” to requiring “recklessness.”

Under subsections (c)(2) and (f)(2), the defendant must “knowingly” be in a position of trust with or authority over the complainant for liability to attach. Under subsection (h)(7)(B), an enhancement applies if the defendant “knows” that the defendant is in a position of trust with or authority over the complainant. By contrast, for Sexual Assault in RCC § 22E-1301(f)(5)(D)(iii), the defendant must only be “reckless” as to the fact that this relationship exists for an enhancement to apply. These *mens rea* should align, and should, at most, require that the defendant be reckless as to the relationship. These changes should be made both to the elements in subsections (c)(2) and (f)(2), and to the enhancement in subsection (h)(7)(B). It is appropriate for the recklessness standard in RCC § 22E-1302 to mirror the recklessness standard in RCC § 22E-1301.

RCC § 22E-1304. Sexually Suggestive Conduct with a Minor.

1. USAO recommends that the Commentary clarify that touching one’s own genitalia when visible to the complainant remains a basis of liability under subsection (a)(2)(A).

The RCC replaced its previously drafted language of “Knowingly 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.” The new language provides that the defendant must engage in a sexual act, sexual contact, or sexual or sexualized display of the genitals, pubic area, or anus—all of which must be visible to the complainant. USAO recommends that the Commentary to RCC § 22E-1204 clarify that a defendant who purposely touches their own genitalia, including masturbation, falls within the newly drafted language. In the human trafficking context, the RCC clarified in the Commentary that masturbation can qualify as a sexual act or sexual contact. USAO requests a similar clarification in the Commentary here to avoid any potential future confusion.

RCC § 22E-1305. Enticing a Minor into Sexual Conduct.

1. USAO opposes the deletion of what was previously subparagraph (a)(1)(B) in the prior draft: “Persuades or entices, or attempts to persuade or entice, the complainant to go to another location and plans to cause the complainant to engage in or submit to a sexual act or sexual contact at that location.”

In making this change, the CCRC states that this overlaps with either the RCC kidnapping offense or the RCC attempted kidnapping offense. (App. D1 at 198.) For most enticing cases, however, there would be no overlap in liability, and this deletion would, in fact, create a gap in liability. Kidnapping requires that the defendant actually move the complainant. In an enticing case, however, a defendant would rarely “move” a complainant. Rather, the point of enticing is that the defendant “enticed” the complainant to move on the complainant’s own volition. Child sexual abuse, including enticing, is based on manipulation and grooming. For most child sexual abuse, force is not required, as a defendant, because of his/her position or relationship with the child—including being a family member or other trusted person to the child—is able to persuade a complainant to engage in sexual activity without using any force. Moreover, kidnapping requires that either the complainant not provide effective consent for being moved, or that a person with legal authority over the complainant would not have provided effective consent for the complainant to be moved. “Effective consent” does not have an exception for a child, so a child could provide effective consent (and, as set forth above, likely was groomed by the defendant to provide that effective consent). Further, a person with legal authority over the complainant may have provided the defendant with authority to move the complainant to a particular location, but not permission to engage in sexual conduct with the complainant. Sadly, however, there are also situations where a person with legal authority over the complainant may have provided the defendant with permission to engage in sexual conduct with the complainant, or may even be the person engaging in sexual conduct with the complainant. Removing this provision from the enticing statute, therefore, would create a gap in liability for enticing.

RCC § 22E-1401. Kidnapping.

1. USAO recommends, in §§ 22E-1401(a)(1) and (b)(1) (Kidnapping) and §§ 22E-1402(a)(1) and (b)(1) (Criminal Restraint), removing the words “substantially.”

With USAO’s changes, these subsections would provide:

“Knowingly ~~and substantially~~ confines or moves the complainant;”

The Commentary notes that this “may constitute a substantive change of law,” and states: “The current kidnapping statute does not explicitly include any substantiality element, and the DCCA has never discussed in a published opinion whether momentary or trivial confinement or movement suffices under the current kidnapping statute. By contrast, the revised kidnapping statute requires that the actor must “substantially” confine or move the complainant. This excludes momentary or trivial confinement or movement. The precise effect on current law is somewhat unclear, as there is no case law on point. Requiring that the actor “substantially” confine or move the complainant improves the proportionality of the RCC by excluding cases that only involve trivial or momentary interference.” (Commentary at 326.) In the recently published case of *Ruffin v. United States*, 219 A.3d 997 (D.C. 2019), however, the DCCA stated:

We have held that “[t]he plain language” of D.C. Code § 22-2001 contains no exception for cases in which the conduct underlying the kidnapping is momentary or incidental to another offense.... “[T]here is no requirement that the victim be moved any particular distance or be held for any particular length of time to constitute a kidnapping; all that is required is a ‘seizing, confining’ or the like and a ‘holding or detaining for ransom or reward ‘or otherwise.’” Accordingly, we hold that the evidence in this case was sufficient to sustain appellant’s conviction for kidnapping while armed.

219 A.3d at 1005–06 (quoting *Richardson v. United States*, 115 A.3d 434, 439 (D.C. 2015)). This change by the RCC to the kidnapping and criminal restraint statutes would, therefore, constitute a change in law. USAO recommends that this provision track current law, and that the CCRC remove the modifier “substantially.” Moreover, “substantial” does not have a clear definition, and there would be extensive litigation around whether a confinement or movement was “substantial.”

USAO is similarly concerned by the CCRC’s accompanying comment in a footnote in the Commentary, which provides: “Confinement or movement may be trivial even if they are of significant duration. For example, if a person barricades a door to prevent another from leaving a building, but there is an alternate exit that is easily accessible, the interference would not be substantial regardless of how long the door remains barricaded.” (Commentary at 330 n.4.) This analysis shifts the focus from the defendant’s actions to the practical circumstances of the kidnapping, which could include the layout of a room. If a defendant holds a gun to the head of a victim and barricades a door, that victim may be too frightened to notice that there is an “alternate exit” that is easily accessible. Further, if the defendant barricades a door to prevent a victim from leaving, but there is an open window that the victim could climb out of, would the

defendant escape liability for kidnapping because the victim could have climbed out of the window? A kidnapping does not require that there be no possibility of escape. Rather, it requires that the defendant confine or move the complainant. If a victim manages to escape from the defendant after the defendant has kidnapped the victim (even if there is an escape route that is easily accessible), that should not eliminate the defendant's culpability for kidnapping or criminal restraint. USAO also disputes the premise that the confinement or movement may be "trivial" even if of a significant duration. Even if the CCRC were to keep the requirement that a defendant "substantially" confine or move the complainant, the duration of the confinement or movement should be a key factor in ascertaining whether the confinement or movement was "substantial."

2. USAO recommends incorporating the kidnapping Commentary for displaying or using a dangerous weapon or imitation dangerous weapon into other Commentary that relies on this or a similar provision.

The Commentary to kidnapping provides, in relevant part:

The phrase "by displaying or using a dangerous weapon or imitation dangerous weapon" should be broadly construed to include kidnappings in which the accused only momentarily displays such a weapon, or slightly touches the complainant with such a weapon. The term "use" is intended to include making physical contact with the weapon, and conduct other than oral or written language, symbols, or gestures, that indicates the presence of a weapon.

(Commentary at 315.) Although the second sentence of that Commentary appears in the Commentary to other offenses, the first sentence does not. USAO recommends including both sentences as Commentary in every RCC offense that uses language regarding the use or display of a dangerous weapon or imitation dangerous weapon to clarify how those statutes should be interpreted.

3. USAO recommends, in subsections (a)(3)(F) and (b)(3)(F), removing the word "significant."

With USAO's changes, subsections (a)(3)(F) and (b)(3)(F) would provide:

"Cause any person to believe that the complainant will not be released without suffering ~~significant~~ bodily injury, or a sex offense defined in Chapter 13 of this Title;"

The requirement that the defendant cause any person to believe that the complainant will not be released without suffering *significant* bodily injury limits this offense too far. A "significant bodily injury" is a term of art that requires certain injuries, and there are many assaults that could result in relatively serious injuries that would not be deemed "significant bodily injury" pursuant to RCC § 22E-701. For example, if the defendant intends to cause another person to believe that the complainant will be repeatedly punched in the face, that defendant should be subject to liability for kidnapping, regardless of whether or not the repeated punching would require hospitalization or immediate medical attention, or would otherwise

qualify as a “significant bodily injury.” Moreover, it is incongruous that a defendant would be required to cause a third party to believe that the defendant will cause the complainant to suffer significant bodily injury, when the defendant need only actually intend to inflict “bodily injury” pursuant to subsections (a)(3)(D) and (b)(3)(D). Requiring only “bodily injury” is appropriate and removes this potential gap in liability.

4. USAO recommends adding a subsection (a)(3)(H) and (b)(3)(H) that provides “or for any other purpose that the actor believes would benefit the actor.”

Current law is clear that the defendant need not be acting with a specified purpose, but may be acting with any purpose that the defendant believes would benefit himself or herself. As set forth in the comments to Redbook Instruction 4.303:

“The kidnapping need not be done for monetary gain or illegal purpose, *U.S. v. Healey*, 376 U.S. 75 (1964), but may be done for any purpose “with the expectation of benefit to the transgressor.” *Gooch v. U.S.*, 297 U.S. 124, 128 (1936). The D.C. Court of Appeals held in *Dade v. U.S.*, 663 A.2d 547, 551 (D.C. 1995), that all the government had to prove was that the defendant “expected to gain some kind of ‘benefit’ by his actions.” *See also Davis v. U.S.*, 613 A.2d 906, 912 (D.C. 1992) (“the detention may be for any purpose that the defendant believes might benefit him”); *Pynes v. U.S.*, 385 A.2d 772, 774 (D.C. 1978), *vacated on other grounds*, 446 U.S. 903 (1980) (kidnapping statute is applicable to kidnappings perpetrated for a broad range of purposes or motives, including lust, desire for companionship, revenge, or some other motive which does not involve ransom or reward, such as silencing a witness); *U.S. v. Wolford*, 444 F.2d 876, 879–80 (D.C. Cir. 1971).”

It is not appropriate to limit the situations that would qualify as kidnapping to those currently drafted in subsections (a)(3) and (b)(3). If, as cited in the above case law, a defendant holds a complainant as an act of revenge, or out of a desire for companionship (without committing a sex offense), that conduct should be punished as kidnapping. If, for example, a defendant holds an adult complainant in his home for months, but does not intend to inflict bodily injury or a sex offense or any of the other options in (a)(3) or (b)(3), and rather forced the complainant to stay there because the defendant wanted someone to live with him, that defendant would not be deemed to have committed kidnapping under the RCC’s proposal. The CCRC notes that this conduct would be punished as Criminal Restraint, but given that unenhanced Criminal Restraint is a misdemeanor offense, it is insufficient to account for the harms incurred by this conduct. The CCRC should include this language to eliminate this gap in liability for kidnapping.

5. USAO recommends that, in § 22E-1401(a) (Kidnapping) and § 22E-1402(e) (Criminal Restraint), the CCRC retain an elements-based merger analysis, instead of a fact-based merger analysis.

The DCCA has recently reaffirmed that, for evidentiary sufficiency purposes, the government need not prove that the movement/detention in a kidnapping was not incidental to some other crime. In *Ruffin v. United States*, 219 A.3d 997 (D.C. 2019), the court stated:

Appellant contends, however, that there was insufficient evidence to sustain his kidnapping conviction because J.C.’s detention lasted only about a minute-and-a-half and was “incidental” to and “wholly coextensive with” the assault and attempted robbery. Appellant argues that offenses like robbery and sexual assault almost always include some detention of the victim (though detention is not an element of them), and the legislature could not have intended the kidnapping statute to apply to such detentions that are “not distinct from another offense” of which the defendant is guilty. This argument is not a new one. It has been made to us before, and we have rejected it. As this court stated in *Richardson*, the argument is “foreclosed” by “binding precedent.” We have held that “[t]he plain language” of D.C. Code § 22-2001 contains no exception for cases in which the conduct underlying the kidnapping is momentary or incidental to another offense.... “[T]here is no requirement that the victim be moved any particular distance or be held for any particular length of time to constitute a kidnapping; all that is required is a ‘seizing, confining’ or the like and a ‘holding or detaining for ransom or reward ‘or otherwise.’ ” Accordingly, we hold that the evidence in this case was sufficient to sustain appellant's conviction for kidnapping while armed.

Ruffin, 219 A.3d at 1005–06. The CCRC’s proposed change would, in essence, achieve via a merger analysis what the DCCA has foreclosed as part of an evidentiary sufficiency analysis—that is, not allowing a kidnapping conviction to stand where the kidnapping is incidental to another offense. The CCRC notes that “[t]his provision is intended to re-instate DCCA case law prior to *Parker v. United States*, 692 A.2d 913 (D.C. 1997).” (Commentary at 335 n.28.) In *Parker*, however, the DCCA noted that the defendant’s merger analysis had been superseded by the DCCA’s *en banc* opinion in *Byrd v. United States*, 598 A.2d 386 (D.C. 1991). *Parker*, 692 A.2d at 916. The relevant DCCA case, therefore, setting current law on merger was the DCCA’s *en banc* ruling in *Byrd*.

RCC § 22E-1801, § 22E-1802, and § 22E-1804. Stalking, Electronic Stalking, and Unauthorized Disclosure of a Sexual Recording.

1. USAO recommends that the CCRC incorporate its discussion of jurisdiction in Appendix D1 into the Commentary.

In response to a USAO comment, the CCRC clarified that jurisdiction to prosecute these offenses in D.C. exists if the fear or emotional distress occurs in D.C. (App. D1 at 275, 284.) The CCRC summarized that D.C. may exercise jurisdiction if the recording, monitoring, fear, or distress occurs in D.C. (*Id.*) The Commentary (at 428) states that authority to exercise jurisdiction has been limited by courts to acts that have a detrimental effect within D.C. Consistent with Appendix D1, the CCRC should clarify in the Commentary that the fear or distress taking place in D.C. is sufficient to establish jurisdiction for these offenses in D.C. Further, it is unclear based on the CCRC’s explanation in Appendix D1 when that fear or distress would lead to jurisdiction in D.C. Although Appendix D1 provides that a person who travels to D.C. months later who is still experiencing significant emotional distress would not be sufficient to create jurisdiction, would it be sufficient if they traveled to D.C. within a day? Within a few

hours? USAO's original proposal allowing for jurisdiction if the victim suffers any harm in the District stemming from the defendant's actions is more clear and avoids the potential confusion inherent in this analysis.

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

1. USAO recommends that the CCRC incorporate its discussion of "alarm" in Appendix D1 into the Commentary.

In response to a USAO comment, the CCRC clarified that "the revised statute does not require that the defendant have a sexual intent," as "[o]ne means of committing the revised offense is for the defendant to intent to 'alarm' the complainant. 'Alarm' is generally understood to broadly include 'disturb,' 'excite,' or 'strike with fear.' This appears to include the example raised by USAO regarding a person [who] intends to 'seek revenge.' A person who acts with a motive to avenge a past wrong appears to act with intent to alarm the complainant." (App. D1 at 283–84.) USAO recommends that the CCRC incorporate this discussion into the Commentary to both clarify the definition of "alarm" and to provide an example that "revenge porn" would fall under this statute. This will eliminate potential future confusion on this point.

RCC § 22E-2701. Burglary.

1. USAO recommends that the CCRC remove the requirement that a person who is not a participant in the burglary be inside "and directly perceives the actor or is entering with the actor."

It is sufficient to require that the defendant be reckless as to the fact that a person who is not a participant in the burglary is inside. Liability for burglary should not turn on whether another person who is, in fact, inside directly perceives the actor or enters with the actor. At a minimum, this should be changed to require that the defendant be reckless that a person who is not a participant in the burglary "may directly perceive the actor or enter with the actor."

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

1. USAO reiterates its recommendation that this offense cover defendants in non-D.C. criminal cases who are supervised by agencies in D.C.

USAO previously filed a comment on this. The CCRC did not incorporate this recommendation because "it may result in overlap between criminal offenses." (App. D1 at 362.) In support of this, the CCRC noted that other deterrents exist, including revocation of release, or charging the defendant with criminal damage to property. (*Id.*) Those deterrents, however, apply equally to those individuals supervised for D.C. cases and those individuals supervised for non-D.C. cases. Moreover, individuals who are being supervised in non-D.C. cases would only be subject to PSA or CSOSA oversight if they are residing in D.C. Thus, to ensure the safety of other D.C. residents, the District has an interest in these individuals complying with their supervision requirements by not tampering with their detection devices. This interest applies regardless of whether the individual is subject to a requirement in a D.C. or non-D.C. case.

Finally, the offense of Tampering with a Detection Device was recently modified in 2017, and did not include this limitation.

2. USAO recommends that the CCRC clarify that this offense applies to those incarcerated at or committed to a D.C. Department of Corrections facility.

Subsection (a)(1)(D) expressly references the Department of Youth Rehabilitation Services, but does not expressly reference the D.C. Department of Corrections. To avoid potential confusion, USAO also recommends that the CCRC clarify that subsection (a)(1)(D) of this offense applies to those incarcerated at or committed to either a DYRS or a DOC facility. Current law applies to, among other circumstances, a person who is “incarcerated or committed.” D.C. Code § 22-1211(a)(1). This language, without a reference to either DYRS or DOC, is also acceptable to USAO.

RCC § 22E-4104. Possession of a Dangerous Weapon During a Crime.

1. USAO reiterates its recommendation that a firearm and imitation firearm be graded the same under this offense, and that the requirement that a weapon be used “in furtherance of” an offense be removed.

USAO previously filed a comment recommending that a firearm and imitation firearm be graded the same under this offense. The CCRC did not incorporate this recommendation, stating that this offense is “primarily intended to capture conduct that is unknown and unseen by the complainant but found on the actor at time of arrest or otherwise subsequently linked to the crime.” (App. D1 at 372.) The offense, however, requires that the firearm or imitation firearm be possessed “in furtherance of and while committing” the crime. Given this significant limitation, there will be few scenarios where possession of the firearm or imitation firearm is “unknown and unseen by the complainant” but also used “in furtherance of” the offense. Thus, when a weapon is used, it may still be impossible for a victim to tell if a firearm is real or imitation, particularly if the defendant flees. Because the weapon must be used “in furtherance” of the offense, the weapon will surely make an impression on the complainant. (See App. D1 at 372.)

USAO also previously filed a comment recommending that the CCRC remove the requirement that a weapon be used “in furtherance” of the underlying offense, which the CCRC did not incorporate. (App. D1 at 373.) Given the CCRC’s statement that this offense is targeted at punishing possession of a dangerous weapon during an offense where the complainant is not aware of the dangerous weapon, the “in furtherance” requirement impedes that objective. USAO therefore reiterates its comment that the “in furtherance” requirement be removed from this offense.

2. USAO recommends that the underlying offenses align for first degree and second degree.

First degree possession of a dangerous weapon during a crime requires that a firearm be used while committing an offense against persons under Subtitle II, arson, or reckless burning. Second degree requires that a dangerous weapon or imitation firearm be used while committing an offense against persons under Subtitle II or burglary. It is unclear why the offenses do not

align. USAO recommends that, at a minimum, burglary, arson, and reckless burning also be included as underlying offenses for both gradations of this offense. A person who commits a burglary while possessing a firearm creates a much heightened risk of injury or death to another person, and it creates a large gap in liability not to have burglary listed as an underlying offense in first degree.

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

1. USAO recommends that subsection (b)(2)(C)(ii) be modified to include a stay away/no contact order.

The RCC’s draft tracks current law at D.C. Code § 22-4503(a)(5)(B), but both current law and the RCC draft contain a gap in liability. The draft includes a defendant who is subject to an order that restrains the actor from assaulting, harassing, stalking or threatening any person (a “no HATS” order), but does not include a defendant who is subject to a stay away/no contact order. A stay away/no contact order is a stricter order than a no HATS order, and a defendant who possesses a firearm while under a court order requiring the defendant to stay away from/have no contact with a complainant (while also ordered to relinquish firearms) should be treated the same way as a defendant subject to a no HATS order. Although judges sometimes impose both a stay away/no contact order and a no HATS order, judges also sometimes just impose one type of order. In addition, there could be circumstances where a judge orders a defendant to stay away from a location where a victim lives or where an offense took place, and does not order the defendant to stay away from the victim. USAO therefore recommends including a stay away from both a person and a location in the modified language. This gap in liability should be filled by changing subsection (b)(2)(C)(ii) to: “Restrains the actor from assaulting, harassing, stalking, or threatening any person, or requires the actor to stay away from, or have no contact with, any person or a location.”

RCC § 48-904.01b. Trafficking of a Controlled Substance.

1. USAO recommends that the CCRC consult with the Department of Forensic Sciences regarding the provisions in subsection (g).

In response to PDS’s recommendations, the CCRC made changes to subsection (g) of this offense to change how the weight of mixtures and compounds of controlled substances within edible products shall be determined. (App. D1 at 436.) USAO recommends that the CCRC consult with the Department of Forensic Sciences to ascertain if the type of testing proposed in this subsection is logistically feasible, and whether it is logistically feasible for all types of controlled substances. If DFS is not able to conduct the type of testing proposed by this subsection of the CCRC, then this language would effectively decriminalize trafficking of any controlled substance that is packaged in an edible form. If DFS is able to conduct this type of testing, but only for certain types of controlled substances, then this language would effectively decriminalize trafficking of all other controlled substances packaged in an edible form on which it is not able to conduct testing. Notably, this subsection is within the trafficking offense, not the possession offense, so this would not apply to low-level possession of controlled substances

within edibles, but rather only high enough quantities that are being distributed, manufactured, or possessed with intent to distribute or manufacture.

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

Public Safety Division



MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: May 14, 2020

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

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

COMMENTS ON THE DRAFT REPORT

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

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

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

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

- (B) The defendant is charged with an attempt, conspiracy, or solicitation to commit an offense specified in subparagraph (b)(1)(A) of this section;
- (C) The defendant is charged with an offense under Chapter 12 [Chapter 12. Robbery, Assault, and Threats] of Title 22E in which the person who is alleged to have been subjected to the criminal offense is a “law enforcement officer” as defined in D.C. Code § 22E-701;
- (D) The defendant is charged with a “registration offense” as defined in D.C. Code § 22-4001(8);
- (E) The defendant is charged with an offense that, if the defendant were a non-citizen and were convicted of the offense, could result in the defendant’s deportation from the United States under federal immigration law; or
- (F) The defendant is charged with 2 or more offenses which are punishable by a cumulative fine or penalty of more than \$4,000 or a cumulative term of imprisonment of more than 1 year; and

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

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

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

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

(A) If:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴ RCC § 22E-701 states:

“Law enforcement officer” means:

- (A) A sworn member, officer, reserve officer, or designated civilian employee of the Metropolitan Police Department, including any reserve officer or designated civilian employee of the Metropolitan Police Department;
- (B) A sworn member or officer of the District of Columbia Protective Services;
- (C) A licensed special police officer;
- (D) The Director, deputy directors, officers, or employees of the District of Columbia Department of Corrections;
- (E) Any officer or employee of the government of the District of Columbia charged with supervision of juveniles being confined pursuant to law in any facility of the District of Columbia regardless of whether such institution or facility is located within the District;
- (F) Any probation, parole, supervised release, community supervision, or pretrial services officer or employee of the Department of Youth Rehabilitation Services, the Family Court Social Services Division of the Superior Court, the Court Services and Offender Supervision Agency, or the Pretrial Services Agency;
- (G) Metro Transit police officers; and
- (H) Any federal, state, county, or municipal officer performing functions comparable to those performed by the officers described in subparagraphs (A), (B), (C), (D), (E), and (F) of this paragraph, including but not limited to state, county, or municipal police officers, sheriffs, correctional officers, parole officers, and probation and pretrial service officers.

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

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

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

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

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

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

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

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

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

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

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

Public Safety Division



MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: May 15, 2020

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

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #52, Cumulative Update to the Revised Criminal Code Chapter 6.¹

COMMENTS ON THE DRAFT REPORT

RCC § 22E-601. OFFENSE CLASSIFICATIONS

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

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

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

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

RCC § 22E-602. AUTHORIZED DISPOSITIONS

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

RCC § 22E-604. AUTHORIZED FINES

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

RCC § 22E-606. REPEAT OFFENDER PENALTY ENHANCEMENT

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

Felony repeat offender penalty enhancement. A felony repeat offender penalty enhancement applies to an offense when, in fact, the actor commits a felony offense and at the time has:

- (1) One or more prior convictions for a felony offense under Subtitle II of this title⁴, or a comparable offense, not committed on the same occasion; or
- (2) Two or more prior convictions for District of Columbia felony offenses, or comparable offenses that were:
 - (A) Committed within 10 years; and

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

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

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

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

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

RCC § 22E-701. GENERALLY APPLICABLE DEFINITIONS

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

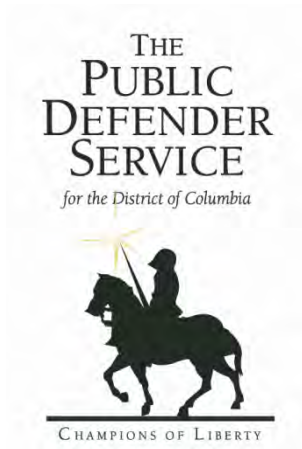
- (A) An offense punishable by a term of imprisonment that is more than one year; or
- (B) In other jurisdictions, an offense punishable by death.”

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

⁵ OAG recommends that this amendment also apply to the misdemeanor repeat offender penalty enhancement in subparagraph (b)(3).

⁶ This subparagraph reads (h)(6) states, “First and Second Degree Parental Kidnapping Designated as Felonies. Notwithstanding the maximum authorized penalties, first and second degree parental kidnapping shall be deemed felonies for purposes of D.C. Code § 22-563.”

M E M O R A N D U M



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

From: Public Defender Service for the District of
Columbia

Date: May 15, 2020

Re: Comments on First Draft of Report No. 51,
Jury Demandable Offenses and First Draft
of Report No. 52, Cumulative Update to
RCC Chapter 6 Offense Classes, Penalties,
& Enhancements.

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

Report No. 51

1. As PDS wrote in its comments of November 15, 2019, PDS believes that all offenses that permit a punishment that includes incarceration should be jury demandable. While the Court of Appeals held in *Bado v. United States*¹ that a defendant who faced a possible sentence of 180 days and deportation had a right to a jury trial, former Chief Judge Eric Washington provided compelling reasons why the right to a jury trial should be available in all instances when a defendant faces incarceration.² If the RCC does not provide a jury trial in each instance that a defendant faces incarceration, PDS submits the additional amendments to RCC § 16-705.
2. RCC § 16-705(b)(1)(D) would provide jury trials where the defendant is charged with a registration offense as defined in D.C. Code § 22-4001(8). Under D.C. Code § 22-4001(8), registration offenses are defined as sex offenses or offenses that involve sexual abuse, although non-sex offenses are charged. PDS recommends expanding this jury trial right to any charge that would subject the defendant to a registration requirement pursuant to either the laws of the District of Columbia or the United States. Currently, this would expand this provision to include gun offenses that require a convicted defendant to register as a gun offender.³ The requirement of registration adds stigma, may foreclose employment and housing opportunities and could lead to future convictions for failing to register. Given the seriousness of the collateral consequences, jury trials should be afforded for all offenses that require registration, not just those offenses that

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

² *Id.* at 1251-52.

³ D.C. Code § 7-2508.02.

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

PDS proposes the following language:

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

3. RCC § 16-705(b)(1)(E) provides the right to a jury trial if the offense, regardless of the defendant’s immigration status, could result in the defendant’s deportation. Granting a jury trial in these instances, based on the offense and without regard to the defendant’s personal immigration status, is consistent with the District’s decision to uphold sanctuary values⁴, and addresses the concerns of former Chief Judge Eric Washington in *Bado*⁵ about only granting jury trials to a subset of individuals charged with the same offense.

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

PDS proposes the following language:

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

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

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

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

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

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

PDS recommends the following language:

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

Report No. 52

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

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

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

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

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

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

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

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

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

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

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

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

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

2. PDS opposes enhancements based on prior offenses.¹⁴ Individuals who have previously been convicted of offenses received sentences for those prior offenses and served the sentence deemed appropriate by the judge. The prior conviction will also be scored on the Sentencing Guidelines and used to increase the severity of the sentence for the new offense. While the RCC has tried to avoid instances of double counting and overlap, sentencing enhancements create triple counting of a prior offense. Nationally, repeat conviction enhancements have created injustices like the sentencing of an individual to 25 years to life for the non-violent theft of golf clubs.¹⁵ Reform in the District should mean jettisoning these enhancements.
3. If the RCC retains RCC § 22E-606, the Repeat Offender Penalty Enhancement, PDS recommends a substantial narrowing of the provision. As currently drafted, an individual will be subject to an enhancement every time the individual commits a felony offense and has any prior offense against persons. Therefore, an individual who is convicted of felony drug distribution who has a prior felony offense for robbery would be subject to an enhancement. The enhancement would apply despite the lack of connection between the two crimes. If the reason for the enhancement is the belief that there is additional culpability when an individual commits the same offense or harms the same persons or community, then the RCC's proposal is

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

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

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

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

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

To narrow this provision, PDS recommends the changes below:

RCC § 22E-606. Repeat Offender Penalty Enhancement

(a) *Felony repeat offender penalty enhancement.* A felony repeat offender penalty enhancement applies to an offense when, in fact, the actor commits a felony offense under Subtitle II¹⁶ of this title and at the time has:

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

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

~~(A) Committed within the prior10 years; and~~

~~(B) Not committed on the same occasion.~~

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

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

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

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

~~(A) Committed within the prior ten years; and~~

~~(B) Not committed on the same occasion.~~

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

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

(1) For the felony repeat offender penalty -

- (A) For a Class 1 or Class 2 felony, 5 years;
- (B) For a Class 3 or Class 4 felony, 3 years;
- (C) For a Class 5 or Class 6 felony, 2 years;
- (D) For a Class 7 or Class 8 felony, 1 year; and
- (E) For a Class 9 felony, 180 days.

(2) For the misdemeanor repeat offender penalty –

- (A) For a Class A or Class B misdemeanor, 60 days; and
- (B) For a Class C, Class D, or Class E misdemeanor, 10 days.

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

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

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

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

Memorandum

Timothy J. Shea
 United States Attorney
 District of Columbia



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

Date: May 15, 2020

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

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

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

First Draft of Report #51—Jury Demandable Offenses

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

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

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

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

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

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

I am writing to alert you about the impact on judicial administration of Bill 18-138, the Omnibus Anti-Crime Amendment Act of 2009. Section 204(b) of the Act amends the penalty for the crime of unlawful entry by providing for imprisonment of not more than 180 days for unlawful entry on private property, while retaining the penalty of up to six months imprisonment for unlawful entry on public property.

Treating every unlawful entry as a 180 days offense would decrease the burden of these cases on the already beleaguered jury pool in the District of Columbia. The current yield to juror summonses in the District of Columbia is approximately twenty-two percent of all the summonses sent. Although improvements have been taken and are being sought to increase that yield, it is still a fairly small number of citizens who are available to serve. As a result, citizens who respond to this civic duty are routinely called to serve every two years. Figures provided by the Jury Office show that in the last two years, a majority of jurors were summoned as soon as two years had lapsed from their last summons date. Judges in the Superior Court commonly hear complaints from residents that calls to District jury service are far more frequent than those from other jurisdictions. Further, our jurisdiction is unique in the jury service burdens it puts on its citizens, since the federal court draws its jury pool from the same municipal pool of citizens as the Superior Court. Drawing jurors from this limited pool for six month offenses makes it more difficult for the Court to maintain the necessary supply of jurors for the serious felony cases.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- 10 years’ incarceration; and 1st Degree Sexual Abuse of a Patient or Client under D.C. Code § 22-3015, which has a maximum of 10 years’ incarceration)
- 1st Degree Arranging a Live Performance of a Minor (comparable to Sexual Performance Using Minors under D.C. Code § 22-3101 *et seq.*, which has a maximum of 10 years’ incarceration)
- Enhanced 1st Degree Burglary (comparable to 1st Degree Burglary While Armed under D.C. Code §§ 22-801, -4502, which has a maximum of 30 years’ incarceration)⁶
- 2nd Degree Arson (comparable to Arson under D.C. Code § 22-301, which has a maximum of 10 years’ incarceration, where a person is present)
- Involuntary Manslaughter (comparable to Manslaughter under D.C. Code § 22-2105, which has a maximum of 30 years’ incarceration)⁷

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

2. USAO recommends that a Class 6 felony be punishable by a maximum of 15 years’ incarceration.

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

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

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

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

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

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

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

- 2nd Degree Sexual Assault (comparable to 2nd Degree Sexual Abuse under D.C. Code § 22-3003, which has a maximum of 20 years' incarceration)
- 2nd Degree Sexual Abuse of a Minor (comparable to 1st Degree Child Sexual Abuse where the child is over 12 years old under D.C. Code § 22-3008, which has a maximum of 30 years' incarceration)
- Kidnapping (comparable to Kidnapping under D.C. Code § 22-2001, which has a maximum of 30 years' incarceration)
- 1st Degree Arson (comparable to Arson under D.C. Code § 22-301, which has a maximum of 10 years' incarceration, with the added requirement of causing death or serious bodily injury)
- Voluntary Manslaughter (comparable to Manslaughter under D.C. Code § 22-2105, which has a maximum of 30 years' incarceration⁸)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Appendix C. Advisory Group Comments on Draft Documents

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

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

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

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

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

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

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

8. USAO opposes the elimination of other mandatory minimums.

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

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

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

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

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

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

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

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

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

2. USAO recommends that the Commentary be revised to state that a conviction under current District law is a “comparable offense.”

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

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

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

RCC § 22E-608. Hate Crime Penalty Enhancement.

USAO proposes the following changes:

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

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

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

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

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

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

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

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

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

4. USAO recommends amending the Commentary.

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

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

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

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

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

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

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

3. USAO recommends increasing the penalty for Incest.

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

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

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

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

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

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

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

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

GOVERN¹MENT 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 19, 2020

SUBJECT: Second Draft of Report #35 - Cumulative Update to Sections 201-213 of the Revised Criminal Code

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 Second Draft of Report #35, Cumulative Update to Sections 201-213 of the Revised Criminal Code.¹

COMMENTS ON THE DRAFT REPORT

RCC § 22E-204. Causation Requirement.

Paragraph (c) of RCC § 22E-204² defines “Legal Cause.” It states:

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 later hearing that the Council may have on any legislation that may result from the Report.

² The full text of this provision is:

RCC § 22E-204. Causation Requirement

(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:

A person's conduct is the legal cause of a result if:

- (1) The result is reasonably foreseeable in its manner of occurrence; and
- (2) When the result depends on another person's volitional conduct, the actor is justly held responsible for the result. [emphasis added]

The phrase "justly held responsible for the result" does not seem to articulate a discernible standard. This is of significant concern as it establishes a criterion for the presence or absence of criminal liability. It is hard to imagine a trial involving an offense with a copерpetrator who committed an act where the defense would not argue that it would be unjust to hold his or her client responsible for the result of that act. By asking a factfinder to determine what is just in a situation without giving detailed instructions as to what criteria the factfinder should use invites jury nullification. As the Court stated in *Reale v. United States*, 573 A.2d 13, 15 (DC 1990)

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.

The removal of (c)(2) would not cause an unjust result, as the government must still prove each and every element of an offense beyond a reasonable doubt. An examination of the example in footnote 30 of the Commentary demonstrates this.

For example, imagine X and D have been in a longstanding competitive basketball rivalry, marked by regular bouts of violence by D perpetrated against his teammates after his losses. Nearing the final few seconds of a championship game, and down by one point, X is about to shoot the game winning shot against D after a game marked

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

(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 reasonably foreseeable in its manner of occurrence; and
- (2) When the result depends on another person's volitional conduct, the actor is justly held responsible for the result.

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

by many missteps by X's teammate V, at which point X realizes that D will almost certainly (and in fact appears to be preparing to) assault V once the loss is formalized. Nevertheless, D decides to disregard this risk and score the final two points necessary for the win. Immediately thereafter, D does as expected: he becomes enraged and viciously beats V on the court. In this scenario, X is the factual cause of V's injuries: but for X's scoring the game-winning basket, D would not have gone on to assault V. Under these circumstances, D's violent response to X's game winning basket was entirely foreseeable...

As noted in the Commentary, this example demonstrates that D's response was foreseeable. However, that is not the end of the inquiry. As X did not commit an assault, the only theory for which he could be prosecuted is as an accomplice. However, RCC § 22E-210 would foreclose that possibility. It states in relevant part:

- (a) *Definition of accomplice liability.* A person is an accomplice in the commission of an offense by another when, acting with the culpability required for that offense, the person:
 - (1) Purposely assists another person with the planning or commission of conduct constituting that offense; or
 - (2) 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) of this section, to be an accomplice in the commission of an offense, a person must intend for all circumstance elements required by that offense to exist.
- (c) *Grading distinctions based on culpability as to result elements.* An accomplice in the commission of an offense that is graded by distinctions in culpability as to result elements is liable for any grade for which he or she has the required culpability.

There is no question that although it was entirely foreseeable that X's game winning basket would result in D's viciously beating V, it is clear that X did not act with the culpability required for the offense nor did he or she encourage D to commit the assault and, therefore, even without the proposed language in (c)(2), X would not be guilty of the offense.³ To avoid jury nullification and because the removal (c)(2) would not cause unjust convictions in the situation described in the footnote, OAG recommends that the CCRC amend (c) to remove subparagraph (2).

If the Commission does not accept OAG's recommendation then we have two suggestions. First, the phrase "volitional conduct" is not defined either in the text of the provision nor in the Commentary. The closest reference to the definition of "volitional conduct" is found in footnote

³ In addition, it cannot be said that X intended for all circumstance elements required by the offense to exist. In addition, though D may have committed first degree assault against V, under RCC § 22E-1202, it cannot be said that X had any of the mental states required for him to have culpability in the assault.

32 of the Commentary. There it states, “Intervening volitional conduct may include both acts and omissions of others. For example, if a driver speeds through an intersection and strikes a child, initially causing minor injury. If the child’s parent does not seek medical care which causes the child’s injury to become much more severe, the driver may argue that the parent’s omission negates legal causation as to the degree of injury.” Because of the importance of this phrase, OAG recommends that the phrase “volitional conduct” be defined in the statutory text as “acts or omissions that resulted from a choice or decision.”

Second, as noted above, the phrase “justly held responsible for the result” must be amended to articulate a discernible standard. This is of significant concern as it establishes a criterion for the presence or absence of criminal liability. OAG believes that a factfinder needs more guidance to determine when, as the Commentary notes, “a person may justly be held liable for a given result that can be attributed to the free, deliberate, and informed conduct of a third party or the victim.” [internal footnotes excluded] OAG’s concern, in addition to jury nullification, is that without more guidance two factfinders, be they a jury or a judge, may come to inconsistent determinations as to criminal liability when faced with nearly identical fact patterns. It would be unjust in that situation for one person to be found guilty and the other one acquitted.

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 19, 2020

SUBJECT: First Draft of Report #54, Prostitution and Related Statutes and Related Provisions in Third 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 #54, Prostitution and Related Statutes¹ and Related Provisions in Third Draft of Report #41 - Ordinal Ranking of Maximum Imprisonment Penalties²

COMMENTS ON THE DRAFT REPORT

RCC § 22E-4401. PROSTITUTION

Pursuant to RCC § 22E-4401(c)(1) the court, with the defendant's consent, may enter a judgment of guilty and defer further proceedings and place the person on probation.³ Following a term of pre-adjudicated probation the court is authorized to dismiss the proceedings and retain a nonpublic record for use solely by the court. Subparagraph (c) states:

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's only comment to the Third Draft of Report #41 - Ordinal Ranking of Maximum Imprisonment Penalties concerns the penalties for Prostitution and Patronizing Prostitution and, so, we have included those comments in this memo.

³ It appears that this provision is akin to what in some jurisdictions is referred to as probation before judgment.

(1) When a person is found guilty of violation of RCC § 22E-4401 the court may, without entering a judgment of guilty and with the consent of such person, defer further proceedings and place him or her on probation upon such reasonable conditions as it may require and for such period, not to exceed one year, as the court may prescribe. Upon violation of a condition of the probation, the court may enter an adjudication of guilt and proceed as otherwise provided. The court may, in its discretion, dismiss the proceedings against such person and discharge him or her from probation before the expiration of the maximum period prescribed for such person's probation. If during the period of probation such person does not violate any of the conditions of the probation, then upon expiration of such period the court shall discharge such person and dismiss the proceedings against him or her. Discharge and dismissal under this subsection shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, such person qualifies under this subsection. Such discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime (including the penalties prescribed under RCC § 22E-606 for second or subsequent convictions or other similar provisions) or for any other purpose. [emphasis added]

(2) Upon the dismissal of such person and discharge of the proceedings against him under paragraph (1) of this subsection, such person may apply to the court for an order to expunge from all official records (other than the nonpublic records to be retained under paragraph (1) of this subsection) all recordation relating to his or her arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this subsection. If the court determines, after hearing, that such person was dismissed and the proceedings against him or her discharged, it shall enter such order...

These subparagraphs permit the retention of a nonpublic record to be retained solely for the purpose of use by the courts. It does not, on its face, permit a prosecutor from retaining a copy of the record as a check on the court. In contrast, D.C. Code § 16-803, the District's sealing statute, addresses practical issues concerning the sealing of records and recognizes that law enforcement and prosecutors also need to retain and view nonpublic sealed records. D.C. Code § 16-803 (1) states:

If the Court grants the motion to seal:

(1) (A) The Court shall order the prosecutor, any law enforcement agency, and any pretrial, corrections, or community supervision agency to remove from their publicly available records all references that identify the movant as having been arrested, prosecuted, or convicted.

(B) The prosecutor's office and agencies shall be entitled to retain any and all records relating to the movant's arrest and conviction in a nonpublic file.

(C) The prosecutor, any law enforcement agency, and any pretrial, corrections, or community supervision agency office shall file a certification with the Court within 90 days that, to the best of its knowledge and belief, all references that identify the movant as having been arrested, prosecuted, or convicted have been removed from its publicly available records.

(2) (A) The Court shall order the Clerk to remove or eliminate all publicly available Court records that identify the movant as having been arrested, prosecuted, or convicted.

(B) The Clerk shall be entitled to retain any and all records relating to the movant's arrest, related court proceedings, or conviction in a nonpublic file.

(3) (A) In a case involving co-defendants in which the Court orders the movant's records sealed, the Court may order that only those records, or portions thereof, relating solely to the movant be redacted.

(B) The Court need not order the redaction of references to the movant that appear in a transcript of court proceedings involving co-defendants.

(4) The Court shall not order the redaction of the movant's name from any published opinion of the trial or appellate courts that refer to the movant.

(5) Unless otherwise ordered by the Court, the Clerk and any other agency shall reply in response to inquiries from the public concerning the existence of records which have been sealed pursuant to this chapter that no records are available.

OAG recommends that the quoted language from subparagraph (c)(1), above, be redrafted to say, "Discharge and dismissal under this subsection shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained. The sealing of the nonpublic record shall be in accordance to, and subject to the limitations of, D.C. Code § 16-803 (l)."⁴

In addition, because these subparagraphs use the term "probation" to describe a defendant's supervision preadjudication, to avoid confusion over the scope of the court's authority, OAG recommends that the Commentary make clear that the court's authority to expunge records pursuant to RCC § 22E-4401 is limited to situations where the person was not sentenced and that

⁵OAG recommends that the same suggestions that we have made thus far concerning RCC § 22E-4401(c)(1) also be applied to RCC § 22E-4401(b)(1). In addition, these recommendations are consistent with the recommendation that OAG made regarding the proposed sealing provision in RCC § 48-904.01a, Possession of a Controlled Substance, in the First Draft of Report #50, Cumulative Update to the Revised Criminal Code Other than Chapter 6.

a person who was sentenced would have to avail themselves of the sealing provisions found in D.C. Code § 16-803.⁵

THE OVERLAP IN ELEMENTS OF RCC § 22E-4401, PROSTITUTION, AND RCC § 22E-4402, PATRONIZING PROSTITUTION.

The offense elements of RCC § 22E-4401, Prostitution, and RCC § 22E-4402, Patronizing Prostitution, though couched in different terms, overlap such that both the prostitute and the person patronizing the prostitute can be charged with either offense.

RCC § 22E-4401(a), pertaining to the elements of the prostitution offense, states:

Offense. An actor commits prostitution when that actor knowingly:

- (1) Pursuant to a prior agreement, express or implicit, engages in or submits to a sexual act or sexual contact in exchange for any person receiving anything of value;
- (2) Agrees, expressly or implicitly, to engage in or submit to a sexual act or sexual contact in exchange for any person receiving anything of value; or
- (3) Commands, requests, or tries to persuade any person to engage in or submit to a sexual act or sexual contact in exchange for any person receiving anything of value. [emphasis added]

RCC § 22E-4402 (a), pertaining to the elements of the patronizing prostitution offense, states:

Offense. An actor commits patronizing prostitution when that actor knowingly:

- (1) Pursuant to a prior agreement, express or implicit, engages in or submits to a sexual act or sexual contact in exchange for giving any person anything of value;
- (2) Agrees, expressly or implicitly, to give anything of value to any person in exchange for any person engaging in or submitting to a sexual act or sexual contact;
- (3) Commands, requests, or tries to persuade any person to engage in or submit to a sexual act or sexual contact in exchange for giving any person anything of value. [emphasis added]

Because “any person receiving” implies that someone gave, and “for giving” to any person implies that someone received, these offenses are essentially the same. To distinguish between the two offenses, OAG recommends that the word “and” appear after each (a)(3) and that a new (a)(4) be added to each offense.

The new RCC § 22E-4401(a)(4) should read “provided the sexual act or sexual conduct that was performed in exchange for any person receiving anything of value.”

The new RCC § 22E-4402(a)(4) should read “was provided the sexual act or sexual conduct that was performed by another person who committed the offense of prostitution pursuant to RCC § 22E-4401.”

Because of the reference to RCC § 22E-4401 in RCC § 22E-4402(a)(4), the Commentary for Patronizing Prostitution should state that to be convicted of that offense it is not necessary that a person be arrested or convicted for the offense of Prostitution.

RCC § 22E-4403. TRAFFICKING IN COMMERCIAL SEX

Subparagraph (a)(3) states, “Obtains anything of value from the proceeds or earnings of a person who has engaged in or submitted to a commercial sex act...” As drafted it would technically reach the proceeds derived from a person who has engaged in a commercial sex act even though those proceeds were earned at a part time job that was unrelated to prostitution. OAG recommends that subparagraph (a)(3) be redrafted to say, “Obtains anything of value from the proceeds or earnings from a commercial sex act that a person has engaged in or submitted to...”

Subparagraph (b)(2) provides for enhanced penalties. It states, “In addition to the general penalty enhancements under this title, the penalty classification of this offense is increased by one class when the actor is reckless as to the fact that the person trafficked is under 18 years of age.” While OAG agrees that there should be an enhancement for recklessly trafficking persons who are under the age of 18, we do not believe that the enhancement goes far enough. Under this provision, a person who was reckless to the fact that they were trafficking a 17 year old girl would be subject to the same penalty as someone who intentionally trafficked an 11 year old girl. We propose that the enhanced penalty be more nuanced by providing for different penalties for knowingly trafficking someone under the age of 18 and for recklessly trafficking someone under the age of 14. We propose that subparagraph (b)(2) be redrafted to say:

- (1) *Enhanced penalties.* In addition to the general penalty enhancements under this title, the penalty classification of this offense is increased by:
 - (i) one class when the actor is reckless as to the fact that the person trafficked is under 18 years of age but older than 13 years of age; or
 - (ii) two classes when the actor is either reckless to the fact that the trafficked person is under 14 years of age or when the actor knowingly traffics a person who is under 18 years of age.

PENALTIES FOR PROSTITUTION AND PATRONIZING PROSTITUTION PROPOSED IN THE THIRD DRAFT OF REPORT #41 - ORDINAL RANKING OF MAXIMUM IMPRISONMENT PENALTIES

On Page 7 of the Third Draft of Report #41 the Commission recommends that the offense of prostitution be a class D misdemeanor, with a maximum penalty of 30 days in jail. The Commission recommends that Patronizing Prostitution be a class C misdemeanor, with a maximum penalty of 90 days in jail.

Pursuant to D.C. Code § 22-2701 the current penalties for prostitution and patronizing prostitution (soliciting prostitution) are the same. This statute states, in relevant part:

- (a) ... [I]t is unlawful for any person to engage in prostitution or to solicit for prostitution.

(b) (1) Except as provided in paragraph (2) of this subsection, a person convicted of prostitution or soliciting for prostitution shall be:

(A) Fined not more than the amount set forth in [§ 22-3571.01](#), imprisoned for not more than 90 days, or both, for the first offense; and

(B) Fined not more than the amount set forth in [§ 22-3571.01](#), imprisoned not more than 180 days, or both, for the second offense.

(2) A person convicted of prostitution or soliciting for prostitution who has 2 or more prior convictions for prostitution or soliciting for prostitution, not committed on the same occasion, shall be fined not more than the amount set forth in [§ 22-3571.01](#), imprisoned for not more than 2 years, or both

OAG agrees with the CCRC proposal to decrease the penalty for both of these offenses and to do away with the enhancement for second and subsequent offenses. However, we disagree with the proposal to specify separate penalties for these two offenses. OAG recommends that, like under current law, persons who are sentenced for committing these related offenses continue to face the same maximum jail exposure. Therefore, we suggest that the penalties for both of these offenses be class D misdemeanors, with maximum penalties of 30 days in jail.

GOVERN¹MENT 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 19, 2020

SUBJECT: First Draft of Report #55 – Failure to Appear and Violation of Conditions of Release 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 #55, Failure to Appear and Violation of Conditions of Release Offenses.¹

COMMENTS ON THE DRAFT REPORT

RCC § 23-586. FAILURE TO APPEAR AFTER RELEASE ON CITATION OR BENCH WARRANT BOND

Paragraph (c) provides for a defense to this charge. It states, “A person does not commit an offense under this section when, in fact, a releasing official, prosecutor, or judicial officer gives effective consent to the conduct constituting the offense.” Footnote 11, pertaining to a prosecutor giving consent, states, “Consider, for example, a prosecutor who confers with defense counsel before the hearing date and notifies defense counsel that no charges will be filed (i.e. the case will be “no papered”) and excuses the accused from appearing in court. The arrestee has the effective consent of a prosecutor to not appear.” While OAG agrees that a person should not be charged in the limited situation noted in that footnote, we disagree that in other situations that a prosecutor – as opposed to a judge – should have the authority to excuse a defendant from

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.

attending a hearing. For example, a prosecutor should not be able to tell a defense attorney that their client does not have to appear at a status, trial, sentencing, or other hearing. Only a judge should have that authority. OAG, therefore, recommends that paragraph (c) be redrafted so that the defense would apply, as to a prosecutor, only when the prosecutor confers with defense counsel (or defendant if he or she is not represented by counsel) before the hearing date and notifies defense counsel (or defendant) that no charges will be filed (i.e. the case will be “no papered”) and excuses the defendant from appearing in court. Similarly, OAG recommends that the defense should be limited, as to a releasing official, to the situation noted in footnote 10.² In other situations, a releasing official, like a prosecutor, should not be able to excuse a defendant from attending a status, trial, sentencing, or other hearing.

RCC § 16-1005A. CRIMINAL CONTEMPT FOR VIOLATION OF A CIVIL PROTECTION ORDER

An element of this offense is that the person knows that they are subject to a temporary civil protection order, a final civil protection order, or a valid foreign protection order.³ OAG agrees that this element is consistent with D.C. Code § 16-1005 (f) which states, “Violation of any temporary or final order issued under this subchapter, or violation in the District of Columbia of any valid foreign protection order. In Superior Court practice, orders issued under the temporary civil protection order provision outside of regular court hours are called emergency temporary protection orders. OAG wants to ensure that under the RCC there is no question that violation of these orders would still be covered. Therefore, OAG recommends that the Commentary include a sentence that states, “The reference to temporary civil protection orders includes both orders issued outside of court business hours (termed emergency temporary protection orders) and those issued during regular business hours.”

This offense also includes the following element. “Knows they are subject to a protection order that, in fact... Advises the person of the consequences for violating the order, including extension of the order, immediate arrest or the issuance of a warrant for the person’s arrest, and the criminal penalties under this section. [emphasis added]. The law requires that an extension of a civil protection order must be separately served on the person and states that any “extension” order is separately appealable. When an order is “extended”, the person becomes the subject of a

² Footnote 10 states, “Consider, for example, an officer who issues a citation and decides to withdraw it (e.g., to correct an erroneous date or to dismiss the accusation based on newly discovered evidence). The officer retrieves the citation from the accused and tells her that she is excused from appearing on the date specified.”

³ RCC § 1005A (a) states:

Offense. A person commits criminal contempt for violation of a civil protection order when that person:

(1) Knows they are subject to a protection order that, in fact:

(A) Is one of the following:

- (i) A temporary civil protection order issued under D.C. Code § 16-1004;
- (ii) A final civil protection order issued under D.C. Code § 16-1005; or
- (iii) A valid foreign protection order;

new civil protection order.⁴ Therefore, OAG recommends that the phrase “extension of the order” be deleted from the text of the offense. OAG suggests that the point that the Commission was making by including the underlined text be noted in the Commentary.

The Explanatory Note at the beginning of the Commentary includes the statement that “*It replaces subsections (f), (g), (g-1), (h), and (i) of D.C. Code § 16-1005, Hearing, evidence, protection order.* [internal footnotes omitted] [italics in original text]”

The Commentary as to paragraph (g-1) states:

First, the revised statute does not specify that children must be prosecuted as children. Current D.C. Code § 16-1005(g-1) states, “Enforcement proceedings under subsections (f) and (g) of this section in which the respondent is a child as defined by § 16-2301(3) shall be governed by subchapter I of Chapter 23 of this title.” This language appears to be superfluous and potentially confusing, as no other criminal offense definition includes a similar cross-reference. This change clarifies the revised statute.

Paragraph (g-1) was added to the D.C. Code because defense counsel argued, at times successfully, that violations of CPOs were not prosecutable as delinquent acts under Chapter 13 of Title 22. While OAG does not object to the Commission recommending that paragraph (g-1) being stricken, we suggest one tweak to the above language to avoid any arguments as to how violations of CPOs by those under 18 years of age should be prosecuted. We recommend that the phrase “This change clarifies the revised statutes and does not change District law” be substituted for the phrase “This change clarifies the revised statute.”

RCC § 16-1005A does not include the provision in D.C. Code § 1605 (g) that states, “Orders entered with the consent of the respondent but without an admission that the conduct occurred shall be punishable under subsection (f), (g), or (g-1) of this section.” While the Explanatory note, quoted above states that RCC § 16-1005A “*replaces subsection[s] ... (i) of D.C. Code § 16-1005*” the Commentary does not address the reason for its removal.⁵ Similarly to the inclusion of paragraph (g-1), paragraph (i) was added to the D.C. Code because defense counsel argued, at times successfully, that because there was no admission of guilt, a person who entered a consent order without having admitted the underlining conduct could not be prosecuted under paragraphs (f), (g), and (g-1). To avoid any arguments that a person who consents but does not admit guilt

⁴ OAG acknowledges that D.C. Code § 16-1005(d) states, “A protection order issued pursuant to this section shall be effective for such period up to one year as the judicial officer may specify, but the judicial officer may, upon motion of any party to the original proceeding, extend, rescind, or modify the order for good cause shown.” However, because the person has to be separately served, a hearing must take place, and an appealable order must be issued (see paragraph (e) “Any final order issued pursuant to this section and any order granting or denying extension, modification, or rescission of such order shall be appealable.”), the extension mentioned in paragraph (d) is a new order.

⁵ Footnote 2 in the Commentary states, “These orders include orders entered by consent without admission of guilt. See D.C. Code § 16-1005(i)” (i.e., consent orders).

may be prosecuted for a violation of this offense, OAG recommends that the substance of paragraph (i) be retained.⁶

⁶ If the Commission does not accept this recommendation, OAG requests that the Commentary specifically address this issue and affirmatively state that no change in District law is intended and that a person who consents to an order but does not admit the underlying conduct is treated no differently than a person who admits the underlying conduct.

GOVERN¹MENT 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 19, 2020

SUBJECT: First Draft of Report #57 - Second Look

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 #57 - Second Look.¹

COMMENTS ON THE DRAFT REPORT

As the Commentary notes “The only changes in the revised statute as compared to the current D.C. Code provision are replacement of the phrases ‘offense committed before the defendant's 18th birthday’ with ‘offense’ in subsection (a) and paragraph (b)(1) of the current statute, and omitting “for violations of law committed before 18 years of age” from the statute’s title.” While OAG is favorably inclined to extending eligibility for second look procedures to older defendants or eliminating the age requirement altogether in D.C. Code § 24-403.03, we are still researching the status of second look legislation around the country, including the qualifying age of the defendant at the time of the offense, the criteria for judicial review, and the resentencing options available to the judge. OAG will communicate our position as soon as this research is completed.

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: June 19, 2020

SUBJECT: First Draft of Report #58- Developmental Incapacity 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 #58, Developmental Incapacity Defense.¹

COMMENTS ON THE DRAFT REPORT

The RCC proposal is to raise the minimum age at which a person can be charged with a delinquent act and to create a new defense to a prosecution against a child based on the actor's developmental immaturity. As discussed below, OAG favorably inclined with the concept of removing the possibility of youth who commit offenses when they are under 12 years of age from being prosecuted as delinquents in Family Court. However, also as discussed below, we oppose, at this time, the proposal to create a developmental incapacity defense for youth who are under 14 years of age.

The substantive portion of the proposal is:

RCC § 22E-501. Developmental Incapacity Defense.

(a) *Defense.* An actor does not commit an offense when:

1. In fact, the actor is under 12 years of age; 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 later hearing that the Council may have on any legislation that may result from the Report.

2. The actor is under 14 years of age and, as a result of developmental immaturity, lacks substantial capacity to:
 - (A) Conform the conduct alleged to constitute an offense to the requirements of the law; or
 - (B) Recognize the wrongfulness of the conduct alleged to constitute an offense.

OAG agrees that the District should have a minimum age for which a youth can be prosecuted for a delinquent offense and that young children should receive services from their health care provider, the Department of Human Services, the Department of Behavioral Health, Child and Family Services Agency, and other providers, as appropriate, rather than in the juvenile justice system. And although we agree that the cutoff should be around the age of 12, we are currently researching a number of issues concerning the setting of a minimum age for prosecuting a child for a delinquent act. OAG will present the CCRC with its recommendations as soon as this research is completed.

Whatever the minimum age that is set in the RCC, OAG recommends changing the statutory reference for such a change. First Draft of Report #58, Developmental Incapacity Defense, and Advisory Group Memo #37, Supplemental Materials to the First Draft Of Report #58, by their terms, do not apply to adults in the criminal justice system. Title 22 of the Code – and the proposed Title 22E – address the District’s Criminal Code. Proceedings about delinquency matters are codified in Title 16, Chapter 23 of the Code. This portion of the Code establishes who is a child eligible for prosecution in the Family Court, what a delinquent act is²; how juvenile competency challenges are handled³; and all other aspects of delinquency proceedings.⁴ Persons who litigate delinquency proceedings, and others who want to understand how these proceedings work, look to D.C. Code § 16-2301, *et. seq.*, for the statutory framework for delinquency proceedings. So, if the concepts in this proposal, or any portion of them, are adopted by the Commission, those changes should be incorporated into Title 16, not in Title 22E.

RCC § 22E-501 (a)(1) couches the proposed establishment of a minimum age for a person to be prosecuted as a defense. It would be, however, a statutory floor as to who can be adjudicated of a delinquent act and the Commission should state it as such. For that reason, while OAG generally supports the establishment of the proposed floor, it recommends that the floor be established by placing a limitation in Chapter 23 of Title 16 on the filing of charges in petitions against a child for offenses committed by the child when he or she was under the specified age.

D.C. Code § 16-2305 is entitled “Petition; contents; amendment.” Paragraph (c)(1) describes the process for the filing of a petition⁵ and (c)(2) states, “Where the delinquency petition filed by the

² See D.C. Code § 16-2301.

³ See D.C. Code § 16-2315.

⁴ See D.C. Code §§ 16-2301 through 16-2340.

⁵ D.C. Code § 16-2305 (c)(1) states,

Each petition shall be prepared by the Corporation Counsel after an inquiry into the facts and a determination of the legal basis for the petition. If the Director of

Corporation Counsel is the 3rd petition filed against a child and the child is 13 years old or younger, the Child and Family Services Agency shall institute a child neglect investigation against the parent, guardian, or custodian of the child.” OAG recommends that paragraph (c) be amended to add a new subparagraph (3) that states, “No charges can be filed in a petition against a child for a delinquent act that was committed when the child was under [x] years of age.”⁶

OAG cannot, however, at this time support the proposal in RCC § 22E-501 (a)(2). That proposal is to create a defense applicable to children who are under 14 years of age based upon the undefined phrase “developmental immaturity” when the child “lacks substantial capacity to ... Conform the conduct alleged to constitute an offense to the requirements of the law; or ... Recognize the wrongfulness of the conduct alleged to constitute an offense.” As the Commentary notes, the incapacity defense only has limited support in United States criminal codes and case law” and that “the standard here is employed in the context of developmental immaturity, District case law based on the insanity defense is instructive but not controlling.” While we agree that the case law for the insanity defense is instructive, but not controlling, we would point out that the D.C. Code and related case law state that the insanity offense is in not applicable in delinquency proceedings except at the dispositional (sentencing) stage. See D.C. Code § 16-2315 (d) and *In re C.W.M.*, 407 A.2d 617 (D.C. 1979) (The insanity defense was repealed by implication when Congress enacted a statute specifying that results of mental examination may not be used to establish a defense of insanity.) As the court noted in *In re C.W.M.*,

In our view, these provisions clearly mandate that a predisposition report contain information relating to the child's mental state at the time of the offense and also at the time of the disposition hearing to enable the Division to determine whether, as a result of mental illness, the child lacked substantial capacity either to recognize the wrongfulness of his conduct or to conform his conduct to the requirements of law.” [emphasis added]

Id. at 624 (internal quotes omitted).

The underlined portion of the quote from *In re C.W.M.*, though stated in the reverse order, is almost identical to the proposal in (a)(2) that creates a defense for a child who “lacks substantial capacity to...Conform the conduct alleged to constitute an offense to the requirements of the law; or ... Recognize the wrongfulness of the conduct alleged to constitute an offense.”

Social Services has refused to recommend the filing of a delinquency petition, or if the Director of the Agency has refused to recommend the filing of a neglect petition, the Corporation Counsel, on request of the complainant, shall review the facts presented and shall prepare and file a petition if he believes such action is necessary to protect the community or the interests of the child. Any decision of the Corporation Counsel on whether to file a petition shall be final.

⁶ D.C. Code § 16-2301 (7) states that a “delinquent act” “means an act designated as an offense under the law of the District of Columbia, or of a State if the act occurred in a State, or under Federal law...”

As noted above, OAG does not support enacting a developmental immaturity defense at this time. While OAG is always interested in working with the Council to improve the District's juvenile justice system, we do not believe that the undertaking should be taken by the CCRC. The CCRC's mandate is to redraft the criminal code.⁷ The advisory group is made up of agencies and people who have expertise in criminal law.⁸ If the Council wanted the CCRC to draft juvenile justice reform, it would have said so explicitly in the Act and it would have

⁷ D.C. Code § 3-152. Recommendations for comprehensive criminal code reform.

(a) By September 30, 2020, the Commission shall submit to the Mayor and the Council comprehensive criminal code reform recommendations that revise the language of the District's criminal statutes to:

- (1) Use clear and plain language;
- (2) Apply consistent, clearly articulated definitions;
- (3) Describe all elements, including mental states, that must be proven;
- (4) Reduce unnecessary overlap and gaps between criminal offenses;
- (5) Eliminate archaic and unused offenses;
- (6) Adjust penalties, fines, and the gradation of offenses to provide for proportionate penalties;
- (7) Organize existing criminal statutes in a logical order;
- (8) Identify any crimes defined in common law that should be codified, and propose recommended language for codification, as appropriate;
- (9) Identify criminal statutes that have been held to be unconstitutional and recommend their removal or amendment;
- (10) Propose such other amendments as the Commission believes are necessary; and
- (11) Enable the adoption of Title 22 as an enacted title of the District of Columbia Official Code.

⁸D.C. Code § 3-153. Code Revision Advisory Group.

(a) The Commission shall establish a Code Revision Advisory Group ("Advisory Group") to review and provide information and suggestions on proposals prepared by the Commission related to the comprehensive criminal code reform recommendations required by § 3-152. The Advisory Group shall consist of 5 voting members and 2 nonvoting members as follows:

- (1) The voting members of the Advisory Group shall consist of the following:
 - (A) The United States Attorney for the District of Columbia or his or her designee;
 - (B) The Director of the Public Defender Service for the District of Columbia or his or her designee;
 - (C) The Attorney General for the District of Columbia or his or her designee; and
 - (D) Two professionals from established organizations, including institutions of higher education, devoted to the research and analysis of criminal justice issues, appointed by the Council;
- (2) The non-voting members of the Commission shall consist of the following:
 - (A) The Chairperson of the Council committee with jurisdiction over the Commission or his or her designee; and
 - (B) The Deputy Mayor for Public Safety and Justice or his or her designee.

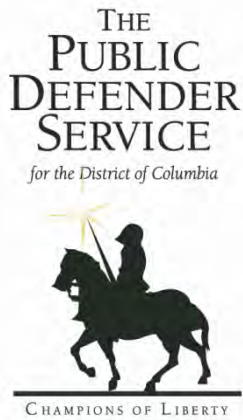
required that some advisory group members have backgrounds devoted to the research and analysis of juvenile justice issues.

Before enacting a defense for youth in the Family Court that is so closely related to the insanity defense, OAG would like an opportunity to review the effect of establishing a developmental immaturity defense in those jurisdictions that have enacted it, including what non-juvenile justice programs have been implemented by those jurisdictions to work with youth who lack developmental immaturity so that public safety is ensured. We would also like to evaluate the effectiveness of those programs.

In conclusion, while OAG supports the establishment of a minimum age for charging of children with delinquent acts, we do not support the establishment of a developmental immaturity defense until further study of this issue.⁹ We would, of course, be happy to work with the Council on further reforms to the juvenile justice system.

⁹ In addition, if the Commission does not adopt OAG's recommendation about eliminating the proposed developmental immaturity defense, OAG makes the following recommendation concerning RCC § 22E-501 (a)(2). It is unclear what is meant by the language in (a)(2)(A) about a person "conform[ing] the conduct alleged to constitute an offense to the requirements of the law." Conduct "constitut[ing] an offense" does not, *by definition*, conform to the requirements of the law. This should instead say the person was "unable to conform his or her conduct to the law."

M E M O R A N D U M



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

From: Public Defender Service for the District of
Columbia

Date: June 19, 2020

Re: Comments on Second Draft of Report No.
35, Cumulative Update to Sections 2013-
213 of the Revised Criminal Code

The Public Defender Service makes the following comments on the Second Draft of Report No. 35.

PDS recommends that the CCRC adopt language about concurrence as part of causation or as part of Chapter 2, Basic Requirements of Offense Liability. The following language is proposed:

For offenses that require proof of a mental state and conduct, the mental state that is required for the conduct must concur with the actor’s prohibited conduct. To concur, the mental state required for the conduct must actuate the conduct.

The Supreme Court in *Morissette v. United States* described crime as a “compound concept, generally constituted only from the concurrence of an evil-meaning mind with an evil doing hand.” 342 U.S. 246, 251 (1952). “...Generally, concurrence reflects a requirement that the mens rea and the action that causes death must go together. “[T]he true meaning of the requirement that the mental fault concur with the act or omission is that the former *actuate* the latter.” *1 Wayne R. LaFave, Substantive Criminal Law § 6.3(a)*, at 451 (2d ed. 2003) (emphasis added). “[M]ere coincidence [of conduct and *mens rea*] in point of time is not necessarily sufficient.” *Id.* “[M]ore is required than that the death-causing acts would not have occurred but for the prior intent.” *Id.* at 454 n.21. “[T]he acts must be done *for the actual carrying out of the intent and not merely to prepare for its execution.*” *Id.* at 454 (emphases added). An illustrative example is where “*A* forms an intent to kill *B*, . . . and . . . he accidentally runs over *B* and kills him.” *Id.* Concurrence is lacking in that scenario even if “at the time of the accident, *A* was driving to a store to purchase a gun with which to kill *B*.” *Id.* Although *A* had formed an intent to kill *B* and actually caused *B*’s death, his action of running *B* over was not actuated by his intent to kill, and thus does not constitute intentional murder.

While concurrence is a general principle in criminal law, it is especially important for result-element offenses. Because the causation definition refers generally to a person’s “conduct” as being the cause of a prohibited result, there is a risk that factfinders might find causation satisfied by any conduct, regardless of whether the conduct concurs with the required mental state. For example, in LaFave’s example of the driver who accidentally hits and kills the very person he intended to shoot and kill, the driver’s conduct causes the death, but that conduct

does not concur with the driver’s intent to kill. Without the principle of concurrence, the driver could be found guilty of first-degree murder.

Turning more specifically to the causation requirement, PDS has three interrelated concerns with RCC § 22E-204(c)(2). First, the “justly held responsible” standard is too vague and subjective to satisfy constitutional requirements. Second, the factors identified in the commentary for determining when a person is “justly held responsible” for the acts of another have no proper role to play in causation analysis. Finally, the standard ultimately codifies an unwarranted twentieth century expansion of criminal law, which tends to undermine the fundamental premise of individuals’ responsibility for their actions that justifies much of criminal law and punishment.

PDS reiterates its previous concerns that the definition of legal cause in RCC § 22E-204(c)(2) does not comport with the requirement of the Due Process Clause that criminal laws be defined with specificity. *See, e.g., Johnson v. United States*, 135 S. Ct. 2551, 2556-57 (2015). This requirement “guarantees that ordinary people have ‘fair notice’ of the conduct a statute proscribes” and “guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges.” *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018). The rule also reflects “the separation of powers—requiring that [the legislative branch], rather than the executive or judicial branch, define what conduct is sanctionable and what is not.” *Id.*; *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.”).

The notion that whether a person is liable for the volitional conduct of a third party turns on whether a jury thinks the person is “justly held responsible” would invite arbitrary results. The same facts presented to two different juries could result in opposite results due to juries’ different subjective senses of what is just. *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.”). “Uncertainty 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.” *Burrage v. United States*, 134 S. Ct. 881, 892 (2014). RCC § 22E-204(c)(2) in its current form would not survive a constitutional challenge and hence would ultimately fail to accomplish the Commission’s goals of reforming the District’s criminal laws.

PDS understands the difficulties in codifying a standard of legal cause that is neither over-inclusive nor under-inclusive—a task that has eluded legal thinkers for centuries. And while achieving “just” results is the ultimate goal of legal causation, this goal can only be furthered through the development of clear, workable standards, not an appeal to the jury’s subjective sense of justice. And while the commentary identifies three non-exhaustive factors that bear on whether a person is “justly

held responsible” for the conduct of another, these factors ultimately fail to cabin factfinders’ discretion in any meaningful or consistent way.

The three factors listed in the commentary are also not appropriate considerations for causation analysis. The first two of these factors—“the inherent wrongfulness of the actor’s conduct” and “whether the actor desired a prohibited result to occur”—are already accounted for by other aspects of law. They have never played a role in causation analysis. Causation is fundamentally about a physical connection between an act and a result. When commentators speak of legal causation as being about what is fair or just, they are talking about whether it is fair or just to treat conduct as the “cause” of a result when other factors had a more direct role in producing the result. Legal causation has always focused on the causal chain of events and whether the “link” between act and result “is too remote, purely contingent, or indirec[t].” *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 9 (2010) (plurality) (internal quotation marks omitted) (alteration in original). It has never turned on the wrongfulness of conduct or the actor’s intent to cause a particular harm. In *Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258 (1992), for example, the defendants committed fraud—certainly wrongful conduct. Yet the Supreme Court held that these fraudsters were not the cause of foreseeable financial losses. *See id.* at 271. The Court focused exclusively on the indirectness of the causal link. *See id.* (“[T]he link is too remote between the stock manipulation alleged and the customers’ harm, being purely contingent on the harm suffered by the broker-dealers.”). 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. Refusing to provide the list was a violation of state law, and hence wrongful. *See id.* And the city’s inability to collect taxes was exactly what the cigarette seller wanted—its business model depended on undercutting its competitors’ prices by allowing customers to avoid the tax. *See id.* at 12. Despite having effectively built its entire business on purposefully aiding tax evasion, the Supreme Court held the seller was not liable for the loss of tax revenue because the link in the causal chain was indirect. *Id.* at 10; *accord Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 458–461 (2006) (steel company that intentionally defrauded state of tax revenue so that it could undercut its competitor was not liable for causing the competitor’s loss of business, even though company’s conduct was wrongful and competitor’s loss of business was the desired result). As these cases show, legal causation is focused on the nature of the causal link, not the blameworthiness of the underlying conduct.

Causation is not intended to grade blameworthiness or culpability of conduct. For example, a person who intends to inflict a horrible, painful death on someone who is unexpectedly killed by a lightning strike is not liable for murder because, however reprehensible the conduct, causation is lacking. But a person who unintentionally, but recklessly (with extreme indifference to human life), directly causes death is liable for murder. The presence or absence of murder liability in these examples does not turn on the degree of blameworthiness but rather on the nature of the causal chain because murder has a result element. Other aspects of the law account for gradations in the wrongfulness of conduct or the actor’s purpose.¹ To incorporate these factors into causation analysis amounts to improper double counting, and ultimately fails to further the point of causation in criminal law.

¹ For example, as the commentary notes, accomplice liability already covers situations where a person contributes to a result directly caused by a third party with the purpose of causing that result. Causation does not need to also attempt to cover this situation.

Much of criminal law is focused on punishing conduct without regard to whether it causes any particular result. But when the law does impose a result element, then a person should be punished only if he has, in fact, “caused” that result. “The doctrine that a person whose conduct excites moral disapproval may be punished for doing what he has not done is . . . a dangerous one.” H.L.A. Hart & A.M. Honoré, *Causation in the Law* 328 (2d ed. 1985).

In addition, these factors ultimately do not produce acceptable results. Take the commentary’s basketball example: if X makes the winning shot knowing that an enraged D will kill V, X is not liable for murder because he did not cause the death. The commentary justifies this result because X’s conduct (making the shot) is not inherently wrongful and X’s purpose is not to kill V (X just wants to win the game). But tweak the example slightly and this logic breaks down. Imagine that just before the final play, X sees that D has deliberately loosened the bolts on the backboard so that sinking the next shot will cause the backboard to come crashing down on V, who is standing right under the basket. X, not wanting to kill V but wanting to win the game, makes the shot, and V is killed. In the tweaked example, X *should be* liable for manslaughter. He has recklessly caused V’s death.² But RCC § 22E-204(c)(2) and the commentary are incapable of explaining X’s liability in the loose-backboard example but not the enraged-D example. X’s conduct is the same (making the shot). X’s purpose is the same (winning the game). Factual causation and reasonable foreseeability are equally present in both examples. And, in both examples, V’s death “depends on another person’s volitional conduct”—D’s. The reason X is liable in the loose-backboard example is that an object falling is exactly the sort of physical phenomenon that a person can be deemed to have legally caused. In the enraged-D scenario, one might say that X’s conduct foreseeably “causes” D to kill V, but the law does not regard D’s volitional conduct as a phenomenon that can be caused by someone else; rather, the law regards D alone as responsible for his own volitional conduct.³ Indeed, as the commentary acknowledges, this principle is fundamental to the legitimacy of criminal law—if a person’s conduct is “caused” by external forces then punishing the person for that conduct is delegitimized. See Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 Cal. L. Rev. 323, 333 (1985) (“To treat the acts of others as causing a person’s actions (in the physical sense of cause) would be inconsistent with the premise on which we hold a person responsible.”).

This fundamental principle that no one causes D’s volitional conduct except D himself is uncontroversial when, as in the enraged-D scenario, X’s conduct and motives are innocent. The principle requires defense only when X’s conduct or motives are wrongful because there is a

² Nothing in this example turns on whether D’s conduct happens before or after X’s. One might imagine that D loosens the bolts just after X launches his shot but before it hits the backboard, but that X sees D preparing to loosen the bolts, realizes what he is going to do, and takes the shot anyway. X would still be liable for manslaughter because his reckless conduct causes the backboard to fall and kill V.

³ In the loose backboard scenario, D would be liable for intentional murder. But this is not because D “caused” X’s volitional conduct of making the shot, but rather because D’s act of loosening the bolts foreseeably caused, in combination with X’s conduct, the backboard to fall and kill V. And if D had been negligent (or reckless) in failing to tighten the bolts, he could still be liable for some degree of homicide corresponding to his mental state. Causation principles do not vary with D’s purposefulness or the inherent wrongfulness of his conduct.

legitimate desire to punish X in that scenario. But the desire to punish X for wrongful conduct need not, and should not, result in twisting the law of causation to make X liable for a result caused by D. If X engages in wrongful conduct, then he can and should be punished for that conduct under the appropriate offense. And if he facilitates D's conduct with an improper purpose, he can be liable for D's conduct as an accomplice. He simply should not be punished for having "caused" the conduct of a different volitional actor.

The third factor in the commentary, the passage of time, is also not a particularly relevant consideration for causation. Ordinarily, the passage of time does not impact causation. If X sets a bomb, X is the factual and legal cause of any resulting death whether he sets the bomb's timer for 10 second, 10 days, or ten years. The passage of time is irrelevant because, no matter how much times goes by, the causal link from act to result is direct and foreseeable. Neither the Court of Appeals' decision in *Fleming*⁴ nor the commentary to RCC § 22E-204(c)(2) offers a logical explanation or policy justification for why the passage of time should ever preclude causation. Certainly, there is an intuitive sense that when a third party acts in response to something a person did a long time ago, the person is not the cause of the third party's response. But that is because the passage of time simply makes it easier to see the real causal problem—that a person's deliberate conduct is the product of her own choices, not caused by someone else. To see this, it helps to consider two examples that are identical except for the passage of time. In both examples, X intends to kill D. X knows to a certainty that if he attempts to kill D but fails to do so, D will set out to kill X in revenge, no matter how long it takes. X also knows that D will use any means to take his revenge, including killing bystanders. In the first variation, X shoots at D and misses, but is able to escape. One year later, X is walking down the street when D finally catches up to him and opens fire, killing bystander V. In this example, the *Fleming* opinion and the commentary suggest that X would likely not be guilty of V's murder (though X is guilty of attempted murder for his earlier attempt to kill D). See *Fleming*, 224 A.3d at 224-25.⁵ Now imagine the same example, except eliminate the passage of time: X shoots at D and misses (as before), but this time D immediately returns fire and kills bystander V.⁶ Under current D.C. law, X would be guilty of murder in this second example because V's death was reasonably foreseeable and there was no passage of time. There is no sensible justification for these different results. In both examples X's conduct and mental state are equally culpable; and the causal link between X's conduct and V's death is identical—X's shooting at D leads to D shooting at X, and hitting V; and V's death is equally foreseeable in both examples. But the passage of time makes it easier to see that D's conduct is a result of D's deliberate choice to seek revenge, not a "caused" phenomenon. The law regards D, and D alone, as the cause of his own volitional conduct. It is not the passage of time that matters; rather, the passage of time makes D's volitional conduct more salient.

⁴ *Fleming v. United States*, 224 A.3d 213 (D.C. 2020) (en banc).

⁵ As *Fleming* notes, "the United States took the position that a person who started a deadly feud between two groups might not properly be held criminally responsible for reasonably foreseeable killings that took place years or even a day after the person's initial conduct." 224 A.3d at 224.

⁶ To simplify things, assume that D is *not* acting in self-defense—D shoots at X purely for revenge.

While the revised version of RCC § 22E-204(c)(2) largely conforms to the Court of Appeals’ decision in *Fleming*, for several reasons RCC § 22E-204(c)(2) should not attempt to codify *Fleming*. First, *Fleming* largely rejected the leading scholarly work on causation in the law because that work was normative rather than descriptive. *See Fleming*, 224 A.3d at 227. But the Commission’s role is normative, and the Commission has appropriately looked to the work of leading scholars such as Professors Kadish, Hart, and Honoré, which *Fleming* largely brushed aside. The work of these preeminent scholars establishes the principle that a third party’s volitional conduct breaks the causal chain. *See Kadish, supra*, at 334-35 (“[W]hen we examine a sequence of events that follows a person’s action, the presence in the sequence of a subsequent human action precludes assigning causal responsibility to the first actor. What results from the second actor’s action is something the second actor causes, and no one else can be said to have caused it through him.”); Hart & Honoré, *supra*, at 326 (“The free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility.”).

Second, by arbitrarily disregarding the majority of relevant cases on this issue, *Fleming* failed to achieve any logical or doctrinal coherence. *See Fleming*, 224 A.3d at 226-27. *Fleming* acknowledged the longstanding and substantial body of law (indeed, from a majority of jurisdictions) that holds that a defendant does not “cause” a gun-battle death when an adversary fires the fatal shot, but ignored these cases on the ground that they addressed causation for felony murder, whereas *Fleming* involved second-degree murder.⁷ But these cases turned on well-defined principles of causation, not anything unique about felony murder. Causation principles have never varied depending on the offense or its degree; and the *Fleming* court offered no justification for why causation should work differently depending on the degree or type of murder charged. The Commission in contrast is appropriately developing a consistent definition of causation for all result-element offenses. And it should appropriately look to the large body of cases that have held, consistent with centuries of precedent and scholarly analysis, that causation is lacking when a death is directly caused by a third party’s volitional conduct.⁸

⁷ *See* Matthew A. Pauley, *The Pinkerton Doctrine & Murder*, 4 *Pierce L. Rev.* 1, 2 n.4 (2005); *see also, e.g., Campbell v. State*, 444 A.2d 1034, 1041–42 (Md. 1982) (no liability for death in gun battle with robbery victim and police because defendant did not fire the fatal shot); *Commonwealth v. Campbell*, 89 Mass. (7 Allen) 541, 545 (1863) (no liable for gun-battle death where adversary fired fatal shot); *Myers*, 261 A.2d at 555 (no liability for person shot by police during gun battle); *State v. O’Kelly*, 84 P.3d 88, 97–98 (N.M. Ct. App. 2003) (defendant not liable for gun-battle death of bystander shot by adversary); *Rivers v. Commonwealth*, 464 S.E.2d 549, 554 (Va. Ct. App. 1995) (same).

⁸ *See* Matthew A. Pauley, *The Pinkerton Doctrine & Murder*, 4 *Pierce L. Rev.* 1, 2 n.4 (2005); *see also, e.g., Campbell v. State*, 444 A.2d 1034, 1041–42 (Md. 1982) (no liability for death in gun battle with robbery victim and police because defendant did not fire the fatal shot); *Commonwealth v. Campbell*, 89 Mass. (7 Allen) 541, 545 (1863) (no liable for gun-battle death where adversary fired fatal shot); *Myers*, 261 A.2d at 555 (no liability for person shot by police during gun battle); *State v. O’Kelly*, 84 P.3d 88, 97–98 (N.M. Ct. App. 2003) (defendant not

Third, *Fleming* overlooked the large body of historical evidence that, before the general expansion of criminal liability in more recent decades, it was widely accepted that a defendant could not be the “cause” of a death at the hands of someone else.⁹ Instead, *Fleming* looked to cases decided in the last “thirty years,” *Fleming*, 224 A.2d at 228, a time period that reflects a marked expansion in criminal liability brought about by judicial fear over then-higher crime rates. *See, e.g., Roy v. United States*, 871 A.2d 498, 507 (D.C. 2005) (“While urban gun battles years ago involved revolvers or clipped pistols of limited fire power, they have now escalated to the use of automatic and semiautomatic weapons. The results are pocket wars with no rules of engagement resulting in a highly increased risk to noncombatants. It is this increased risk to innocent bystanders which justifies the application of proximate cause liability to those participants who willfully choose to engage in these battles.”). As the law of causation developed over hundreds of years, it was consistently understood that a person could not cause another’s volitional conduct. The recent relaxation of that settled doctrine should now be corrected.

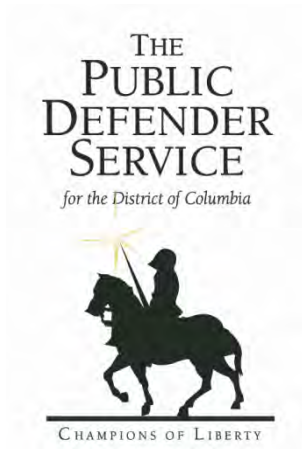
PDS proposes that the definition of legal cause reflect the venerable and fundamental principle that individuals do not cause the deliberate volitional conduct of others. RCC § 22E-204(c) should read:

Legal Cause Defined. A person’s conduct is the legal cause of a result if the result is reasonably foreseeable in its manner of occurrence. Another person’s volitional conduct is not reasonably foreseeable unless the other person’s volitional conduct consists of lawful self-defense or defense of others that results from the defendant’s actions.

liable for gun-battle death of bystander shot by adversary); *Rivers v. Commonwealth*, 464 S.E.2d 549, 554 (Va. Ct. App. 1995) (same).

⁹ *See, e.g.,* John Kaplan et al., *Criminal Law* 261 (6th ed. 2008) (“Rather than distinguish between foreseeable and unforeseeable intervening events . . . the common law generally assumed that individuals were the exclusive cause of their own actions.”); Norval Morris, *The Felon’s Responsibility for the Lethal Acts of Others*, 105 U. Pa. L. Rev. 50, 66 (1956) (“For centuries innocent persons and felons have been killed as the result of justified resistance to felonies of violence; in only a handful of such cases has it been even suggested that the surviving felons are guilty of murder.”); *Ross v. W. Union Tel. Co.*, 81 F. 676, 677–78 (5th Cir. 1897); *Commonwealth ex rel. Smith v. Myers*, 261 A.2d 550, 553 (Pa. 1970); *Commonwealth v. Campbell*, 89 Mass. (7 Allen) 541, 545 (1863) (defendant cannot be liable for shooting “committed by a person who is his direct and immediate adversary, and who is, at the moment when the alleged criminal act is done, actually engaged in opposing and resisting him and his confederates and abettors in the accomplishment of the unlawful object for which they are united”)

M E M O R A N D U M



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

From: Public Defender Service for the District of
Columbia

Date: June 19, 2020

Re: Comments on Second Draft of Report No.
19, Homicide Offenses; Second Draft of
Report No. 27, Human Trafficking; First
Draft of Report No. 54, Prostitution; First
Draft of Report No. 55, Failure to Appear
and Violation of Conditions of Release
Offenses; First Draft of Report No. 57,
Second Look; and First Draft of Report No.
59, Endangerment with a Firearm.

The Public Defender Service makes the following comments.

Second Draft of Report No. 19, Homicide Offenses

1. PDS objects to the inclusion of felony murder as basis for liability in second degree murder and manslaughter. Lowering the mental state required for murder fails to deter crime or appropriately apportion culpability. PDS agrees with the commentary to Hawaii’s murder statute about the state’s reasons for abolishing felony murder: “Even in its limited formulation, the felony-murder rule is still objectionable. It is not sound principle to convert an accidental, negligent, or reckless homicide into a murder simply because, without more, the killing was in furtherance of a criminal objective of some defined class. Engaging in certain penally-prohibited behavior may, of course, evidence a recklessness sufficient to establish manslaughter, or a practical certainty or intent, with respect to causing death, sufficient to establish murder, but such a finding is an independent determination which must rest on the facts of each case.”¹

If felony murder remains a basis of liability for second degree murder, PDS strenuously opposes the expansion of felony murder to include persons who did not commit the lethal act the Second Draft of Report No. 19. Felony murder, which already allows for attenuated murder liability, becomes all the more divorced from actual culpability when it is applied to an individual who did not commit the lethal act and who might only be a peripheral aider and abettor to the predicate felony. The examples of miscarriage of justice in such instances are legion and caused California to retroactively amend its felony murder statute to preclude its application to individuals who

¹ Hawaii Rev.Stat., s 707-701.

were not the actor who committed the fatal act and to those who did not actively participate in bringing about the death as accomplices.² The RCC attempts to address the well-recognized miscarriage of justice of applying felony murder to those who do not commit a fatal act by creating an additional defense to felony murder. But the RCC commentary contemplates that the defense is much more protective than it would be in reality. The commentary states: “[A]n actor may be held liable for the lethal acts of a fellow participant in a predicate felony if he or she knows that the fellow participant intends to cause death or serious bodily injury, or failed to make reasonable efforts to prevent death or serious bodily injury.” According to the RCC commentary, “These changes permit an actor to be convicted of felony murder when a co-felon committed the lethal act only when the actor’s culpability is sufficient to warrant liability.”³ But in reality, that is far from the case. By creating a defense rather than elements that the government must prove, whether the actor’s conduct is sufficient to warrant liability rests entirely on a jury’s assessment of the defendant’s testimony. Much of the credibility determination will depend on the defendant’s prior record, education, fear about identifying and negatively testifying about co-actors, and jurors’ biases about the defendant and his participation in the predicate felony. This defense would in some instances require the defendant to risk his own safety by testifying about the criminal conduct of multiple other actors. The failure to answer questions about other actors would also lead to claims that the defendant is evasive and not credible. Further, to benefit from this defense, in instances where there is uncertainty about who caused the fatal act, the defendant would have to assume the government’s burden and prove that he did not commit the fatal act. For these reasons, PDS strongly urges the CCRC to preclude the application of felony murder to individuals who did not commit the fatal act.

If the RCC maintains the offense of felony murder or continues to apply felony murder to actors who do not commit the lethal act, PDS proposes the following revisions:

RCC § 22E-1101. Murder.

- (a) *First Degree.* A person commits first degree murder when that person purposely, with premeditation and deliberation, causes the death of another person.
- (b) *Second Degree.* A person commits second degree murder when that person:
 - (1) Recklessly, with extreme indifference to human life, causes the death of another person; or
 - (2) Negligently causes the death of another person, other than an accomplice, by committing the lethal act in the course of and in furtherance of committing or attempting to commit one of the following offenses:
 - (A) First or second degree arson as defined in RCC § 22E-2501;
 - (B) First degree sexual abuse as defined in RCC § 22E-1303; ...
 - (3) (A) Commits or attempts to commit one of the following offenses:

² SB 1437, California. Available at: https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1437

³ RCC Report No. 33, page 3.

- (i) First or second degree arson as defined in RCC § 22E-2501;
 - (ii) First degree sexual abuse as defined in RCC § 22E-1303; ...
 - (B) (i) Intending to cause death or serious bodily injury; or
 - (ii) Knowing another participant in the predicate felony intends to cause death or serious bodily injury;
 - (C) Did not make reasonable efforts to prevent another participant from causing death or serious bodily injury; and
 - (D) The death of another person, other than an accomplice, was caused in the course of and in furtherance of committing or attempting to commit the predicate offense.
- (c) ...
- ~~(g) No Accomplice Liability for Felony Murder. Notwithstanding RCC § 22E-210, no person shall be guilty as an accomplice to second degree murder under paragraph (b)(2) or (b)(3). –Defense to Felony Murder. It is an affirmative defense to prosecution under paragraph (b)(2) of this section that the actor, in fact, does not commit the lethal act and either:~~
- ~~(1) Believes that no participant in the predicate felony intends to cause death or serious bodily injury; or~~
 - ~~(2) Made reasonable efforts to prevent another participant from causing the death or serious bodily injury of another. ...~~

2. PDS objects to the inclusion of first and second degree criminal abuse of a minor as predicate felonies for felony murder. If the CCRC includes felony murder in the reform code, it should also adopt a merger principle that provides that the predicate felony must have a purpose that is independent of the decedent's death or serious injury.⁴ First and second degree criminal abuse of a minor requires that the defendant commit serious injury, either physical or mental, to the minor. Generally, the failure to adopt a merger rule would mean that every act of violence against another that is not immediately fatal could be converted into felony murder – thereby relieving the government from proving the defendant's mental state.
3. PDS makes the same objections and recommendations with respect to RCC § 22E-1102, Manslaughter, as it makes above with respect to RCC § 22E-1101, Murder.

First Draft of Report No. 54, Prostitution

1. PDS recommends rewriting subsection (b)(2) to require that the District, rather than the Metropolitan Police Department (MPD) specifically, refer persons under age 18 who are suspected of violating subsection (a) of the section. PDS hopes that the Council for the District of Columbia and the Mayor answer the call to narrow the duties of MPD and to assign the work

⁴ *People v. Rector*, 19 Wend. 569, 592-93 (N.Y. Sup. Ct. 1838).

of delivering health and human services to District agencies that are better suited to delivering those services. Requiring that the *District* make the referral allows the District to assign the work to a current social services agency, a new agency not currently in existence, or if it deems it appropriate, even to MPD.

2. PDS notes that RCC § 22E-4401, prostitution, and RCC § 22E-4402, patronizing prostitution, include provisions to allow for the suspension and dismissal of proceedings. PDS supports these provisions. As it did in its May 1, 2020 comments on the First Draft of Report No. 50, PDS recommends that the CCRC consider creating a general provision that allows for the judicial dismissal of proceedings for all offenses up to a certain class. In many instances, there is little difference between the capacity for rehabilitation of someone convicted of, for example, a shoplifting offense or a criminal graffiti offense or a 2nd degree trespass offense and someone convicted of prostitution or of patronizing prostitution or of a possessory drug offense. All of these individuals would benefit greatly from the opportunity to have the case dismissed. The dismissal could prevent collateral consequences in education, housing, and employment. Without a judicial dismissal provision, case dismissal rests entirely on the discretionary decisions of prosecutors. It makes good sense to expand this option of dismissal and allow dismissal when a judge who is familiar with the facts of the offense and with the defendant think it is warranted. Without an expanded dismissal provision, defendants are left to struggle with a record sealing process through which there is an eight-year waiting period to seal an eligible misdemeanor conviction.⁵ The suspension and dismissal of proceedings provisions should be expanded or repeated elsewhere in the RCC to allow for judicial dismissal of all offenses of equivalent or similar grading.

First Draft of Report No. 55, Failure to Appear and Violation of Conditions of Release Offenses

1. PDS recommends rewriting the second element of both first degree and second degree failure to appear in violation of a court order at RCC § 23-1327. Currently, the second element reads: “Knowingly fails to appear or remain for the hearing.” The commentary explains that this element “means the person must be practically certain that they failed to appear or remain as required.”⁶ As written, the element suggests that a person may be found guilty of this offense if they know they were not in court when they knew (pursuant to element 1) they were supposed to be. PDS does not believe that the CCRC intends to make the offense turn on whether or not the person knows they failed to appear in court. The gravamen of the offense is actually whether the person made reasonable efforts to appear in court as required. It is no coincidence that the commentary specifically notes that “the person’s conduct must be voluntary,”⁷ despite the fact

⁵ D.C. Code § 16-803(c)(1).

⁶ Report No. 55, page 12.

⁷ *Id.*

that the government must prove voluntariness for *every* offense in the RCC.⁸ Voluntariness is specifically mentioned because whether the person’s non-appearance in court is “voluntary” is largely, though perhaps not exclusively, what determines the culpability of the person. It is not clear that all conduct that should be excused from liability would be excused because it fails to meet the definition of “voluntariness.” The voluntariness requirement at RCC § 22E-203 defines both the voluntariness of an act and the voluntariness of omission. Because a person’s omission (by failing to appear) provides the basis for liability of this offense, “a person commits the conduct element of [the] offense when [either] (A) the person has the physical capacity to perform the required legal duty [to appear or remain in court] or (B) the failure to act is otherwise subject to the person’s control.”⁹ The failure to appear commentary gives examples of a person’s absence being not subject to the person’s control such as if the person is incarcerated, hospitalized, stranded, or unable to connect to a virtual hearing due to a technological problem.¹⁰ One “stranded” scenario is the defendant in *Foster v. United States*, 699 A.2d 1113 (D.C. 1997), a bus driver for Greyhound who was “stranded in Montreal” when the bus that would have allowed him to drive back to the District from Montreal in time to appear in court was cancelled by his employer.¹¹

Consider another scenario: D texts with the Pretrial Services Agency the day before his scheduled trial date in a felony case to confirm the date, time and courtroom of his hearing. D sets an alarm to wake up in plenty of time to get to court, but actually wakes up before his alarm rings. Though he leaves his house earlier than planned, he runs to the metro station (as witnessed by numerous people). When he arrives at the metro station, he learns that it is closed for “track maintenance work.” Evidence would show that the metro station had closed one month earlier and that signs had been posted outside the station announcing the closure starting one month prior to the closure. Under the RCC’s proposed failure to appear offense, D (1) knew he was required to appear before a judicial officer on a specified date and time for what was in fact a hearing in a felony matter and (2) knew that he failed to appear for the hearing. The question for the factfinder would be whether his “failure to appear” was voluntary, that is was his non-appearance subject to D’s control? Under current law, the question for the factfinder in this case would be whether D’s “failure to appear” was “willful,” as in “deliberate and intentional” or whether it was “accidental or inadvertent.” Rather than asking whether the person was practically certain that he failed to appear, the question that better focuses on the conduct (by act or omission) that justifies holding someone culpable for this offense is whether the person made reasonable efforts to appear in court.

⁸ See RCC § 22E-203. (“No person may be convicted of an offense unless the person voluntarily commits the conduct element required for that offense.”)

⁹ RCC § 22E-203(b)(2).

¹⁰ See Report No. 55, page 12, n. 11.

¹¹ *Foster*, 699 A.2d. at 1114. The *Foster* court found that, if the trial court credited Mr. Foster’s testimony as to the events preceding his trip to Montreal in the days before his court hearing, then there would not be a factual underpinning for a conclusion that Mr. Foster’s failure to appear for his trial was “deliberate and intentional, not inadvertent or accidental.” *Id.* at 1115.

Even if the “voluntariness” standard is coextensive with the culpability question at the heart of the failure to appear offense, it is inarguable that “voluntariness” does more work in this offense than in most other offenses in the RCC. For that reason alone, it should be “elementized” specifically in this offense. Specifically, PDS recommends rewriting first-degree failure to appear in violation of a court order be rewritten to read as follows:

A person commits first degree failure to appear in violation a court order when that person:

- (1) Knows they are required to appear before a judicial officer on a specified date and time by a court order for what is, in fact, a hearing:
 - (A) In a case in which the person is charged with a felony; or
 - (B) In which the person is scheduled to be sentenced; ~~and~~
- (2) Knowingly ~~fails~~ failed to make reasonable efforts to appear or remain for the hearing; ~~and~~
- (3) In fact, the person did not appear or remain for the hearing.

Second-degree failure to appear should be rewritten similarly.

PDS further recommends that the commentary explaining failure to appear should be clear that it is adding an element that encompasses voluntariness because it is the heart of the offense and that doing so does not diminish the requirement that no person may be convicted of an offense unless the person voluntarily commits the conduct element required for that offense.

2. PDS makes the same recommendations for the rewriting of RCC §23-586 as it makes above for rewriting RCC § 23-1327.
3. PDS recommends eliminating the mandatory consecutive sentencing provisions from RCC § 23-1327, failure to appear in violation of a court order, and from RCC § 24-241.05A, violation of work release. The reasoning offered by the CCRC for eliminating all mandatory minimum sentences,¹² which proposal PDS enthusiastically supports, applies equally to this mandatory sentencing provision. It exacerbates, rather than solves, disproportionality. “Sentencing guidelines, rather than statutory mandates are a more appropriate way to guide judicial decision making...”¹³ There is no reason to distrust that the judges will not take seriously and exercise carefully their discretion when sentencing for violations of these offenses, particularly when both offenses are in essence about a defendant’s defiance of the court’s authority to issue and enforce orders.
4. PDS recommends rewriting subsection (d) of RCC § 23-1329A, Criminal contempt for violation of a release condition. First, PDS recommends eliminating the language that would require that the proceeding to determine a violation of this statute be “expedited.” PDS recognizes that the

¹² See First Draft of Report No. 52, Cumulative Update to the Revised Criminal Code Chapter 6, March 20, 2020, at pages 6-7.

¹³ *Id.* at page 6.

statute for the current offense requires that the proceedings be expedited.¹⁴ The CCRC does not cite any legislative history, case law, or court rules to explain what would constitute an “expedited” hearing versus one that is not “expedited.” Judges control their calendars and the scheduling of proceedings. This offense is at heart about the court enforcing its own orders. A judge who wishes to initiate a proceeding for contempt under this section or is merely scheduling a proceeding initiated by a prosecutor, may schedule it as soon as their calendar, and the defendant’s constitutional rights¹⁵ permit without needing a statutory requirement to do so. On the other hand, if the judge is not in a rush to schedule the proceedings, this offense is not inherently more urgent than any other criminal offense and should not dictate how judicial resources are expended. Second, the subsection should simply provide that the proceedings shall be heard by the court without a jury. It is widely understood that bench trials are by a “single judge” and that the verdict is a conviction generally the same as a verdict in a jury trial. That said, a bench trial is decidedly not the same as a jury trial. To the extent any law distinguishes between a verdict delivered by a single judge and one delivered by a jury, this language proposed by the RCC should not be allowed to erase the stark differences between the two types of proceedings. In sum, subsection (d) should be rewritten as follows:

(d) ~~Expedited non-jury~~ Non-jury hearing. A proceeding determining a violation of this section shall be ~~expedited~~. ~~The proceeding shall be by a single judge, whose verdict shall have the same force and effect as that of~~ heard by the court without a jury.

5. PDS reiterates its position¹⁶ that the violation of a release condition should be punished as contempt pursuant to RCC § 23-1329A, even when the violation is the commission of a new offense. If a person is found guilty of committing a new offense, they should be punished for that offensive conduct and not additionally for their “status” of having been released in another matter pursuant to D.C. Code § 23-1321. If the CCRC decides to retain an enhancement for having committed an offense while on release, then the penalty should be significantly lower than what was proposed in Report No. 52.

First Draft of Report No. 57, Second Look

1. CCRC’s Second Look Provision, D.C. Code § 24-403.03 (a)(3)(A) provides that “any proceeding under this section may occur by video teleconferencing and the requirement of a defendant’s presence is satisfied by participation in video teleconferencing.” PDS recommends that the CCRC both expand and limit this provision. Some BOP facilities do not have the

¹⁴ See D.C. Code § 23-1329(c). (“Such contempt proceedings shall be expedited and heard by the court without a jury.”)

¹⁵ Whatever “expedited hearing” currently means, it cannot mean a hearing so rushed that it deprives the defendant of their constitutional rights, such as the right to present a defense, which might take time to investigate, and the right to have compulsory process to obtain witnesses.

¹⁶ See PDS Comments First Draft of Report No. 52, Cumulative Update to RCC Chapter 6 Offense Classes, Penalties, & Enhancements, dated May 15, 2020.

capacity for video conferencing or may raise objections to video conferencing because it may occur over non-secure lines. Remote participation should include participation by phone. However, non-physical appearance should only occur with the defendant's consent.

PDS recommends the following language:

With the consent of the defendant, Any proceeding under this section may occur by video teleconferencing or by phone and the requirement of a defendant's presence is—shall be satisfied. by participation in video teleconferencing.

2. With respect to modifications to D.C. Code § 24-403.03, PDS also recommends modifying the requirement at (b)(3)(B) that a “defendant brought back to the District for any hearing conducted under this section shall be held in the Correctional Treatment Facility.” Rather than mandating detention and a particular placement, PDS recommends the following language: “A defendant brought back to the District under this section, if detained, shall be placed in a manner that maximizes programming and educational supports.”

First Draft of Report No. 59, Endangerment with a Firearm

PDS recommends that the statute and commentary make clear that this offense merges with any completed offense or inchoate offense, such as attempt, where part of the government's proof is evidence of the discharge of a firearm. For example, the endangerment with a firearm offense should merge with any homicide or assault or a robbery offense where the death or injury was caused by a projectile from a firearm. Similarly, the endangerment with a firearm offense should merge with any offense, such as menacing, first degree sexual assault, or a human trafficking offense, where the menacing or coercive threat involved the discharge of a firearm. While presumably, these offenses would merge pursuant to the general merger provision at RCC § 22E-214, PDS wants it made clear that this offense, with no precedent in the current criminal code, merges with other offenses as explained above. The endangerment with a firearm offense overlaps with many other criminal offenses. A primary mandate of the CCRC is to create a reform criminal code that reduces such overlap. Failing to address explicitly the overlap/merger issues created by this new offense would threaten to undo much, if not most, of the work the CCRC has done to reduce overlap amongst and between weapons offenses and offenses against persons.

Memorandum

Michael R. Sherwin
Acting United States Attorney
District of Columbia



Subject: Comments to D.C. Criminal Code Reform Commission for First Draft of Reports #53–59, Second Draft of Reports #19, 27, and 35, and Third Draft of Report #41

Date: June 19, 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 Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the CCRC's First Draft of Reports #53–59, the CCRC's Second Draft of Reports #19, 27, and 35, and the CCRC's Third Draft of Report #41. USAO reviewed these documents and makes the recommendations noted below.¹

First Draft of Report #54—Prostitution

1. USAO recommends modifying the expungement provisions to allow prosecutors to have access to these records.

In RCC § 22E-4401(c) (Prostitution) and RCC § 22E-4402(b) (Patronizing Prostitution), the CCRC makes proposals regarding expungement of records in certain circumstances. In its April 29, 2020 comments on the First Draft of Report #50 (at 18–19), OAG made recommendations regarding an identical proposal in RCC § 48-004.01a (Possession of a Controlled Substance). USAO agrees with OAG's comments that prosecutors and law enforcement need to have access to these nonpublic records. The same rationale applies to Possession of a Controlled Substance, and to Prostitution and Patronizing Prostitution. USAO recommends that, in lieu of expungement, the CCRC create a sealing provision for these offenses. Sealing would accomplish many of the goals of this provision, including lack of public access to these records. Expungement would have adverse impacts that are not immediately apparent. This would include an impact on USAO's ability to locate and disclose relevant *Brady* material. Sealing would help alleviate those *Brady* concerns. Closed files, including those that do not result in a conviction, sometimes contain *Brady* information, and USAO obtains that information from closed files. If those files were expunged, the government would not be able to access that material either for its own investigatory purposes or to disclose to defense. This would be a significant detriment to the defense at trial, and would preclude the government from carrying out its obligations regarding exculpatory information. Exculpatory material can be

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

present even in these relatively low-level misdemeanor offenses. For example, if a case was originally investigated as a felony offense, a witness may have testified in the grand jury and perjured himself or herself. If a case went to trial as a misdemeanor offense, a witness may have perjured himself or herself at trial, or, regardless of whether it went to trial, a witness may have made inconsistent statements to police or prosecutors that could be exculpatory. The government must be able to access those prior statements to assess a witness's credibility and to make disclosures to defense. Finally, a requirement that USAO or federal law enforcement agencies expunge records may violate the Home Rule Act, as the DC Council cannot alter the authority or duties of a federal agency.

First Draft of Report #55—Failure to Appear and Violation of Conditions of Release Offenses

1. USAO recommends amending the Commentary to RCC § 23-1329A—Criminal Contempt for Violation of a Release Condition.

In the Commentary to this offense, a footnote provides: “Disobedience of these and other court orders are also punished under D.C. Code §§ 11-741 and 11-944. *See Caldwell v. U.S.*, 595 A.2d 961, 965–66 (D.C. 1991). The statute does not apply to a person who is detained. *That is, a person cannot be subject to pretrial or presentencing conditions if they are detained in the same case. For example, no statutory or other authority exists under District law for a judicial officer to order a defendant held at D.C. Jail and order that the defendant have no contact with a witness.*” (First Draft of Report #55 at 18 n.4 (italics added).) USAO recommends that the CCRC remove the italicized sentences from the Commentary. Although the CCRC appropriately notes that *this* offense is limited to violations of conditions where the defendant is not detained, it is not accurate to state that there is *no* authority under District law for a judicial officer to order a defendant held at D.C. Jail and order that the defendant have no contact with a witness. A judge may issue an order other than one listed in D.C. Code § 23-1321, and, as the footnote discusses earlier, a court can punish violations of other court orders under the general contempt provisions of D.C. Code §§ 11-741 and 11-944. D.C. Code § 23-1330 further provides: “Nothing in this subchapter shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt.”

First Draft of Report #57—Second Look

1. USAO recommends that the CCRC not adopt this provision.

As this proposal would significantly expand second look review from current law, this proposal would affect many cases. Many victims and their families would be affected. Victims are not a monolith voice, and may have vastly differing views on what they want to see happen in a case in which they or a family member were victimized. Many victims, however, are opposed to a defendant's early release, or may require support services beyond those currently available that would enable them to navigate this second look process and/or a defendant's early release. Further, given the gravity of the relief sought in these motions—that is, the early release of a defendant who committed what is likely to have been a serious, violent offense—USAO is concerned about whether USAO and Superior Court will have sufficient resources available to

thoroughly address and litigate these important motions. Finally, USAO is concerned about limited support systems available to defendants who are released early and who transition back to the community following release that would enable them to succeed.

USAO also has concerns regarding the statutory factors that a court must consider, including the fact that the “nature of the offense” is not an expressly enumerated factor for a court to consider. Given that the CCRC, however, notes that its recommendation is based on current law (Commentary at 2 n.1), USAO will address these factors more fully at the appropriate time.

Second Draft of Report #35—Cumulative Update to Sections 201–213 of the Revised Criminal Code

1. USAO recommends removing subsection (c)(2) from RCC § 22E-204.

In an earlier report, the CCRC proposed that this subsection provide that a person’s conduct is the legal cause of a result if the result is “not too dependent upon another’s volitional conduct, to have a just bearing on the person’s liability.” In its May 20, 2019 comments on this section, USAO recommended deleting this quoted language. The CCRC modified its proposal, and subsection (c)(2) now provides: “When the result depends on another person’s volitional conduct, the actor is justly held responsible for the result.”

Determining whether one is “justly” held responsible remains vague, and suffers from many of the same concerns previously articulated by USAO in response to the earlier draft. The Commentary notes this difficulty in precision, stating: “There is no precise formula for determining the point at which intervening influences become so great as to break the causal chain between a defendant’s conduct and the prohibited result.” (Second Draft of Report #35 at 20.)

The interpretive factors suggested in the Commentary explaining this provision do not resolve this vagueness. For example, the Commentary discusses the “inherent wrongfulness of the conduct.” (Second Draft of Report #35 at 20.) This language, however, does not clarify the standard, and introduces additional layers of imprecision, both as to (1) how to measure the “inherent wrongfulness” of particular conduct, and (2) how “inherently wrongful” conduct must be in order to support legal causation. Further, the wrongfulness of the conduct is not related to causation. The Commentary also discusses the “desire to cause the prohibited result.” (*Id.*) Likewise, this language is not related to causation, but instead pertains to the defendant’s *mens rea*. It also runs counter to the principle behind causation based on reasonable foreseeability, which arises almost exclusively in situations where the defendant did *not* intend the result, but is nonetheless responsible for having caused it because it was reasonably foreseeable.

We agreed that the third factor discussed in the Commentary, the passage of time, may be an attenuating factor. USAO took this position in *Fleming v. United States*, 224 A.3d 213, 224 (D.C. 2020) (*en banc*) (“Although the United States in this case initially appeared to argue that reasonable foreseeability by itself sufficed to establish proximate cause in the [urban gun battle] context, the United States acknowledged at oral argument that concepts of temporal attenuation

are also relevant. For example, the United States took the position that a person who started a deadly feud between two groups might not properly be held criminally responsible for reasonably foreseeable killings that took place years or even a day after the person’s initial conduct.”). Given that attenuation principles are already well-established in the case law analyzing reasonable foreseeability, and would probably be used to interpret when to “justly” hold someone responsible, it would be clearer to refer directly to “attenuation” rather than using “justly” as an undefined but roughly equivalent term.

We believe that attenuation principles are properly encompassed within the “reasonable foreseeability” analysis, without the need for a separate provision; and to avoid ambiguity, this could be set out expressly in the Commentary. But if the CCRC disagrees with USAO’s recommendation to delete subsection (c)(2) in its entirety, USAO recommends that subsection (c)(2) be modified as follows:

“When the result depends on another person’s volitional conduct, ~~the actor is justly held responsible for the result~~ is not attenuated by that conduct, or by the passage of time.”

Third Draft of Report #41—Ordinal Ranking of Maximum Penalties

1. USAO recommends increasing the penalty for RCC § 22E-4120—Endangerment with a Firearm.

We agree with the statements in the Commentary that “[t]he current D.C. Code provides significant liability for possessing or carrying a weapon illegally, irresponsibly, or during a crime but very little additional liability for firing a gun,” and that public shootings that are not otherwise part of a crime against property or persons are “distinctly terrifying.” (First Draft of Report #59 at 3.) The CCRC has proposed that Endangerment with a Firearm be a Class 9 felony, with a maximum of 3 years’ incarceration. USAO recommends that the maximum penalty be increased to account for the significant danger created by discharging a firearm. Even where the defendant does not intend to hit someone, discharging a firearm in a manner that either creates a substantial risk of death or bodily injury to another person, or that is in a location that is open to the general public, etc. at the time of the offense is serious conduct that merits a higher maximum penalty.

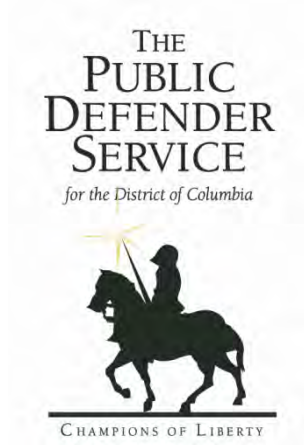
2. USAO recommends increasing the penalties for RCC § 23-586—Failure to Appear after Release on Citation or Bench Warrant Bond, and RCC § 23-1327—Failure to Appear in Violation of a Court Order.

The CCRC has proposed that 1st Degree Failure to Appear after Release on Citation or Bench Warrant Bond be a Class B misdemeanor, punishable by a maximum of 180 days’ incarceration, and that 2nd Degree Failure to Appear after Release on Citation or Bench Warrant Bond be a Class D misdemeanor, punishable by a maximum of 30 days’ incarceration. Under current law, the corollary to 1st degree is a felony punishable by a maximum of 5 years’ incarceration, and the corollary to 2nd degree is a misdemeanor punishable by not more than the maximum provided for the offense for which such citation was issued. *See* D.C. Code § 23-585(b). The CCRC has proposed that 1st Degree Failure to Appear in Violation of a Court Order

be a Class A misdemeanor, punishable by a maximum of 1 year incarceration, and that 2nd Degree Failure to Appear in Violation of a Court Order be a Class C misdemeanor, punishable by a maximum of 90 days' incarceration. Under current law, the corollary to 1st degree is a felony punishable by a maximum of 5 years' incarceration, and the corollary to 2nd degree is a misdemeanor punishable by a maximum of 180 days' incarceration. *See* D.C. Code § 23-1327(a).

For both offenses, the maximum penalty needs to be sufficiently high to incentivize the defendant's appearance. If it is too low, a defendant may make a calculation that it is better not to appear and not have to face the consequences of the underlying criminal charge. Of course, a defendant is still accountable for the underlying criminal charge if they fail to appear, but, in certain circumstances, it becomes more difficult for the government to proceed after a defendant has failed to appear. This is particularly true when the defendant has failed to appear for a lengthy time, which may impede the government's ability to locate essential witnesses, and may lead to witnesses' memories fading.

M E M O R A N D U M



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

From: Public Defender Service for the District of
Columbia

Date: July 17, 2020

Re: Comments on First Draft of Report No. 60,
Execution of Public Duty, Lesser Harm, and
Temporary Possession Defenses

The Public Defender Service supports the establishment of the temporary possession affirmative defense, which the CCRC proposes in the First Draft of Report No. 60.¹ PDS recommends that the CCRC expand the defense in two significant ways.

First, the temporary possession defense should apply when the actor possesses the item while acting in lawful self-defense or defense of others. It is easy to imagine a number of scenarios where the actor's possession of a weapon would not be blameworthy but which would not be excused by the temporary possession defense as it is currently drafted. For example:

- X and Y get into an argument; Y attempts to stab X with a knife. X struggles with Y. During the struggle, X stabs Y and then fully gains possession of the knife.
- X is walking home from baseball practice when he sees Y attempting to sexually assault Z. X wields his baseball bat in a threatening manner towards Y, who ceases the assault and runs off.
- Y attempts to rob X with a pistol. Y trips and falls and loses control off the pistol. X picks up the pistol and points it at Y to prevent Y from escaping until the police arrive.

In each of the above scenarios, X's conduct likely constitutes second or third degree carrying a dangerous weapon pursuant to RCC § 22E-4102(b). While X could defend against an assault charge by claiming either self-defense or defense of others, neither is a defense to weapon possession.² It

¹ See RCC § 22E-502 (Report No. 60, pp. 13 – 19).

² The CCRC has a placeholder in the table of contents for Self-Defense and Defense of Others, at § 22E-404 and § 22E-405 respectively, but CCRC has not yet shared a draft of either defense with the Advisory Group. PDS would welcome a construction of both defenses that spares from liability not just the assaultive or threatening conduct but also other conduct that is essentially tied to the defense. For example, in addition to the weapon possession scenarios offered above, consider if, instead of pointing the pistol at

might be the case that none of the above scenarios would result in a prosecutor bringing charges against X; however, the CCRC should not leave it to prosecutorial discretion to prevent the injustice that would be created by a defense that it drafted too narrowly. Rather, CCRC should expand the Temporary Possession defense to cover conduct that is clearly not blameworthy, to wit: when the actor possesses a weapon while acting in lawful self-defense or defense of others.

Second, PDS recommends not limiting the Temporary Possession defense to only weapons and controlled substances offenses. This is a new defense in the District and it represents an excellent policy idea. As noted above, if law enforcement or the charging prosecutor is aware of the circumstances, such as the actor's temporary possession with intent to turn the item into law enforcement or to permanently dispose of the item, the actor might not be arrested or charged with a possession offense. Rather than rely on law enforcement's ability perceive the circumstances and willingness to exercise their discretion in response, there should be a codified defense that ensures the defendant has the opportunity to show – and the burden of doing so by a preponderance of evidence – that their conduct was not blameworthy. That is true whether the item is a weapon or a controlled substance or whether the item is an obscene image of a minor or an open container of alcohol.

PDS proposes that rather than define the phrase “predicate possessory or distribution offense” with an exclusive list of offenses, particularly a list that only includes weapons and controlled substances offenses, the phrase should be defined to apply to “any offense where the gravamen of the criminal conduct is the possession or distribution of contraband.” In addition to the weapons and controlled substances offenses already listed, this definition would then also include RCC § 22E-1808, possession of an obscene image or a minor, and RCC § 25-1001, possession of an open container or consumption of alcohol in a motor vehicle. It would also apply to offenses that are added to the revised code after its adoption by the District. However, the definition would not include offenses such as RCC § 22E-2401, possession of stolen property, because the gravamen of the offense is not mere possession, rather the actor must also have the intent to deprive an owner of the property; or to RCC § 22E-2105, unlawful creation or possession of a recording, because the actor, in addition to possessing the contraband recording, must have the intent to sell, rent, or otherwise use the recording for commercial gain or advantage. The definition would not include RCC § 22E-2702, possession of tools to commit property crime, because in addition to possessing the contraband tools, the actor must have the intent to use the tools to commit one of the enumerated offenses; nor would the definition include RCC § 48-904.10, possession of drug manufacturing paraphernalia, because in addition to possessing the paraphernalia, the actor would have to have the intent to use the paraphernalia to manufacture a controlled substance. Because distribution is the transfer of possession, distribution offenses should also be generally included and generally defined. For example, if the “distribution” of an obscene image of a minor is the transfer of the possession of the image from X to Y, who is the supervisor of X or the person in charge of the location where the item was found, for Y to take appropriate and lawful action, then X's conduct is as blameless as if the item being “distributed” were a controlled substance or a dangerous weapon.

Y to prevent Y's escape, X picks up Y's dropped pistol and runs off with it. In addition to a weapon possession charge, X's conduct may technically constitute theft as well.

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 19, 2020

SUBJECT: First Draft of Report #60 – Execution of Public Duty, Lesser Harm, and
Temporary Possession Defenses

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 #60, Execution of Public Duty, Lesser Harm, and Temporary Possession Defenses.¹

COMMENTS ON THE DRAFT REPORT

RCC § 22E-401, Lesser Harm

This provision states:

- (a) *Defense.* A person does not commit an offense when, in fact:
 - (1) The person reasonably believes the conduct constituting the offense is necessary, in both its nature and degree, to avoid a specific, identifiable harm;

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 later hearing that the Council may have on any legislation that may result from the Report.

- (2) The specific, identifiable harm that the person seeks to avoid significantly exceeds the harm prohibited by the law the person is charged with violating.
- (b) *Exceptions.* This defense is not available when:
 - (1) Recklessness is the culpable mental state for an objective element of the offense and the person is reckless in bringing about the situation requiring a choice of harms;
 - (2) Negligence is the culpable mental state for an objective element of the offense and the person is negligent in bringing about the situation requiring a choice of harms; or
 - (3) The conduct constituting the offense is expressly addressed by another available defense, affirmative defense, or exclusion from liability.
- (c) *Definitions.* The term “objective element” has the meaning specified in RCC § 22E-201; the terms “recklessly” and “negligently” have the meanings specified in RCC § 22E-206; and the term “in fact” has the meaning specified in RCC § 22E-207.

There are two statements made in the Commentary explaining this offense that OAG believes should be in the text of the statute because they are not necessarily implicated by a strict reading of the text. The first, is that “A necessity defense excuses criminal actions taken in response to exigent circumstances.” [emphasis added] Webster’s dictionary defines “exigent” as “requiring immediate aid or action.” However, paragraph (a) does not appear to have this requirement.

The second statement is the limitation that the “Conduct is not necessary if the greater harm can be avoided by “a reasonable legal alternative available to the defendants that does not involve violation of the law.” Like the Commentary referring to exigent circumstances, the requirement that there not be a reasonable legal alternative is substantive in nature and does not necessarily flow from a plain reading of the substantive text.

OAG proposes that RCC § 22E-401, Lesser Harm, be redrafted to read as follows:

- (a) *Defense.* A person does not commit an offense when, in fact:
 - (1) The criminal actions were taken in response to exigent circumstances;
 - (2) The person reasonably believes the conduct constituting the offense is necessary, in both its nature and degree, to avoid a specific, identifiable harm; and
 - (3) The specific, identifiable harm that the person seeks to avoid significantly exceeds the harm prohibited by the law the person is charged with violating.
- (b) *Exceptions.* This defense is not available when:
 - (1) Recklessness is the culpable mental state for an objective element of the offense and the person is reckless in bringing about the situation requiring a choice of harms;

- (2) Negligence is the culpable mental state for an objective element of the offense and the person is negligent in bringing about the situation requiring a choice of harms; ~~or~~
 - (3) The conduct constituting the offense is expressly addressed by another available defense, affirmative defense, or exclusion from liability ~~or~~
 - (4) There is a reasonable legal alternative available to the person that does not involve a violation of the law.
- (c) *Definitions.* The term “objective element” has the meaning specified in RCC § 22E-201; the terms “recklessly” and “negligently” have the meanings specified in RCC § 22E-206; and the term “in fact” has the meaning specified in RCC § 22E-207.

The Commentary states that “Paragraph (a)(2) requires that the harm to be avoided is significantly greater than the harm prohibited by the law the person is charged with violating.” However, it does not provide guidance as to what principled legal metrics a judge uses to fairly decide that one reasonably-feared harm is greater than another. The text or the Commentary should supply a legal principle that would guide how a judge conducts this weighing. OAG has not found any local appellate precedent that sheds light on this question.

Finally, in the discussion in the Commentary about paragraph (a)(1) it states, “The question of necessity is not committed to the private judgment of the person engaging in the conduct, it is a mixed question of fact and law for determination at trial. [footnotes omitted]. However, paragraph (a)(1) states, “The person reasonably believes the conduct constituting the offense is necessary, in both its nature and degree, to avoid a specific, identifiable harm.” At first glance, it appears that these two phrases may be in conflict; how can it be both what a reasonable person believes and at the same time not be committed to the private judgment of the person? OAG believes that the two phrases can be reconciled if the Commentary is tied to the term “reasonably” in the phrase “reasonably believes.” The Commentary should clarify this issue.

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 19, 2020

SUBJECT: First Draft of Report #62 – Impersonation of a District Official

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 #62, Impersonation of a District Official.¹

COMMENTS ON THE DRAFT REPORT

RCC § 22E-3201, Impersonation of a District Official, states in relevant part:

- (a) *First degree.* An actor commits first degree impersonation of a District official when that actor:
 - (1) With intent to:
 - (A) Deceive any other person as to the actor’s lawful authority; and
 - (B) Receive a personal benefit of any kind, or to cause harm to another;

While OAG generally agrees with this formulation, we believe that subparagraph (a)(1)(B) is too limited. It requires that the actor “receive a personal benefit.” There may be times, however, where the actor is impersonating a District official to benefit someone else. The following hypothetical illustrates this point. Say a tenant is two months behind on his rent and the landlord wants him out. A friend of the landlord lies and tells the tenant that he is a high ranking OAG

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 later hearing that the Council may have on any legislation that may result from the Report.

prosecutor and that unless the tenant has moved out by the end of the week he would criminally prosecute the tenant.² While the actor would not receive a personal benefit, the landlord would. To cover this type of situation, OAG proposes that subparagraph (a)(1)(B) be redrafted to state, “That any person receive a personal benefit of any kind, or to cause harm to another.”

² A high ranking OAG prosecutor is a “Public official” under D.C. Code 1-1161 (47) (I), incorporated into the RCC via RCC § 22E-701, by virtue of being a District of Columbia Excepted Service employee.

Memorandum

Michael R. Sherwin
Acting United States Attorney
District of Columbia



Subject: Comments to D.C. Criminal Code
Reform Commission for First Draft of Reports
#60–62

Date: July 20, 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 Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the CCRC’s First Draft of Reports #60–62. USAO reviewed these documents and makes the recommendations noted below.¹

First Draft of Report #60—Execution of Public Duty, Lesser Harm, and Temporary Possession Defenses

1. USAO recommends, for the Lesser Harm Defense, clarifying consideration of whether a specific, identifiable harm is “imminent” or “immediate.”

The CCRC Commentary states that the lesser harm defense statute clearly changes District law by not requiring that the harm to be avoided be an immediate harm. (Commentary at 7.) As the Commentary notes (at 7 & n.18), the necessity defense under current law requires evidence of “a specific, *immediate*, identifiable harm.” But even though the CCRC’s proposal would not include the word “immediate” or “imminent” in the plain language of the statute, consideration of whether a specific, identifiable harm is immediate or imminent would still be considered as part of the lesser harm analysis.

The commentary to the Model Penal Code choice of evils defense provides: “It is true that genuine necessity rests on the unavailability of alternatives that would avoid both evils, and that *typically when the evil is not imminent some such alternative will be available*, but it is a mistake to erect imminence as an absolute requirement, since there may be situations in which an otherwise illegal act is necessary to avoid an evil that may occur in the future.” Model Penal Code § 3.02 cmt. at 17 (1985) (emphasis added). Thus, although the Model Penal Code recommends against establishing imminence as an absolute requirement, it contemplates consideration of imminence in assessing whether an alternative is available.

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

The CCRC Commentary to this defense provides: “Conduct is not necessary if the greater harm can be avoided by a reasonable ‘legal alternative available to the defendants that does not involve violation of the law.’” (Commentary at 6.) Consistent with the Model Penal Code, when evaluating if there is a reasonable legal alternative available, an important consideration would be whether the specific, identifiable harm to be avoided is “imminent” or “immediate.” The CCRC Commentary recognizes the importance of considering imminence when it states: “*In unusual circumstances*, conduct may be necessary to avoid a much later but otherwise inevitable harm.” (Commentary at 7 (emphasis added).)

USAO therefore recommends that the Commentary clarify that, although imminence/immediacy of the harm to be avoided may not be an absolute requirement, consideration of imminence/immediacy of the harm to be avoided is an important factor when assessing whether the actor reasonably believes the conduct constituting the offense is necessary, in both its nature and degree, to avoid that harm.

Further, as the CCRC drafts additional justification defenses, including self-defense and defense of others, USAO may have additional comments on this defense and any interplay between the justification defenses.

First Draft of Report #62—Impersonation of a District Official

1. USAO recommends renaming this offense to “Impersonation of an Official.”

This offense includes impersonation of various District officials, but also includes impersonation of various federal officials, including prosecutors at USAO, federal law enforcement officers, and federal court judges. To eliminate any potential future confusion as to whether federal officials are included in this offense, USAO recommends renaming this offense to “Impersonation of an Official,” rather than “Impersonation of a District Official.”

2. USAO recommends modifying the language of subsections (a)(1)(B) and (b)(1)(B).

With USAO’s changes, subsections (a)(1)(B) and (b)(1)(B) would provide:

“(B) ~~Receive a personal benefit of any kind; or to cause harm to another~~ Cause a benefit, or harm, to any person;”

As currently drafted, a defendant “receiv[ing] a personal benefit” might not include cases where a defendant acts not for his or her own benefit, but for the benefit of someone else, such as a friend or relative. It is appropriate to include liability where a defendant impersonates an official for the benefit of someone else, as that can be equally culpable as impersonating an official for the benefit of himself or herself. USAO therefore recommends modifying the language to include causing a benefit to any person.

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 9, 2020

SUBJECT: First Draft of Report #63 –Misrepresentation as a District of Columbia Entity

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 #63 –Misrepresentation as a District of Columbia Entity¹

COMMENTS ON THE DRAFT REPORT

Both first and second degree Impersonation of a District Official, RCC § 22E-3201, contain the following elements:

- (a) An actor commits ... impersonation of a District official when that actor:
 - (1) With intent to:
 - (A) Deceive any other person as to the actor's lawful authority; and
 - (B) Receive a personal benefit of any kind, or to cause harm to another;
 - (2) Knowingly and falsely represents themselves to currently hold lawful authority as a:
 - (A) Judge of a federal or local court in the District of Columbia;
 - (B) Prosecutor for the United States Attorney for the District of Columbia, or the Attorney General for the District of Columbia;
 - (C) Notary public;
 - (D) Law enforcement officer;

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.

- (E) Public safety employee;
- (F) District official;
- (G) District employee with power to enforce District laws or regulations; or
- (H) Person authorized to solemnize marriage...

In addition, the first degree offense includes the element, in subparagraph (a)(3) that the actor “Performs the duty, exercises the authority, or attempts to perform the duty or exercise the authority pertaining to a person listed in paragraph (a)(2).” It is difficult to imagine scenarios where an actor is actually acting as a District official that the complainant would not be harmed in some way by the actor’s actions. For example, a complainant who relies on the representation that someone is a notary is necessarily harmed if that person believed that the actor who “notarized” their papers was not, in fact, a notary and that the papers were not actually notarized in compliance with the law.

Similarly, it is hard to imagine situations where a person would deceive another person by representing themselves to be a District official without receiving some personal benefit. Why else would they be involved in the deception? And conversely, if a person did deceive a complainant by impersonating a District official, say by claiming that the actor was a judge, there is no reason to excuse that deception just because the actor did not receive a personal benefit. OAG, therefore, recommends that the element of “Receiv[ing] a personal benefit of any kind, or to cause harm to another” be deleted.

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 9, 2020

SUBJECT: First Draft of Report #65 – Contributing to the Delinquency of a Minor

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 #65, – Contributing to the Delinquency of a Minor.¹

COMMENTS ON THE DRAFT REPORT

OAG has three recommendations concerning RCC § 22E-4601, Contributing to the Delinquency of a Minor. The first relates to the second degree offense of causing a child to engage in conduct constituting chronic truancy. RCC § 22E-4601(b) states:

(b) An actor commits second degree contributing to the delinquency of a minor when that actor:

- (1) In fact, is at least 18 years of age and at least four years older than the complainant;
- (2) Recklessly disregards the fact that the complainant is under the age of 18 years; and
- (3) Knowingly engages in one of the following:
 - (A) Assists the complainant with the planning or commission of conduct constituting chronic truancy or a violation of a court order;
 - (B) Encourages the complainant to engage in specific conduct constituting chronic truancy or a violation of a court 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.

- (C) Commands, requests, or tries to persuade the complainant to engage in or aid the planning or commission of specific conduct, which, if carried out, will constitute chronic truancy or a violation of a court order, or an attempt to commit chronic truancy or a violation of a court order; or
- (D) Causes the complainant to engage in conduct constituting chronic truancy or a violation of a court order.

The provisions that criminalize assisting, encouraging, commanding, causing... a child to be truant do not distinguish between a parent or guardian, on the one hand, and someone who is not responsible for raising the child, on the other. OAG strongly believes the children who are truant - and their parents - should receive services to not only address the truancy, but the underlying issues that resulted in the unexcused absences as well.² While it is a sign of family disfunction, that can be addressed, for a parent or guardian not to send their child to school, there is no excuse for an adult non-parent or guardian to discourage school attendance.

OAG would note that DC Code § 38-203, referenced in footnote 11, gives OAG jurisdiction to prosecute parents and guardians for failing to send their child to school. To avoid the overlapping of offenses and improve proportionality, OAG recommends that parents and guardians be excluded from the provisions of RCC § 22E-4601 that pertain to truancy. One way that the CCRC could do that is to redraft paragraph (c), Exclusions of from liability, by renumbering that provision as (c)(1)³ and exempting parents and guardians under a new (c)(2) as follows:

- (c) *Exclusions from liability.* An actor does not commit an offense:
 - (1) Under this section when, in fact, the conduct constituting a District offense or a comparable offense in another jurisdiction, constitutes an act of civil disobedience; or
 - (2) Relating to truancy, when the actor is, in fact, a person who is required to send a child to school pursuant to the Compulsory School Attendance Act and is subject to the enforcement provision under D.C. Code § 38-203.

OAG's second recommendation concerns subparagraph (a)(3)(B) and the language that is used to ensure that the revised offense includes criminal liability for an actor who encourages a child to possess or consume alcohol. That subparagraph makes it an offense for an actor who "Knowingly encourages the complainant to engage in specific conduct that, in fact, constitutes a District offense or a comparable offense in another jurisdiction." OAG notes that the

² As to parents and guardians, OAG believes that families are better served utilizing a prevention model. Towards that end, starting in January 2018, OAG unveiled the Abating Truancy Through Engagement and Negotiated Dialogue (ATTEND) Mediation Program which is a pre-papering (prior to charges being filed) diversion program that affords parents a venue to openly share their challenges and attendance issues, the ability to communicate directly with key stakeholders (school officials) and receive linkage to appropriate community-based services.

³ RCC § 22E-4601(c) currently states, "*Exclusions from liability.* An actor does not commit an offense under this section when, in fact, the conduct constituting a District offense or a comparable offense in another jurisdiction, constitutes an act of civil disobedience.

Commentary makes clear that it is the Commission’s intent that this remain criminal behavior. OAG bases this understanding on the following explanation in the Commentary:

Third, the revised contributing to the delinquency of a minor statute no longer includes as a discrete basis of liability encouraging or causing a minor to possess or consume alcohol. The current D.C. Code contributing to the delinquency of a minor statute specifically prohibits encouraging or causing a minor complainant to “[p]ossess or consume alcohol.” The revised contributing to the delinquency of a minor statute prohibits assisting, encouraging, or soliciting a minor complainant to engage in conduct that constitutes a District “offense,” which includes the underage possession of alcohol law in current D.C. Code § 25-1002. It is unnecessary to codify in the revised statute a provision that is specific to encouraging or causing a minor to possess or consume alcohol. This change improves the clarity of the revised statutes.

Their point is driven home in footnote 59, which states:

Current D.C. Code § 25-1002 prohibits a person under 21 years of age from “purchas[ing], attempt[ing] to purchase, possess[ing], or drink[ing] an alcoholic beverage in the District, except as provided under subchapter IX of Chapter 7.” D.C. Code § 22-1002(a). A violation of current D.C. Code § 25-1002 is a “misdemeanor,” although the statute also states that “No person under the age of 21 shall be criminally charged with the offense of possession or drinking an alcoholic beverage under this section, but shall be subject to civil penalties under subsection (e) of this section.” D.C. Code § 25-1002(a), (c)(4)(D). Although a minor is not subject to criminal prosecution, a violation of current D.C. Code § 25-1002(a) is still an “offense,” and the RCC contributing to the delinquency of a minor statute treats it as such. Assisting, encouraging, or soliciting a minor complainant to engage in conduct that violates current D.C. Code § 25-1002(a) is sufficient for liability under the RCC contributing to the delinquency of a minor statute.

As noted above, OAG’s concerns are not with the substance of the Commission’s recommendation, but rather with the drafting. While it is true, that D.C. Code § 25-1002 (a) does not specifically state that it is not an “offense” for a person under 21 to possess or drink alcohol, it does limit the enforcement of actions against those persons to civil penalties. It could be argued that the language in D.C. Code § 25-1002 (a) that provides for civil penalties means that it is no longer an “offense” for a person who is under the age of 21 to possess or drink alcohol.⁴ To forestall arguments that the plain meaning of the statute precludes the Court from looking at

⁴ An offense has been defined as “A crime or misdemeanor; a breach of the criminal laws. *Moore v. Illinois*, 14 How. 13, 14 L. Ed. 306; *lilies v. Knight*, 3 Tex. 312; *People v. French*. 102 N. Y. 583, 7 N. E. 913; *State v. West*, 42 Minn. 147, 43 N. W. 845. It is used as a genus, comprehending every crime and misdemeanor, or as a species, signifying a crime not indictable, but punishable summarily or by the forfeiture of a penalty. In re *Terry (C. C.)* 37 Fed. 649.” See <https://thelawdictionary.org/offense/>.

the legislative history, as contained in the Commentary, to conclude that it was the drafter's intent that this behavior remain criminal, OAG recommends that the text of RCC § 22E-4601(a)(3)(B) be redrafted to say, "Knowingly encourages the complainant to engage in specific conduct that, in fact, constitutes a District offense, including a violation of D.C. Code § 25-1002, or a comparable offense in another jurisdiction."

OAG's final recommendation has to do expanding the explanation concerning OAG's lack of prosecutorial role in the new statute. While OAG does not disagree with the proposal, given the evolving nature of the analysis concerning the distribution of prosecutorial authority in the District⁵, we believe that a fuller explanation is warranted. OAG proposes that the Commentary be amended as follows:

Eighth, the revised contributing to the delinquency of a minor statute does not ~~assign mention prosecutorial authority to the Office of the Attorney General for the District of Columbia (OAG) as having a prosecutorial role, which makes it an offense that~~ leaves the United States Attorney for the District of Columbia (USAO) prosecutes as the sole prosecutor for all of the offenses contained in that statute. The current D.C. Code contributing to the delinquency of a minor statute states that OAG "shall" prosecute all violations that have a maximum term of imprisonment of six months, while USAO shall prosecute violations subject to higher sentences.⁶ The legislative history for the current D.C. Code contributing to the delinquency of a minor offense indicates that the Council regarded it as a new offense,⁷ and the sole rationale for assignment of prosecutorial authority to OAG was the likelihood that OAG would be involved in prosecution of the underlying violations by the minor.⁸ However, the legislative history failed to

⁵ See *In re Prosecution of Nicco Settles*, 218 A.3d 235 (D.C. 2019).

⁶ The current D.C. Code contributing to the delinquency of a minor statute states that "The Attorney General for the District of Columbia, or his or her assistants, shall prosecute a violation of subsection (a) of this section for which the penalty is set forth in subsection (c)(1) of this section." D.C. Code § 22-811(e). The reference to paragraph "(c)(1)" appears to be an error. There is no paragraph (c)(1) in the current statute and subsection (b) codifies the penalties. Per paragraph (b)(1), all violations of the current D.C. Code contributing to the delinquency of a minor statute, except contributing, causing, etc., a minor to commit a felony, have a maximum term of imprisonment of 6 months, provided that the enhanced penalties for prior convictions, serious bodily injury, or death do not apply. D.C. Code § 22-811(b)(1) ("Except as provided in paragraphs (2), (4) and (5) of this subsection, a person convicted of violating subsection (a)(1)-(6) of this section shall be fined not more than the amount set forth in § 22-3571.01, or imprisoned for not more than 6 months, or both.").

⁷ See Testimony of Robert J. Spagnoletti, Attorney General for the District of Columbia, Committee on the Judiciary Report on Bill 16-247, the "Omnibus Public Safety Act of 2006" at 27 ("The District does not have a law that prohibits contributing to the delinquency of a minor.").

⁸ *Id.* at 28-29 ("The misdemeanor offense would be prosecuted by OAG and the felony offense would be prosecuted by the USAO. The rationale for this bifurcated system of prosecution is based on the likelihood that OAG would be involved in the criminal and/or civil prosecution of most of the underlying offenses that would give rise to a misdemeanor violation of this Act, while the USAO is better situated to prosecute the felony violations.").

note that, in 1963, the authority to prosecute the crime of contributing to the delinquency of a minor was provided to OAG (then Corporation Council) by Congress under D.C. Code §§ 11-1583, 11-1554. Public Law 88-241, December 23, 1963. D.C. Code § 11-1554 provided that “[t]he Juvenile Court has original and exclusive jurisdiction to determine cases of persons 18 years of age or over charged with willfully contributing to, encouraging, or tending to cause by any act or omission, a condition which would bring a child under the age of 18 years within the provisions of section 11-1551.” Under D.C. Code § 11-1583 (a)(3), the Corporation Counsel of the District of Columbia or any of his assistants shall “prosecute cases arising under sections 11-1554 and 11-1556 and the sections specified by section 11-1557, in which a person 18 years of age or over is charged with an offense.”

The Act Reorganizing the District of Columbia Courts, however, replaced the entirety of what was Title 11 of the D.C. Code, and created a Family Division in the Superior Court, which would handle, among others, cases of juvenile delinquency, paternity, support, and intra-family offenses (civil protective orders). Public Law 91-358, July 29, 1970 (“Title 11 of the District of Columbia Code is amended to read as follows” and did not move or restate 11-1551, 11-1554, 11-1557 in any other portion of the D.C. Code). Procedures related to the Family Division in the D.C. Superior Court and in particular, juvenile matters, were moved to Title 16 of the D.C. Code. *Id.* (renaming 11-1551 in 16-2303). While Public Law 91-358 did not specifically state that it was repealing sections 11-1554, 11-1556, and 11-1557, Congress repealed it, as those section did not appear in either Title 11 or 16 and the table in the 1973 version of the D.C. Code stated that these provisions were repealed by the Reorganization Act.

However, controlling DCCA case law based on the Home Rule Act precludes Council assignment of prosecutorial authority to OAG unless the offenses falls into one of the categories in D.C. Code § 23-101(a).⁹ In contrast to current law, the revised contributing to the delinquency of a minor statute does not purport to assign any prosecutorial authority to OAG because doing so appears creates an argument that such assignment would be a violation of District case law based on the Home Rule Act. While There is history of OAG enforcement of this offense, there is no other evidence that the current contributing to the delinquency of a minor statute meets or was intended to meet the exceptions to USAO prosecution for a penal statute in the nature of a police or municipal

⁹ See, generally: *In re Crawley*, 978 A.2d 608 (D.C. 2009); *In re Hall*, 31 A.3d 453, 456 (D.C. 2011); and *In re Settles*, 218 A.3d 235 (D.C. 2019).

regulation, or otherwise. This change improves the enforceability and consistency of the revised statutes.

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 9, 2020

SUBJECT: First Draft of Report #66 - Defense of Self, Others, or Property

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 #66, Defense of Self, Others, or Property.¹

COMMENTS ON THE DRAFT REPORT

RCC § 22E-403. Defense of Self or Another Person

Paragraph (c) contains a nonexclusive list of factors that the factfinder shall consider in determining whether the law enforcement officer reasonably believed the conduct was necessary. Subparagraph (c)(4) states, “Whether the law enforcement officer increased the risk of a confrontation resulting in deadly force being used.” OAG interprets this phrase to mean whether the officer chose to act in ways that increased the risk, rather than whether the law enforcement officer’s mere presence increased the risk of confrontation. The former interpretation is in line with the lead in language in paragraph (c) that “...a factfinder shall include consideration of all of the following when determining whether the actor reasonably believed the conduct was necessary...” The Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020, A23-336, phrased this factor as “Whether any conduct by the law enforcement officer prior to the use of deadly force increased the risk of a confrontation resulting in deadly force being used.” OAG recommends that the Commission model this factor

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.

more closely to the language used in A23-336 to make clear that what is being evaluated is the officer's conduct, not their presence.

The remainder of OAG's recommendations address text in the Commentary. On the bottom of page 4 going into page 5, it states, "A person acting in the heat of passion caused by an assault may actually and reasonably believe something that seems unreasonable to a calm mind and does not necessarily lose a claim of defense or another person by using greater force than would seem necessary to a calm mind." It's true that reasonableness relies heavily on the actor's own perceptions, and those perceptions may be especially imperfect in the heat of the moment. *Lee v. United States*, 61 A.3d 655, 660 (D.C. 2013) makes that clear. It is unclear, however, what it means to "reasonably believe" something in the *heat of passion*. The heat of passion, after all, seems to indicate that passion has overtaken reason. Either the statutory text or the Commentary should clarify what a reasonableness inquiry would look like there.

Referring to paragraph (a), on page 5, it states, "Conduct is not necessary if the harm can be avoided by a reasonable 'legal alternative available to the defendants that does not involve violation of the law...'" Paragraph (a), however, does not incorporate this definition. Given the importance of that statement to the correct interpretation of the statute, OAG suggests that that sentence be used in paragraph (a).

On page 6, the Commentary explains subparagraph (b)(2)(B). Paragraph (b)(2) states, in relevant part, "The actor recklessly brings about the situation requiring the defense, unless, in fact ... The actor's conduct that brought about the situation is speech only." The Commentary states, "Under subparagraph (b)(2)(B), the defense is still available to an initial aggressor who is engaging in speech only." [footnotes omitted] OAG recommends clarifying the comment. Someone "engaging in speech only", discounting menacing speech, is not an aggressor in any ordinary sense of that word. OAG recommends that the Commentary be amended to state, "Under subparagraph (b)(2)(B), the defense is still available to an actor who recklessly brings about the situation requiring the defense when the actor is engaging in speech only" (with the relevant footnotes added back in).

RCC § 22E-404. Defense of Property

On page 14, in referring to paragraph (a), on page 13, it states, "Conduct is not necessary if the harm can be avoided by a reasonable 'legal alternative available to the defendants that does not involve violation of the law...'" Paragraph (a), however, does not incorporate this definition. Given the importance of that statement to the correct interpretation of the statute, and consistent with OAG's recommendation to amend RCC § 22E-403, OAG suggests that that sentence be used in paragraph (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: November 9, 2020

SUBJECT: First Draft of Report #67 - Entrapment, Duress, and Mental Disease or Defect Defenses

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 #67, Entrapment, Duress, and Mental Disease or Defect Defenses.¹

COMMENTS ON THE DRAFT REPORT

RCC § 22E-501. Duress

Paragraph (a) states:

- (a) *Affirmative defense.* It is an affirmative defense that, in fact:
- (1) The actor reasonably believes another person communicated to the actor that the person will cause a criminal bodily injury, sexual act, sexual contact, or confinement to any person;
 - (2) The actor reasonably believes the conduct constituting the offense is necessary, in its timing, nature, and degree, to avoid the threatened criminal harm; and
 - (3) A reasonable person of the same background and in the same circumstances as the actor would comply.

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.

While paragraph (a)(2) includes the phrase “to avoid the threatened criminal harm” paragraph (a)(1) does not mention “the threatened harm.” Paragraph (a)(1) as written appears to refer to an open ended threat, not one that is premised on avoidance of the threatened harm if the actor violates the law. The first paragraph of Criminal Jury Instruction 9.300 DURESS states:

[Name of defendant] must have had a reasonable belief that s/he would suffer immediate serious bodily injury or death if s/he did not [[commit] [participate in] the crime] [[leave] [fail to return to] a correctional institution]² [emphasis added]

To make it clear that the defense of Duress only applies when the action is taken to avoid the threatened harm, OAG recommends that paragraph (a)(1) be redrafted to say, “The actor reasonably believes another person communicated to the actor that unless the actor commits the act constituting the offense the person will cause a criminal bodily injury, sexual act, sexual contact, or confinement to any person.”

Paragraph (b) lists the exceptions to the defense. Subparagraph (1) states, “The person recklessly brings about the situation requiring a choice of harms.” The phrase “brings about” is not defined in the text, nor is it explained in the Commentary.³ OAG recommends that the Commentary describe the contours of that phrase and give examples of situations that fall within and without that requirement.

Subparagraph (b)(3) lists an exception when “The conduct constituting the offense is expressly addressed by another available defense, affirmative defense, or exclusion from liability. The Commentary explains “Paragraph (b)(3) specifies that the defense does not apply in circumstances where the legislature has more specifically addressed the conduct in question in another codified defense or exclusion from liability.” Because, in general, a person may raise multiple defenses, including statutory ones, the Commentary should include examples of the applicability of this exception.

In the Commentary to subparagraph (a)(2) it states, “Conduct is not necessary if it can be avoided by a reasonable ‘[a] legal alternative available to the defendants that does not involve

² The full text of Instruction 9.300 DURESS is:

A person who commits [name of criminal act] because of duress is not guilty of that charge. Duress requires more than simply a fear for one’s safety. It has [two] [three] equally important elements.

1.[Name of defendant] must have had a reasonable belief that s/he would suffer immediate serious bodily injury or death if s/he did not [[commit] [participate in] the crime] [[leave] [fail to return to] a correctional institution] [and]

2.[Name of defendant] must have had a reasonable belief that s/he had no reasonable opportunity to avoid the danger except by [[committing] [participating in] the crime] [[leaving] [failing to return to] the institution] [and]

3.[Name of defendant] must have immediately returned to custody once the threat of harm was no longer imminent.

³ This phrase is repeated in subparagraph (b)(3).

violation of the law.” [footnotes excluded] Given the importance of that statement to the correct interpretation of the statute, OAG suggests that that sentence be used in subparagraph (a)(2).⁴

In the Commentary to subparagraph (b)(4) it states, “For this offense, a defendant must not only prove that duress not only caused them to leave custody but also prove inhibited them from safely returning.” [footnotes omitted] However, in *Stewart v. U.S.*, 370 A.2d 1374, 1376–77 (D.C. 1977), contained in footnote 13, the Supreme Court stated, that they “do not distinguish cases in which duress was directed at a defendant while in custody from those situations in which he was prevented from returning to custody following a temporary lawful absence.” The Commentary should note that the applicability of the defense to situations where the person was granted a temporary absence and either fails to return or waits longer than reasonable to return.

RCC § 22E-503. Entrapment

The last paragraph of the Commentary pertaining to this offense states:

...the District of Columbia Circuit has held that such a defense is available only if the alleged inducement communicated by the unwitting intermediary is the *same* inducement, directed at the *same* target as the inducement that the government agent directs the intermediary to communicate. Resolving this ambiguity, the revised statute requires that the conduct is the result of the same encouragement, inducement, or creative activity—that is, it does not apply where an intermediary deviates from the government’s plan—but it does not require that the inducement be directed at the same target. [emphasis in original][footnotes omitted]

At the end of that quote is a footnote that presents a hypo. The hypo is:

Consider, for example, a law enforcement officer who runs a sting operation to take down a fraudulent college admissions scheme. The officer arrests the owner of the business running the scheme and, by offering a plea bargain, persuades the owner to wear a wire and ask a desperate parent to sign up her child to participate. The parent subsequently agrees and then convinces her child to participate in the scheme. In this hypothetical the owner is a person acting directly at the encouragement of a law enforcement officer. The parent may raise an entrapment defense on the ground that the owner persuaded her (but must also satisfy subsection (b)). With respect to their child, the parent is a person acting indirectly at the encouragement of a law enforcement officer. The child may raise an entrapment defense on the ground that the parent persuaded her (but must also satisfy subsection (b)).

OAG does not believe that the hypo is correct. The statute captures indirect entrapment, but that indirect entrapment still has to be directed at a target set by the law enforcement officer, since the indirect entrapper still has to be acting at the law enforcement officer’s direction. Applying this

⁴ This is consistent with OAG’s recommendation that that sentence, in the Commentary to RCC § 22E-403(a), Defense of Self or Another Person, be included in the text of that offense.

to the hypo, in order for the parent's entrapment of the child to fall under this defense, the parent would have to be entrapping the child at the officer's direction. It's not clear whether that that is what the hypo contemplates.

RCC § 22E-504. Mental Disease or Defect Affirmative Defense

Paragraphs (a) and (c) of this offense include the following:

- (a) *Affirmative defense.* It is an affirmative defense in a criminal proceeding⁵ that, in fact, as a result of a mental disease or defect, the actor lacked substantial capacity to:
 - (1) Conform the actor's conduct to the requirements of the law; or
 - (2) Recognize the wrongfulness of the actor's conduct...
- (c) *Definitions...*
 - (2) In this section, the term "mental disease or defect" means an abnormal condition of the mind, regardless of its medical label, that affects mental or emotional processes and substantially impairs a person's ability to regulate and control their conduct.

The Commentary, explains "Subsection (a) requires that the actor must be suffering a 'mental disease or defect,' a defined term, at the time the offense is committed. The disease or defect may affect either volitional control, under paragraph (a)(1), or cognitive understanding, under paragraph (a)(2). [footnotes omitted] [emphasis added] However, notwithstanding that paragraph (a) has an "or" between subparagraphs (1) and (2), when read carefully paragraph (a) seems to suggest that the actor must satisfy both in order to use this defense. To explain this point, we can put paragraph (a) into the form of a sentence. As a sentence, it says the actor "lacked substantial capacity to conform the actor's conduct to the requirements of the law or recognize the wrongfulness of the actor's conduct." [emphasis added] Anyone reading that sentence would read it to mean that if the actor can conform their conduct to the law, or can recognize the conduct's wrongfulness, the actor cannot satisfy the requirements of the defense. To clarify this paragraph, OAG suggests restructuring paragraph (a) to say:

- (a) It is an affirmative defense ... that, in fact, as a result of a mental disease or defect, the actor either:
 - (1) Lacked substantial capacity to conform the actor's conduct to the requirements of the law; or
 - (2) Lacked substantial capacity to recognize the wrongfulness of the actor's conduct.

OAG also notes an incongruity between the introductory portion of paragraph (a) and the definition in subparagraph (c)(2). If you substitute the definition of "mental disease or defect" from subparagraph (c)(2) into paragraph (a) for that phrase, you get, in relevant part:

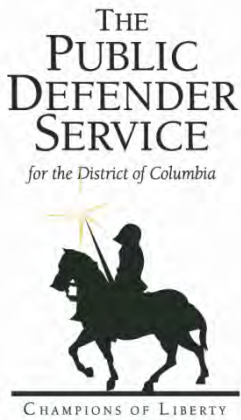
⁵ OAG would note that the other defenses included in the First Draft of Report #66 and the First Draft of Report #67 do not contain the phrase "in a criminal proceeding." Given this defense's placement in the criminal code, this phrase is superfluous and should be deleted. The phrase is also used in the first sentence of the Commentary, below the Explanatory Note, and should be deleted there as well.

(a) *Affirmative defense*. It is an affirmative defense in a criminal proceeding that, in fact, as a result of an abnormal condition of the mind ... that affects mental or emotional processes and substantially impairs a person's ability to regulate and control their conduct, the actor lacked substantial capacity to...

(1) Recognize the wrongfulness of the actor's conduct... [emphasis added]

A person's failure to recognize the wrongfulness of their conduct, however, does not flow from their inability to regulate and control their conduct. OAG submits that the capacity to recognize the wrongfulness of conduct is distinct from the ability to regulate conduct. As originally drafted, suppose a person has a mental condition that that does not inhibit their ability to regulate and control their conduct, but does prevent them from recognizing the wrongfulness of that conduct. It would appear that this defense does not reach that person.

M E M O R A N D U M



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

From: Public Defender Service for the District of
Columbia

Date: November 9, 2020

Re: Comments on First Draft of Report No. 63,
Misrepresentation as a DC Entity; First
Draft of Report No. 65, Contributing to the
Delinquency of a Minor; First Draft of
Report No. 66, Defense of Self, Others, or
Property; and First Draft of Report No. 67,
Entrapment, Duress, and Mental Disease or
Defect Defenses

The Public Defender Service submits the following comments for consideration.

First Draft of Report No. 63, Misrepresentation as a District of Columbia Entity

PDS reiterates the comment it made at the CCRC’s October 7, 2020 public meeting that the actor’s intent to deceive as to their lawful authority should be rewritten to require an intent to deceive as to the actor’s lawful authority *as a District of Columbia government entity*. As the Misrepresentation as a D.C. Entity offense is currently written, the following conduct would be violative.

Dylan Collins engages in the business of collecting debts. His business is called *Dylan Collins Debt Collection*. Sometimes, he shortens it to *D.C. Debt Collection*. While entirely lawful when he first began his business, Collins knows his license to operate a business the District has expired. A prospective customer calls Collins. Collins answers, “DC Debt Collection.” The caller says she is interested in a 12-month contract with a debt collection company to handle all of the debt collection in D.C. for her business. Among other questions, the caller specifically asks Collins: “Does Dylan Collins Debt Collection have all of the necessary licenses and permits to be able to carry out such a contract?” Collins, writing a note to himself to renew his license as soon as he gets off the phone, answers, “Absolutely.”

Dylan Collins knowingly engages in the debt collection business and uses the words “D.C.” in some of his business communications. In that call, he intended to deceive the caller as to his lawful authority to engage in the debt collection business; he did so with the intent to receive a 12-month contract, a business benefit; and in fact, the name “D.C. Debt Collection” would (arguably) cause a “reasonable person” (though this not this specific caller) to believe that Collins is a D.C. government entity. While arguably meeting every element of the offense as currently written, Collins utterly fails to commit the gravamen of the offense – that of, intentionally deceiving someone that he is a District of Columbia government entity for personal or business benefit. PDS proposes rewriting the offense

to clarify a requirement of a nexus between the intent to deceive and the lawful authority *to represent oneself as a D.C. government entity or representative*.

First Draft of Report No. 65, Contributing to the Delinquency of a Minor

1. PDS proposes eliminating Second Degree Contribution to the Delinquency of Minor. PDS agrees with Professor Butler’s comments at the CCRC October 7, 2020 public meeting that this conduct is better addressed outside of the criminal legal system. While the offense does not appear to be directed at parents or at mothers specifically, PDS believes that is who prosecutors will target. It is difficult to imagine scenarios where law enforcement will have evidence to bring a case against a non-parent for knowingly assisting, encouraging, requesting or causing a minor to engage in chronic truancy or in the violation of a court order. On the other hand, it is quite easy to imagine scenarios where law enforcement will be able to build a case against the minor’s parent(s). Prosecuting a minor’s parent for contributing to the delinquency of a minor almost certainly means prosecuting mothers, as women are more often held accountable for the conduct of their children regardless of the family structure. Prosecuting a child’s mother does nothing to solve the underlying problems that are causing truancy – whether they are problems related to the child’s school placement or whether they are problems that are happening at home or with the physical or mental health of the child. A criminal legal system response in such instances will only aggravate the underlying problems and will create new ones with time and resources spent going to court instead of on solutions.

In addition to the expected gender disparity, this offense will almost by definition have a race and class disparate impact. To sustain a charge of 2nd degree contributing to the delinquency of a minor, there must first be chronic truancy or a court order directed towards a child. Truancy correlates with poverty.¹ Indeed, “[p]overty ... remains the driving factor for chronic absence.”² As the wealth and income gap in the District falls starkly, though not at all surprisingly, along racial lines.³ Thus, we can expect that Black

¹ See “Data Matters: Using Chronic Absence to Accelerate Action for Student Success” http://new.every1graduates.org/wp-content/uploads/2018/09/Data-Matters_083118_FINAL-2.pdf (“Our analysis also found that greater poverty can predict higher levels of absenteeism.” at page 5.).

² “Groundbreaking Johns Hopkins analysis shows national scale of chronic student absence,” Johns Hopkins School of Education (September 15, 2018), <https://education.jhu.edu/2018/09/groundbreaking-johns-hopkins-analysis-shows-national-scale-of-chronic-student-absence/>. See also, Annette Fuentes, “The Truancy Trap,” *The Atlantic* (September 5, 2012) <https://www.theatlantic.com/national/archive/2012/09/the-truancy-trap/261937/> (“Chronic absenteeism is how poverty manifests itself on school achievement. It isn’t an argument for making truancy criminal.”); Dana Goldstein (in conjunction with The Marshall Project), “Inexcusable Absences,” *The New Republic*, March 6, 2015, <https://newrepublic.com/article/121186/truancy-laws-unfairly-attack-poor-children-and-parents>. (“The criminalization of truancy often pushes students further away from school, and their families deeper into poverty.”).

³ In 2016, the median household income of Black D.C. residents was less than one-third of the median household income of white D.C. residents, \$38,000 compared to \$126,000. See Tinsae

women in D.C. will pay the price if 2nd degree contributing to the delinquency of a minor based on truancy is codified. That alone makes it intolerable.

Similarly, Black women will pay the price if 2nd degree contributing to the delinquency of a minor based on the violation of a court order is codified. First, there must be a court order directed at a child. Violation of a court order will be racially disproportionate because of who is prosecuted in juvenile court. Black children are overrepresented in juvenile court. Using the demographics of DC public school students, which would already skew Black, shows that in the 2018-2019 school year, 66% of D.C. public school students were Black (non-Hispanic), 18% Latino, 10% white (non-Hispanic); and 4% were “other.”⁴ Compare that racial breakdown to the race of children interviewed by the Public Defender Service Defender Services Office to determine their eligibility for court appointed counsel.⁵

	Black	White	Hispanic/Latino	Race Not Specified
Feb 2020	78%	1%	10%	11%
Feb 2019	79%	0%	7%	12%
Feb 2018	85%	0%	8%	7%
Feb 2017	92%	2%	2%	3%

White children rarely end up in the system and are therefore almost never subject to court orders. Thus, white parents will almost never be charged with 2nd degree contributing to the delinquency of a minor. It is also incredibly unlikely that the parents in wealthy households with children who attend private schools would ever be charged – that truancy would likely be addressed through school psychologists, counselors, drug treatment or other affirmative supports rather than criminalization.

Not only should this second degree delinquency of a minor be eliminated because it will only serve to perpetuate the racism and classism of the District’s criminal legal system, it is not a necessary tool for holding parents accountable. A “neglected child” includes a child “who is without proper parental care or control, subsistence, [or] *education* as required by law...”⁶ Thus, while a child can be “in need of supervision” if they are “subject to

Gabriel, “Economic Inequality in DC Reflects Disparities in Income, Wages, Wealth, and Economic Mobility. Policy Solutions Should Too.,” DC Fiscal Policy Institute Blog, August 6, 2018, <https://www.dcfpi.org/all/economic-inequality-in-dc-reflects-disparities-in-income-wages-wealth-and-economic-mobility-policy-solutions-should-too/>. In 2014 and 2014, white households in D.C. had a net worth 81 times greater than Black D.C. households. See Kilolo Kijakazi et al., “The Color of Wealth in the Nation’s Capital,” November, 1, 2016, <https://www.urban.org/research/publication/color-wealth-nations-capital>.

⁴ See <https://osse.dc.gov/page/data-and-reports-0>. See also “Landscape of Diversity in D.C. Public Schools,” D.C. Policy Center, December 17, 2018, <https://www.dcpolicycenter.org/publications/landscape-of-diversity-in-dc-public-schools/>.

⁵ All children who are detained and brought to Superior Court are interviewed by DSO.

⁶ D.C. Code § 16-2301(9)(A)(ii).

compulsory school attendance and habitually truant from school without justification,”⁷ the parent can be charged with “educational neglect” for contributing to the child’s habitual truancy. In addition, in all juvenile proceedings in Family Court, the court “shall” enter an order requiring a parent or guardian to participate in the rehabilitation process of a juvenile, “including ... mandatory attendance at a juvenile proceeding, parenting class, counseling, treatment, or an education program,” unless such an order would not be in the best interest of the child.⁸ A parent’s failure to comply with such an order is punishable by civil contempt of court.⁹

For all of the above reasons, PDS strongly recommends eliminating RCC §22E-4601(b) in its entirety.

2. PDS recommends rewriting first degree and, if it is not eliminated, second degree. As noted throughout the commentary, the proposed offense largely tracks accomplice liability at RCC § 22E-210 and the solicitation offense at RCC § 22E-302.¹⁰ Thus, it is largely duplicative and has no place in a reform code written with a mandate to reduce overlap as a primary goal. If there is a place for such an offense in the RCC, however, it should be written so that it does not punish a person for speaking to a minor, even if that speech is to suggest that the minor engage in criminal behavior. Neither should the offense allow liability for speech knowingly made but without any intent for the speech to have an effect.

PDS proposes changing the mental state required of the actor in (a)(3) and (b)(3) from *knowingly* to *purposefully*. It is not clear what it even means to “knowingly command,” for example, as allowed at (a)(3)(C) and (b)(3)(C). As explained in the commentary, it means that the actor must be “practically certain that he or she commands ... the [minor] to engage in or aid the planning or commission of specific conduct which, if carried out, will constitute specific conduct.”¹¹ The “specific conduct” must be a District offense or an offense comparable to a District offense, but there is no mental state required for this circumstance. In other words, the government need only prove that the specific conduct, as a matter of law, is a District offense or a comparable one. So then is it the case that to violate the offense all the actor must *know* is that his speech is an instruction to do particular conduct? Does there have to be a chance that the minor will engage in that conduct and does the actor have to have some mental state with respect to that chance? Imagine a 20-year-old young man sees a 15-year-old girl walking down the street wearing a karate uniform with a black belt. He says: “Hey cool! A girl who can fight. That guy over there just bumped into me. Would you go give him a karate chop?” The chances are incredibly low that the teenager is going to assault a man at the request of a stranger, yet technically, the 20-year-old is “practically certain” that he has requested specific conduct. If *knowingly* means more in this context, the commentary must say so. PDS proposes that

⁷ D.C. Code § 16-2301(8)(A)(i).

⁸ D.C. Code § 16-2325.01(a).

⁹ D.C. Code § 16-2325.01(c).

¹⁰ See *e.g.*, Report No. 65 at 3, 4, and 5.

¹¹ Report No. 65 at 4. See also Report No.65 at 5 for second degree.

the adult should have to act purposefully and consciously desire that the minor engage in the conduct.

PDS further proposes adding an element requiring that the minor had to engage in the conduct or attempt to do so. It should not be a crime merely to suggest specific conduct which if carried out would constitute a crime. If the minor ignores the “command, request,” or attempted persuasion, then the adult has not contributed to the delinquency of a minor. Speech that no one heeds is not corrupting and we should not send someone to prison for speech that is ignored.

3. If the CCRC does not eliminate the second degree of the offense, PDS recommends rewriting the definition of “chronic truancy,” at RCC §22E-4601(g)(2), and adding to the commentary to explain more clearly that chronic truancy is being absent from school without a legitimate excuse after having already been absent from school without an excuse for at least 10 days. In other words, “chronic truancy” starts on the 11th day and assisting, encouraging, or commanding a minor to skip school on what would be the 10th day of unexcused absence would not be a violation of this law.
4. Finally, PDS recommends narrowing the merger restriction at RCC § 22E-4601(f)(4) to disallow merger of this offense with a conviction for the target offense, that is the offense the actor assisted, encouraged, or commanded the minor to commit. Prohibiting merger with any offense that arises from the same course of conduct is too broad. As currently written, the restriction would disallow merger of this offense with the almost identical offense of solicitation.¹² It would also disallow merger with a conviction for criminal abuse of a minor or criminal neglect of a minor or any other offense where liability rests on the actor being responsible for the health, welfare, or supervision of the minor. That is not to say that RCC § 22E-214 should necessarily require the merger of either degree of contributing to the delinquency of a minor with the examples provided; it is simply to say that there is no good policy reason to preclude the possibility of such merger.

First Draft of Report No. 66, Defense of Self, Others, or Property

PDS proposes modifications to the CRCC’s codification of self-defense and defense of others that brings it into closer linguistic alignment with current law. Although the version proposed in the RCC is largely in *conceptual* alignment with current law, the use of different terms and a different structure may make it less recognizable to practitioners and judges in this formulation. The District’s self-defense law has been developed through a long common law history.¹³ It is a nuanced body of law and PDS has serious concerns that adopting new language and structure will obscure the statute’s roots in that common law, confusing practitioners and upending the application of self-defense in the courtroom. The defense is employed in some of the most serious cases charged in Superior Court and typically requires a defendant to testify. In light of these concerns, PDS proposes a modification of the language at the core of the defense that will maintain more consistency across the language of current self-defense law. PDS has a number of additional requested modifications of RCC § 22E-403.

¹² RCC § 22E-302.

¹³ See *Parker v. United States*, 155 A.3d 835, 839 (D.C. 2017).

1. Use of “Necessary”

PDS has concerns about defining self-defense at RCC § 22E-403(a) as: “the actor reasonably believes that the conduct constituting the offense is necessary... to protect” the actor or another person.” The use of “necessary” in addition to the legal requirement that the actor’s conduct be reasonable both subjectively and objectively invites a jury to speculate about what was truly necessary under those circumstances and whether some alternative conduct was available to the actor. The use of the word “necessary” may build in a *duty* to retreat – if not as a matter of law, then as a matter of how the jury would analyze whether the conduct was “necessary,” as in “required.” Adding a duty to retreat is clearly contrary to the CCRC’s intent and the language of the defense should not open the door to the jury engaging in such analysis. While the concept of necessity is connected to the concepts of excessive use of force and to imminence, necessity has never been an independent part of the District’s standard and should not be injected into our standard now.

2. Duty to Retreat

The RCC commentary seems to invite a jury to consider failure to retreat in cases that do not involve deadly force.¹⁴ The DCCA has said that failure to retreat is uniquely relevant in deadly force cases. In *Dawkins v. United States*¹⁵ the DCCA held that:

“Where a defendant has presented any evidence that she acted in self-defense, the government bears the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense.” The government may carry this burden by showing that a defendant who employed deadly force either did not reasonably believe that she was in imminent danger of death or serious bodily injury, or “used greater force than she actually and reasonably believed to be necessary under the circumstances.

These means of disproving a self-defense claim are available to the government whether a defendant employs nondeadly force or deadly force. *But in the deadly force context*, this court has acknowledged that a defendant’s ability to retreat is a special consideration in assessing the viability of his self-defense claim. . .

Accordingly, this court held in *Gillis* that a defendant’s failure to retreat, *instead using deadly force*, is one factor the jury is “allow[ed]” to consider “together with all the other circumstances” in determining if the government has disproved beyond a reasonable doubt that a defendant acted in self-defense.”

Dawkins also notes that the weight of authority contradicts any notion that the law requires “anticipatory disengagement from every potential interpersonal conflict.”¹⁶ “It seems everywhere agreed that one who can safely retreat need not do so before using nondeadly

¹⁴ Report No. 66 at 5, 8, and 10.

¹⁵ *Dawkins v. United States*, 189 A.3d 223, 231–33 (D.C. 2018) (emphasis added) (citations omitted).

¹⁶ *Id.* at 235.

force.”¹⁷ Therefore, the CRCC should clarify that the consideration of any ability to retreat is applicable only to the use of deadly force.

3. Dwelling Place

RCC 22E-403(b)(1)(B)(i) lowers the degree of harm or risk that must be perceived by the actor prior to using deadly force when the actor is “inside their own individual dwelling unit.” This formulation provides more protection to individuals who live in single-family housing and would allow them to use deadly force in self-defense in the foyer of their single-family home, but would prohibit a similarly situated person from using deadly force under similar circumstances in the entryway or hallway in a multiple dwelling unit. The heightened need to protect oneself in one’s own home should not be differentiated based on income level and type of home. PDS recommends allowing this heightened level of action for individuals in common space of their multi-unit housing as long as the defensive conduct is against someone who is not also a resident of the multi-unit housing.

4. Provocation

RCC § 22E-403 prohibits self-defense where “the actor recklessly brings about the situation requiring the defense,” with exceptions for withdrawal and where the actor’s conduct “that brought about the situation is mere speech.” The RCC language is a slight modification of the infamous case of *Laney v. United States*.¹⁸ *Laney* held that a Black man on his way to work, accosted on the street by an armed lynch mob shouting “kill the n*,” forfeited his right to defend himself by going out into the street.¹⁹ The provocation doctrine as derived from *Laney* was that an individual forfeited self-defense if he had “reason to believe that his presence there would provoke trouble.”²⁰ The *Laney* opinion has been uniformly panned by legal scholars, who have called *Laney* racist, overbroad, unworkable, and violative of “our collective sense of justice.”²¹

Laney is an embarrassment to the District. The doctrine it established cannot be divorced from its racist roots; that it is so contrary to almost all other jurisprudence in this country should be taken as evidence that had the facts of the case been different – had the race of the defendant or of the decedent been different – then the decision, and the development of the District’s provocation jurisprudence, would also have been different. Frankly, PDS was disappointed that the CCRC

¹⁷ *Id.* at 235 citing, LAFAVE, SUBST. CRIM. L. § 10.4(f) (3d ed.); accord *Higgenbottom v. United States*, 923 A.2d 891, 899 n.7 (D.C. 2007).

¹⁸ *Laney v. United States*, 294 F. 412 (D.C. Cir. 1923).

¹⁹ *Id.* at 413–14.

²⁰ *Id.* at 414.

²¹ José Felipé Anderson, *The Criminal Justice Principles of Charles Hamilton Houston: Lessons in Innovation*, 35 U. Balt. L. Rev. 313, 318 (2006) (noting “obvious racial overtones of [*Laney*]”); John D. Moore, Note, *Reasonable Provocation: Distinguishing the Vigilant from the Vigilante in Self-Defense Law*, 78 Brook. L. Rev. 1659, 1685–86 (2013) (*Laney* “cannot be accepted as a workable principle”); see also Joshua D. Brooks, Note, *Deadly-Force Self-Defense & the Problem of the Silent, Subtle Provocateur*, 24 Cornell J.L. & Pub. Pol’y 533, 565 (2015) (*Laney* “impermissibly supports a bully’s control over another person’s freedom”); Margaret Raymond, *Looking for Trouble: Framing & the Dignitary Interest in the Law of Self-Defense*, 71 Ohio St. L.J. 287, 307 (2010) (criticizing *Laney*’s “racist views of autonomy, dignity and privilege”); Paul H. Robinson, *Causing the Conditions of One’s Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 Va. L. Rev. 1, 12 (1985) (*Laney* rule unfairly punishes negligence the same as a malicious intent to kill).

did not plainly and vehemently disavow *Laney*. While the use in the proposed statute of the phrase “recklessly brings about the situation requiring the defense” adds some affirmative action prior to the forfeiture of self-defense, the requirement remains vague and does not require purposeful conduct by the actor. Rather than modifying *Laney*, the CRCC should bring the District’s provocation doctrine in line with other jurisdictions. In the commentary, the CCRC in no uncertain terms should repudiate *Laney* and confirm that neither the *Laney* decision nor its progeny has any role in shaping the RCC provocation doctrine.

Instead of the current draft proposal, the CRCC should adopt a purpose-based standard for provocation and come into line with nearly all other states, the Model Penal Code, and Supreme Court jurisprudence.²² The vast majority of states—at least 44—do not permit forfeiture of self-defense unless the defendant provokes violence on purpose or intentionally.²³ Six states require wrongful, affirmative conduct to forfeit self-defense, such as forcibly entering a home or a robbery, that could only be expected to provoke a violent response.²⁴ Some jurisdictions require an affirmative provocative act *in addition* to the intent to provoke.²⁵

The drafters of the Model Penal Code also selected a purpose-based standard for forfeiture: self-defense is unavailable to a person who, “with the *purpose* of causing death or serious bodily injury, provoked the use of force against himself in the same encounter.”²⁶

A purpose-based standard would also be consistent with long-standing Supreme Court case law. Around the turn of the twentieth century, the Supreme Court decided a series of cases that have collectively been dubbed “the Self-Defense Cases” and remain “precedents for any court which must consider common law self-defense issues.”²⁷ In the Self-Defense Cases, the Supreme Court held that a person forfeits self-defense by provocation only if he has a purpose to provoke violence. For instance, in *Beard v. United States*,²⁸ the Court held that a person does not forfeit self-defense unless he provokes violence purposefully. In that case, Beard, armed with a shotgun, approached three men with whom he was involved in a property dispute, one of whom had threatened to kill him. Beard was attacked, and killed one of his adversaries.²⁹ The Supreme Court held that it was error for the trial judge to have instructed the jury on forfeiture of self-defense by provocation because “[t]here was no evidence tending to show that Beard went from his dwelling house to [the three men] for the *purpose* of provoking a difficulty, or with the *intent*

²² See attached chart.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Model Penal Code § 3.04(2)(b)(i) (emphasis added).

²⁷ David B. Kopel, *The Self-Defense Cases: How the United States Supreme Court Confronted A Hanging Judge in the Nineteenth Century and Taught Some Lessons for Jurisprudence in the Twenty-First*, 27 Am. J. Crim. L. 293, 298–99, 325 (2000).

²⁸ *Beard v. United States*, 158 U.S. 550 (1895).

²⁹ *Id.* at 552–53.

of having an affray.”³⁰ Similarly, in *Thompson v. United States*³¹, Thompson encountered the decedent, who had threatened him, while running an errand; Thompson was concerned enough by that encounter to arm himself for his return past the same spot.³² But he did not forfeit self-defense: “Certainly the mere fact that the accused used the same road [where he knew he would see the decedent] would not warrant the inference that his return was with the *purpose* of provoking an affray, particularly as there was evidence that this road was the proper and convenient one.”³³

The RCC’s standard of reckless provocation continues *Laney’s* reliance on a vague actus reus of “bringing about the situation” and fails to account for all the ways that individuals may have to disregard risks of violence in order to go about their lives – to live in their communities, to go to work, to see their families. This standard puts an unfair onus on individuals, that will disproportionately be borne by the District’s Black residents, to avoid situations that pose a risk of violence as a result of merely residing in a neighborhood where crime and violence are more prevalent.

5. Withdrawal

RCC § 22E-403(b)(2)(C) applies where the defendant is the initial aggressor but then “withdraws or makes reasonable efforts to withdraw from the location.” Requiring an individual to withdraw from the location is too narrow a standard for withdrawing from conflict. An individual may effectively withdraw from a conflict and communicate the withdrawal without leaving a location. For example, if the actor starts a fight with another person at school, and then communicates his unequivocal withdrawal from the fight, the actor should not also have to leave school in order to regain a right of self-defense if the other person refuses to accept the withdrawal and attacks the actor. Withdrawing from the conflict, rather than the location, should be sufficient.

6. Nature

PDS objects to the use of the word “nature” as vague. PDS does not understand, and the commentary does not explain, what it would mean to determine whether the “nature” of the actor’s conduct – as opposed to just its timing and degree – was reasonable in light of the perceived risk of harm.

7. Standards for Law Enforcement

PDS suggests that the CRCC develop use of force standards for non-deadly force by law enforcement officers that include many of the considerations required for deadly force including whether the officer engaged in de-escalation measures and whether the officer increased the risk of confrontation. Further, use of deadly force by a law enforcement officer should be permissible only in response to an imminent threat. While noting PDS’s objection to the use of “necessary,” the broader standard of “necessary in its timing” may be suitable

³⁰ *Id.* at 558 (emphasis added).

³¹ *Thompson v. United States*, 155 U.S. 271 (1894).

³² *Id.* at 274-76.

³³ *Id.* at 278.

for actors who are not officers, but law enforcement officers should be held to a standard of absolute imminence given their training, the availability of back-up, and the abundance of resources to address situations that are not absolutely imminent without killing people.

Suggested statutory language follows:

Defense of Self or Another Person

(a) *Defense.*

- (1) It is a defense that
 - (A) The actor, in fact, believes that they or another person are in danger of a physical contact, bodily injury, sexual act, sexual contact, confinement, or death;
 - (B) The actor has reasonable grounds for their belief; and
 - (C) The actor's conduct constituting the offense was reasonable in its timing and degree.
- (2) Retreat is a factor in the reasonableness of the actor's response only when the actor has used or attempted to use deadly force.

(b) *Exceptions.* This defense is not available when:

- (1) In fact, the actor uses or attempts to use deadly force, unless the actor:
 - (A) All
 - (i) The actor, in fact, believes that they or another person are in danger of a serious bodily injury, sexual act, confinement, or death;
 - (ii) The actor has reasonable grounds for their belief; and
 - (iii) The actor's conduct constituting the offense was reasonable in its timing and degree; or
 - (B) All
 - (i) The actor, in fact, believes that they or another person are in danger of a serious of a physical contact, bodily injury, sexual act, sexual contact, confinement or death;
 - (ii) The actor has reasonable grounds for their belief; and
 - (iii) Is inside their own individual dwelling unit or, as against a person who, in fact, is not a co-occupant of the multi-unit dwelling, is in a communal area of their multi-unit dwelling that is secured against the public.
- (2) While acting with the purpose to provoke, the actor engages in an unlawful affirmative act that would induce a reasonable person in the passion of the moment to lose self-control and commit a violent or lethal act on impulse and without reflection unless, the actor withdraws or makes reasonable efforts to withdraw from the conflict; or
- (3) The actor is reckless as to the fact that they are protecting themselves or another from lawful conduct.

First Draft of Report No. 67, Entrapment, Duress, and Mental Disease or Defect Defenses

Duress

PDS recommends removing the provision at RCC § 22E-501(b)(3) that prevents a defendant from presenting a duress defense to a jury if the conduct constituting the offense is expressly addressed by another available defense. A defendant, consistent with their Sixth Amendment rights, should be able to present evidence of all applicable defenses and to have all available defenses go to the jury. There is no fair basis for depriving a defendant of the right to have a jury consider the entire circumstances of their case. Further, this limitation is particularly unjust given that the government is allowed to present various theories of liability, such as conspiracy and aiding and abetting in the same trial. The government is not limited in its presentation of evidence and the defense should not be either.

Entrapment

PDS recommends defining “predispose” in the text of the statute, using the explanation in the commentary. That is, CCRC should add the following definition to subsection (c) of RCC § 22E-503: “‘Predisposed’ means the defendant was ready and willing to commit the offense whenever an opportunity presented itself.”³⁴

Mental Disease or Defect

1. PDS objects to the use of the word “defect.” It is antiquated, offensive, and stigmatizing. PDS strongly urges the CCRC to adopt a term that recognizes neurological differences without disparaging those differences. PDS recognizes that the term should be a defined legal term, not a psychiatric or neurological term.³⁵ PDS proposes using the phrase “mental disease or atypical mental condition” instead.
2. PDS requests that CCRC note in the commentary the reference in RCC § 22E-504 to D.C. Code § 24-501 was procedural in nature only. As a review of D.C. Code § 24-501 is beyond the mandate of the Commission, the CCRC takes no position on whether the statute would or would not benefit from reform and the reference to the statute is not meant to imply otherwise.
3. PDS objects to the categorical statement in the commentary that mental disease or [atypical mental condition] “does not include voluntary intoxication.” The statement, and accompanying footnote, is strikingly at odds with the RCC approach to voluntary intoxication and how it “excuses” criminal behavior. While the CCRC might decide that voluntary intoxication should not serve as “the basis” for a mental disease or [atypical mental condition], it should not go so far as to imply that voluntary intoxication has no

³⁴ See Report No. 67 at 10.

³⁵ “While medical evidence is highly relevant to the question of the existence of a mental disease or defect, the provision that this definition relates to ‘any abnormal condition of the mind, *regardless of medical label*’ specifies that the legal standard for a relevant mental incapacitation is not identical to the medical definition of a mental disease or defect.” Report No. 67 at 16.

relevance in the manifestation of a person's mental disease or [atypical mental condition] in a particular case. At a minimum, PDS urges that the commentary clarify that while voluntary intoxication cannot serve as the basis for the mental disease or [atypical mental condition], that is not to say that an actor's mental disease or atypical mental condition is irrelevant when, pursuant to RCC § 22E-209, a factfinder is considering whether the actor's intoxication negates the existence of a culpable mental state.

4. PDS recommends eliminating subsection (d). Including it implies that the court, as a matter of settled and static law, has some "ability" *sua sponte* to order a psychiatric examination or to raise a mental disease or [atypical mental condition] defense. The commentary does little to explain the contours of this ability or even the constitutional or statutory basis for it. The subsection is unnecessary. PDS does not object to the commentary noting that RCC § 22E-504 is independent of and not meant limit any authority the court might have to order a psychiatric examination or to raise a mental disease or [atypical mental condition] defense.

PROVOCATION LAW BY JURISDICTION

Jurisdictions that require an intent or purpose to provoke violence for forfeiture of self-defense			
Alabama	Ala. Code § 13A-3-23(c)(1)	Iowa	Iowa Code Ann. § 704.6(2)
Alaska	Alaska Stat. Ann. § 11.81.3309(a)(2)	Kansas	Kan. Pattern Instructions Crim. 52.240
Arizona	<i>State v. Jackson</i> , 382 P.2d 229, 232 (Ariz. 1963)	Kentucky	Ky. Rev. Stat. Ann. § 503.060(2)
Arkansas	Ark. Code Ann. § 5-2-606(b)(1)	Louisiana	<i>State v. Short</i> , 46 So. 1003, 1006 (La. 1908)
California	Cal. Crim. Jury Instruction 3472	Maine	Me. Rev. Stat. tit. 17-A, § 108(2)(C)(1)
Colorado	Colo. Rev. Stat. Ann. § 18-1-704(3)(a)	Maryland	<i>Gunther v. State</i> , 179 A.2d 880, 882 (Md. 1962)
Connecticut	Conn. Gen. Stat. Ann. § 53a-19(c)(1)	Mississippi*	<i>Patrick v. State</i> , 285 So. 2d 165, 169 (Miss. 1973)
Delaware	Del. Code Ann. tit. 11, § 464(e)(1)	Missouri	<i>State v. Evans</i> , 28 S.W. 8, 11 (Mo. 1894)
Florida	<i>Barnes v. State</i> , 93 So. 2d 863, 864 (Fla. 1957)	Montana	Mont. Code Ann. § 45-3-105(2)
Georgia	Ga. Code Ann. § 16-3-21(b)(1)	Nebraska	Neb. Rev. Stat. § 28-1409(4)(a)
Hawaii	Haw. Rev. Stat. § 703-304(5)(a)	Nevada	<i>Johnson v. State</i> , 551 P.2d 241, 242 (Nev. 1976)
Idaho ¹	<i>State v. Livesay</i> , 233 P.2d 432, 435 (Idaho 1951)	New Hampshire	N.H. Rev. Stat. Ann. § 627:4(III)(c)
Illinois	Ill. Pattern Jury Instructions-Crim. 24-25.11	New Jersey	N.J. Stat. Ann. § 2C:3-4(b)(2)(a)
Indiana	Ind. Code Ann. § 35-41-3-2(g)(2)	New Mexico	<i>State v. Cochran</i> , 430 P.2d 863, 864–65 (N.M. 1967)

¹ An asterisk indicates states that require an affirmative unlawful or provocative act in addition to an intent to provoke for forfeiture of self-defense.

New York	N.Y. Penal Law § 35.15(1)(a)	South Dakota	<i>State v. Means</i> , 276 N.W.2d 699, 701–02 (S.D. 1979)
North Carolina	<i>State v. Sanders</i> , 281 S.E.2d 7, 14–15 (N.C. 1981)	Tennessee	<i>Floyd v. State</i> , 430 S.W.2d 888, 890 (Tenn. Crim. App. 1968)
North Dakota	N.D. Cent. Code Ann. § 12.1-05-03(2)(a)	Texas*	<i>Smith v. State</i> , 965 S.W.2d 509, 513–14 (Tex. Crim. App. 1998)
Ohio	<i>State v. Melchior</i> , 381 N.E.2d 195, 200 (Ohio 1978)	Utah	Utah Code Ann. § 76-2-402(2)(a)(i)
Oklahoma*	Okla. Uniform Jury Instructions-Crim. 8-50	Washington	<i>State v. Wasson</i> , 772 P.2d 1039, 1040 (Wash. Ct. App. 1989)
Oregon	Or. Rev. Stat. Ann. § 161.215(1)	West Virginia	<i>State v. Bowyer</i> , 101 S.E.2d 243, 249 (W. Va. 1957)
Pennsylvania	18 Pa. Cons. Stat. Ann. § 505(b)(2)(i)	Wisconsin	Wis. Stat. Ann. § 939.48(2)(c)
Rhode Island	<i>State v. Hanes</i> , 783 A.2d 920, 926 (R.I. 2001)	Wyoming	<i>State v. Bristol</i> , 84 P.2d 757, 763–64 (Wyo. 1938)

Jurisdictions that require wrongful, affirmative conduct for forfeiture of self-defense			
Massachusetts	<i>Com. v. Chambers</i> , 989 N.E.2d 483, 489–90 (Mass. 2013)	South Carolina	<i>State v. Williams</i> , 733 S.E.2d 605, 609 (S.C. Ct. App. 2012)
Michigan	<i>People v. Bailey</i> , 777 N.W.2d 424, 425–26 (Mich. 2010)	Virginia	<i>Bausell v. Com.</i> , 181 S.E. 453, 461–62 (Va. 1935)
Minnesota	<i>State v. Edwards</i> , 717 N.W.2d 405, 412 (Minn. 2006) (plurality); <i>State v. Gardner</i> , 104 N.W. 971, 975 (Minn. 1905)	Vermont	Vt. Model Crim. Jury Instructions CR07-091

Memorandum

Michael R. Sherwin
Acting United States Attorney
District of Columbia



Subject: Comments to D.C. Criminal Code Reform Commission for First Draft of Reports #63–67

Date: November 9, 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 Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the CCRC’s First Draft of Reports #63–67. USAO reviewed these documents and makes the recommendations noted below.¹

First Draft of Report #65—Contributing to the Delinquency of a Minor

RCC § 22E-4061. Contributing to the Delinquency of a Minor.

1. USAO recommends that the RCC clarify that the Developmental Incapacity Defense would not preclude liability for an adult defendant under this provision.

At the October 7, 2020, Advisory Group meeting, the Advisory Group members discussed adding a provision to clarify that the Developmental Incapacity Defense would not preclude liability for an adult defendant under this provision. The RCC Developmental Incapacity Defense, as currently drafted, provides that a child under the age of 12—or 14, under certain circumstances—does not commit an offense. RCC § 22E-505. The CCRC clarified that, even if a child defendant legally could not be prosecuted for the underlying conduct due to their age or other developmental incapacity, liability should still attach under this provision for an adult who contributes to that child’s delinquency. For example, if an adult defendant were charged with contributing to the delinquency of an 8-year-old child, the adult could be prosecuted, even if the child legally could not be prosecuted for the underlying conduct. To ensure liability under this statute, USAO recommends that the CCRC clarify this point.

Similarly, USAO recommends clarifying that D.C. Code § 25-1002(c)(4)(D) would not exclude liability for an adult defendant providing alcohol to a minor. At the November 4, 2020, Advisory Group meeting, the CCRC clarified that, even if a person under the age of 21 could not be charged with a criminal offense for possessing or drinking an alcoholic beverage, liability

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

should still attach under this provision for an adult who contributes to a minor’s delinquency by providing them with alcohol. D.C. Code § 25-1002(c)(4)(D) states: “No person under the age of 21 shall be criminally charged with the offense of possession or drinking an alcoholic beverage under this section, but shall be subject to civil penalties under subsection (e) of this section.” Because this statute makes it only a civil offense—not a criminal offense—for a minor to possess alcohol, under the plain language of the RCC statute, it is arguable whether this would “constitute a District offense.” Moreover, it is unclear whether this offense would constitute a “misdemeanor offense” for purposes of the RCC penalty provision. To ensure liability under this statute, USAO recommends that the RCC clarify this point.

2. USAO recommends removing subsection (c).

Subsection (c) provides: “An actor does not commit an offense under this section when, in fact, the conduct constituting a District offense or a comparable offense in another jurisdiction, constitutes an act of civil disobedience.” Although this tracks current law, *see* D.C. Code §§ 22-811(a)(5), (a)(7), it is unclear what would constitute “civil disobedience.” USAO is not aware of any legislative history or case law that would elucidate the definition of “civil disobedience” in this statute.

3. USAO recommends, in subsection (f)(1), adding the words “or, if carried out, would constitute.”

With USAO’s changes, subsection (f)(1) would provide:

“First degree contributing to the delinquency of a minor is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both, when the complainant’s conduct, in fact, constitutes or, if carried out, would constitute a District offense that is a felony, or a comparable offense in another jurisdiction.”

This language tracks the language in subsection (a)(3)(C). Liability for First Degree Contributing to the Delinquency of a Minor is based on the defendant encouraging/assisting the complainant with committing an offense, or commanding/requesting/trying to persuade the complainant to engage in conduct that, if carried out, would constitute an offense. Because liability is based primarily on the defendant’s actions in commanding the complainant to engage in certain conduct—not the complainant’s actions—felony liability should attach where the defendant is trying to command the complainant to engage in felony-level conduct, regardless of whether the complainant, in fact, engages in such conduct.

First Draft of Report #66—Defense of Self, Others, or Property

1. USAO strongly opposes eliminating the imminence or immediacy requirement for the use of force in self-defense.

The RCC’s proposal would make the District an extreme outlier by eliminating the requirement that a harm be immediate or imminent for a person to lawfully employ force in self-defense. District law has included such a requirement since at least 1912. *See Sacrini v. United States*, 38 App. D.C. 371, 378 (D.C. Cir. 1912). The RCC’s proposal removes this imminence

requirement, noting the Model Penal Code’s commentary on Necessity: “[I]t is a mistake to erect imminence as an absolute requirement, since there may be situations in which an otherwise illegal act is necessary to avoid an evil that may occur in the future. If, for example, A and B have driven in A’s car to a remote mountain location for a month’s stay and B learns that A plans to kill him near the end of the stay, B would be justified in escaping with A’s car although the threatened harm will not occur for three weeks.” *See* Model Penal Code § 3.02 cmt. at 17 (1985).

However, when applied to the use of force in self-defense, the MPC’s commentary seems particularly inapt. Without an imminence requirement, B may arguably be justified in simply killing A (as opposed to taking his car) despite the fact that the threatened harm will not occur for another three weeks and that B may have many opportunities to escape the threatened harm without the use of violence (such as taking A’s car and leaving). Eliminating the imminence requirement gives a green light to the preemptive use of violence in resolving private disputes. It is inconsistent with life in an ordered, civilized society. Rather, it draws from some of the darkest chapters of human experience—the vendetta, the blood feud, and vigilante justice.

Perhaps because of this, every jurisdiction that has fully adopted the Model Penal Code has maintained a requirement of imminence or immediacy for the use of force in self-defense.² These jurisdictions do not stand alone, as “most of the modern codes require that the defendant reasonably perceive an ‘imminent’ use of force.” Wayne R. LaFare, 2 Subst. Crim. L. § 10.4(d) (3d ed.). LaFare finds the reasoning for such a requirement to be compelling: “As a general matter, the requirement that the attack reasonably appear to be imminent is a sensible one. If the threatened violence is scheduled to arrive in the more distant future, there may be avenues open

² *Diggs v. State*, 168 So.3d 156, 161 (Ala. Crim. App. 2014); *Ha v. State*, 892 P.2d 184, 191 (Alaska App. 1995); *State v. Buggs*, 806 P.2d 1381, 1385 (Ariz. App. 1990); *Stalnaker v. State*, 437 S.W.3d 700, 704 (Ark. App. 2014); *People v. Janes*, 982 P.2d 300, 304 (Colo. 1999); *State v. Hargett*, 229 A.3d 1047, 1063 (Conn. App. 2020); *Lewis v. State*, 144 A.3d 1109, 1117 (Del. 2016); Hawai’i Revised Statutes § 703-304 (“Subject to the provisions of this section and of section 703-308, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by the other person on the present occasion.”); *People v. Willis*, 577 N.E.2d 1215, 1220 (Ill. App. 1990); *White v. State*, 726 N.E.2d 831, 834 (Ind. App. 2000); *State v. Stewart*, 763 P.2d 572, 577 (Kan. 1988); *Commonwealth v. Bennett*, 553 S.W.3d 268, 271 (Ky. App. 2018); *State v. Smith*, 472 A.2d 948, 950 (Me. 1984); *State v. Nystrom*, 596 N.W.2d 256, 260 (Minn. 1999); *State v. Goodine*, 196 S.W.3d 607, 620 (Mo. App. 2006); *State v. King*, 304 P.3d 1, 6 (Mont. 2013); *State v. Chen*, 813 A.2d 424, 428 (N.H. 2002); *State v. Aguiar*, 730 A.2d 463, 465 (N.J. Super. Ct. 1999); McKinney’s Penal Law § 35.15(1) (N.Y.) (Subject to certain exceptions, “A person may, subject to the provisions of subdivision two, use physical force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself, herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by such other person.”); *State v. Leidholm*, 334 N.W.2d 811, 816 (N.D. 1983); *State v. Thomas*, 673 N.E.2d 1339, 1342 (Ohio 1997); Oregon Revised Statutes § 161.209. (“Except as provided in ORS 161.215 and 161.219, a person is justified in using physical force upon another person for self-defense or to defend a third person from what the person reasonably believes to be the use or imminent use of unlawful physical force, and the person may use a degree of force which the person reasonably believes to be necessary for the purpose.”); *Commonwealth v. Grove*, 526 A.2d 369, 373-75 (Pa. Super. Ct. 1987) (rejecting argument that enactment of Model Penal Code changed Pennsylvania common law requiring an imminent threat of death or serious bodily injury to justify self-defense instruction); *State v. Bruder*, 676 N.W.2d 112, 116 (S.D. 2004); *State v. Leaphart*, 673 S.W.2d 870, 873 (Tenn. App. 1983); *McKee v. State*, 785 S.W.2d 921, 926 (Tex. App. 1990); *State v. Lucero*, 283 P.3d 967, 969 (Utah App. 2012); *State v. Bradley*, 10 P.3d 358, 361 (Wash. 2000); *State v. Head*, 648 N.W.3d 413, 430 (Wis. 2002).

to the defendant to prevent it other than to kill or injure the prospective attacker; but this is not so where the attack is imminent.” *Id.*³

Ha v. State, an Alaska Court of Appeals case, shows the danger of eliminating an imminence or immediacy requirement. *See* 892 P.2d 184 (Alaska App. 1995). Defendant Ha, a commercial fisherman, was violently assaulted one evening by another fisherman when both were aboard a fishing vessel. *Id.* at 186. Following the assault, the defendant could not sleep, as he relived the violent assault he had just suffered. *Id.* at 186–87. The following morning, the defendant armed himself with a rifle and left the boat to look for the other fisherman. *Id.* at 187. At 1:30 that afternoon, the defendant found him, walking home from the grocery store, carrying a bag of groceries. *Id.* The defendant shot him seven times in the back, killing him instantly. *Id.*

The trial court did not provide a self-defense instruction to the jury, in part because the evidence did not show that the defendant was in imminent risk of harm from the initial aggressor. *Id.* at 188. On appeal, the defendant argued that this failure to instruct was erroneous because the Alaska statute did not specifically include an imminence requirement. The appellate court noted that the defendant’s fear of the other fisherman was entirely reasonable. *Id.* at 191. The victim was a violent person “who nursed grudges” and “came from a violent, criminal clan.” *Id.* But the appellate court found that “a reasonable fear of future harm does not authorize a person to hunt down and kill an enemy.” *Id.* The court held that there must be an imminent threat of harm to the defendant to justify a self-defense instruction, despite the Alaska statute’s silence on that point. *Id.* at 194.

In many homicides in the District of Columbia, the defendant *has* reason to fear the decedent, from some past interaction, beef, or dispute. Eliminating the requirement that the defendant fear an imminent threat of harm to justify a self-defense instruction will give license in too many instances for aggrieved individuals to take justice into their own hands and preemptively kill an enemy. And as neighborhood beefs escalate, more and more innocent men, women, and children will be caught in the cross fire and killed or seriously injured.⁴ USAO therefore urges the CCRC to include an imminence or immediacy requirement in the proposed self-defense statute.

³ LaFave also lays out the following scenario: “Suppose *A* kidnaps and confines *D* with the announced intention of killing him one week later. *D* has an opportunity to kill *A* and escape each morning as *A* brings him his daily ration. Taken literally, the *imminent* requirement would prevent *D* from using deadly force in self-defense until *A* is standing over him with a knife, but that outcome seems inappropriate.” Wayne R. LaFave, 2 Subst. Crim. L. § 10.4(d) (3d ed.). The proposed language in the self-defense statute would address this scenario, however, because it permits a person to use a reasonable amount of force not just to repel a deadly assault, but also in the face of “confinement.” *See* First Draft of Report #66, RCC § 22E-403(a).

⁴ *See* Fatimah Fair, “In some parts of D.C., the worry isn’t on getting into college but being caught in crossfire,” *Washington Post*, February 7, 2020, available at https://www.washingtonpost.com/opinions/local-opinions/in-some-parts-of-dc-the-worry-isnt-on-getting-into-college-but-being-caught-in-crossfire/2020/02/06/32f5b2cc-4798-11ea-bc78-8a18f7afcee7_story.html, last visited November 6, 2020.

First Draft of Report #67—Entrapment, Duress, and Mental Disease or Defect Defenses

RCC § 22E-501. Duress

1. USAO recommends limiting this defense to situations where the threatened harm is imminent or immediate.

The RCC recognizes that the proposal to remove an imminence/immediacy requirement would be a change in law, and that current District case law requires a reasonable belief that the actor would suffer immediate harm. (Commentary at 3 & n.14 (citing *McClam v. United States*, 775 A.2d 1100, 1104 (D.C. 2001)). For the reasons stated above with respect to the RCC’s proposal to remove the imminence/immediacy requirement for self-defense, USAO similarly opposes removing the imminence/immediacy requirement for duress.

2. USAO recommends that this defense contain a proportionality requirement.

USAO recommends modifying subsection (a)(2) as follows:

“(2) The actor reasonably believes the conduct constituting the offense is necessary and proportionate, in its timing, nature, and degree, to avoid the threatened criminal harm;”

USAO recommends that this defense create a proportionality requirement that the harm to be avoided be objectively worse than the harm committed. The actor should reasonably believe both that the offense is necessary and that the offense is proportionate to avoid the threatened criminal harm. This is particularly true in light of the fact that the RCC’s proposal is no longer limited to “serious bodily harm or death,” which allows the possibility of a far wider range of behavior to invoke this defense. For example, if person A threatens to punch person B in the face unless person B kills person C, it would be absurd to allow person B to claim duress as a complete defense to the murder of person C. Subsection (a)(3) may permit an argument that a reasonable person in the situation of person B would not have murdered person C, because the harm that person B committed is disproportionate to the harm that he was trying to avoid. To eliminate any ambiguity on this point, however, USAO recommends that the statute expressly include a proportionality requirement.

3. USAO recommends clarifying subsection (a).

As currently drafted, under subsection (a)(1), an actor must reasonably believe that another person communicated to the actor that the person will cause bodily injury, etc., and under subsection (a)(2), the actor must reasonably believe the conduct is necessary to avoid the threatened harm. It is ambiguous, however, whether an actor must also reasonably believe that the harm will occur. The Redbook Jury Instruction for Duress states the first element of duress as: “[Name of defendant] must have had a reasonable belief that s/he would suffer immediate bodily injury or death...” Criminal Jury Instructions for the District of Columbia, No. 9.300 (5th ed. 2019). The RCC does not state that this is a change in law, so, consistent with current law, the RCC appears to have intended that an actor must reasonably believe that the harm will, in fact, occur. To clarify this point and eliminate any potential ambiguity, USAO recommends

clarifying subsection (a) to provide that the actor must also reasonably believe that the harm will occur.

4. USAO recommends including the word “death” in subsection (a)(1).

USAO recommends that the list of harms in subsection (a)(1) include “death.” This is likely a typographical error, and it is appropriate to include it here because acting under threat of death would clearly count as a duress situation.

RCC § 22E-504. Mental Disease or Defect Affirmative Defense.

1. USAO recommends the following modifications to subsection (b):

- (a) *Effect of Defense.* An actor who is ~~not guilty by reason of~~ acquitted solely on the ground of mental disease or defect shall be ~~civily~~ committed under D.C. Code § 24-501.

USAO recommends clarifying that this commitment occurs when the defendant is “acquitted solely on the ground of mental disease or defect.” This is consistent with D.C. Code § 24-501(d)(1), which provides: “If any person tried upon an indictment or information for an offense raises the defense of insanity and is acquitted solely on the ground that he was insane at the time of its commission, he shall be committed to a hospital for the mentally ill until such time as he is eligible for release. . .”

Further, commitment following an acquittal by reason of insanity is not a civil commitment, but rather a form of criminal commitment. *See Brown v. United States*, 682 A.2d 1131 (D.C. 1996). To clarify this, USAO recommends removing the word “civilly” so that the statute provides simply “committed.”

2. USAO recommends revising the definition of “mental disease or defect” in subsection (c)(2) to be consistent with the current Redbook definition.

The Redbook Jury Instruction for Insanity provides, in relevant part:

“Mental disease or defect includes any abnormal condition of the mind, regardless of its medical label, which affects mental or emotional processes and substantially impairs a person’s ability to regulate and control his/her conduct. A ‘mental disease’ is a condition which is capable of either improving or deteriorating; a ‘mental defect’ is a condition not capable of improving or deteriorating. An abnormal condition of the mind evidenced only by repeated criminal or otherwise antisocial conduct is not sufficient to establish that [name of defendant] had a mental disease or defect.”

Criminal Jury Instructions for the District of Columbia, No. 9.400 (5th ed. 2019). The RCC’s proposal incorporates the first sentence from this excerpt, but not the remaining sentences. The second sentence in the Redbook clarifies the definition of “mental disease” and “mental defect,” so should be incorporated into the RCC definition. The Commentary discusses these definitions

(Commentary at 17 n.14), but USAO recommends that they be included in the plain language of the statute for clarity.

The RCC proposes changing current law by no longer excluding “abnormalities manifested only by repeated criminal or otherwise antisocial conduct from the definition of mental disease or defect.” (Commentary at 17.) The Commentary recognizes that this proposal is contrary to both the Model Penal Code and DCCA case law as set forth in *Bethea v. United States*, 365 A.2d 64, 79 (D.C. 1976). USAO opposes this change.

As a practical matter, it is unclear how a defendant would be permitted to prove an abnormality that manifested only by repeated criminal or otherwise antisocial conduct. Under the current system, expert testimony is essential to establish whether or not a defendant is deemed criminally responsible.⁵ Under the RCC’s proposal, it is unclear whether expert testimony would be required, or how this would be proven otherwise, and it could be inappropriately broad. For example, could a defendant argue that the fact of their criminal record demonstrates a mental disease or defect, and rely solely on their criminal history record rather than expert testimony? Would a court-appointed or government expert be permitted to evaluate a defendant who intended to rely solely on their criminal record in support of this defense? Further, the nature of any person committing an offense—given that commission of an offense is inherently contrary to society’s rules—may demonstrate certain antisocial characteristics, so this defense could be interpreted very broadly.

3. USAO recommends that the procedural mechanisms in D.C. Code § 24-501(j) be incorporated into this provision.

USAO proposes adding the following language to RCC § 22E-504:

“Mental disease or defect shall not be a defense in any criminal proceeding unless the actor or the actor’s attorney in such proceeding, at the time the actor enters a plea of not guilty, or within 15 days thereafter, or at such later time as the court may for good cause permit, files with the court and serves upon the prosecuting attorney written notice of the actor’s intent to rely on such defense.”

D.C. Code § 24-501(j) provides: “Insanity shall not be a defense in any criminal proceeding in the United States District Court for the District of Columbia or in the Superior Court of the District of Columbia, unless the accused or his attorney in such proceeding, at the time the accused enters his plea of not guilty, or within 15 days thereafter, or at such later time as the court may for good cause permit, files with the court and serves upon the prosecuting attorney written notice of his intention to rely on such defense. No person accused of an offense shall be acquitted on the ground that he was insane at the time of its commission unless his

⁵ Under current law, once a defendant provides notice of their intent to raise an insanity defense, the court orders a criminal responsibility examination by an expert. The expert evaluates the defendant, reviews the records and evidence in the case, and may conduct external third party interviews of individuals who are familiar with the defendant. Following a full evaluation and review of the relevant materials, the expert makes a determination as to whether the defendant should be deemed criminally responsible. The government and the defense are both entitled to retain independent experts to conduct their own examinations of the defendant and, as appropriate, present that evidence at trial.

insanity, regardless of who raises the issue, is affirmatively established by a preponderance of the evidence.”

Although the burden of proof in the second sentence of D.C. Code § 24-501(j) has been incorporated into the RCC proposal, USAO recommends incorporating the first sentence of this provision into the RCC proposal as well. The RCC refers to D.C. Code § 24-501 for commitment *following* an acquittal by reason of mental disease or defect, but this procedural mechanism would necessarily be required *before* an acquittal and subsequent commitment. Therefore, as currently drafted, this defense under the RCC would not require this procedural mechanism of notice to the prosecution to invoke this defense. Consistent with current law, a defendant must be required to serve notice of intent to rely on this defense to allow the prosecution to investigate and prepare this defense.

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

Public Safety Division



MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: January 29, 2021

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

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report 68 - Red-Ink Comparison and Attachments.¹

COMMENTS ON THE DRAFT REPORT

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

I. OAG's Proposed Amendments

RCC § 22E-102. Rules of Interpretation

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

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

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

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

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

RCC § 22E-301. Criminal Attempt

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

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

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

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

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

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

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

RCC § 22E-505. Developmental Incapacity Affirmative Defense⁶

For persons who are under 12 years of age, OAG does not believe that these children should be prosecuted in the juvenile justice system. Instead of requiring a child of this age to mount an affirmative defense, OAG recommends that this provision be amended to state that “a child who is under 12 years of age does not commit a delinquent act.”⁷ However, because a child is not required to carry identification to show their age, or may lie about their age, police officers may nevertheless inadvertently arrest a child in this age group or may seize the child prior to making an arrest to confirm the child’s age. As a result, OAG may bring charges against a child who is under the age of 12 and that prosecution would continue until such time as proof of age has been established. To ensure that there is no civil liability for such an act, OAG recommends that this provision also include the statement that “Nothing in this section shall be construed as creating a cause of action against the District of Columbia or any public official⁸ for seizing, arresting, or prosecuting a child who is under 12 years of age.”⁹

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

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

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

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

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

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

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

RCC § 22E-608. Hate Crime Penalty Enhancement

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

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

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

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

Hate crime penalty enhancement. A hate crime penalty enhancement applies to an offense when the actor commits the offense with the purpose, in whole or part, of threatening, physically harming, damaging the property of, or causing a pecuniary loss to any person or group because of:

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

RCC § 22E-1201. Robbery

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

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

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

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

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

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

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

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

RCC § 22E-1204. Criminal Threats

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

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

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

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

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

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

RCC § 22E-1301. Sexual Assault

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

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

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

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

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

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

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

RCC § 22E-1303. Sexual Abuse by Exploitation

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

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

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

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

RCC § 22E-1307. Nonconsensual Sexual Conduct

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

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

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

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

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

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

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

OAG recommends that it be amended to say:

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

RCC § 22E-1401. Kidnapping

The elements of First Degree Kidnapping is:

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

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

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

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

RCC § 22E-1402. Criminal Restraint

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

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

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

The elements of this offense are:

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

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

RCC § 22E-1403. Blackmail

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

Pursuant to paragraph (a):

An actor commits blackmail when the actor:

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

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

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

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

- (1) It is an affirmative defense to liability under this section committed by means of the conduct specified in subparagraphs (a)(1)(A)-(F) that:
 - (A) The actor reasonably believes the threatened official action to be justified, or the accusation, secret, or assertion to be true, or that the photograph, video, or audio recording is authentic, and
 - (B) Engages in the conduct with the purpose of compelling the other person to:
 - (i) Desist or refrain from criminal or tortious activity or behavior harmful to any person's physical or mental health,
 - (ii) Act or refrain from acting in a manner reasonably related to the wrong that is the subject of the accusation, assertion, invocation of official action, or photograph, video or audio recording; or
 - (iii) Refrain from taking any action or responsibility for which the actor believes the other unqualified.
- (2) It is an affirmative defense to liability under this section that, in fact, the actor reasonably believes that the complainant gives effective consent to the actor to engage in the conduct constituting the offense.

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

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

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

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

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

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

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

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

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

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

under the age of 12 are developmentally incapacitated, OAG recommends that this affirmative offense be amended to limit it to when there is a four year age difference between the actor and the victim(s), like it does in other RCC offenses that involve sexual activities between people under the age of 18 or 16.²⁴ For example, see the affirmative defense contained in subparagraph (c)(3) this offense.

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

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

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

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

RCC § 22E-2203. Check Fraud

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

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

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

RCC § 22E-2601. Trespass

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

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

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

Bar Notices shall only be issued by the following persons:

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

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

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

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

RCC § 22E-2701. Burglary

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

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

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

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

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

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

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

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

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

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

“Law enforcement officer” means:

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

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

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

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

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

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

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

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

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

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

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

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

- (a) The court shall not enter a judgment of conviction for more than one of the following District offenses based on the same act or course of conduct:
 - (1) Possession of an Unregistered Firearm, Destructive Device, or Ammunition under RCC § 7-2502.01A;
 - (2) Possession of a Stun Gun under RCC § 7-2502.15;
 - (3) Carrying an Air or Spring Gun under RCC § 7-2502.17;
 - (4) Carrying a Dangerous Weapon under RCC § 22E-4102;
 - (5) Possession of a Dangerous Weapon with Intent to Commit Crime under RCC § 22E-4103; and
 - (6) Possession of a Dangerous Weapon During a Crime under RCC § 22E-4104.
- (b) The court shall not enter a judgment of conviction for more than one of the following District offenses based on the same act or course of conduct:
 - (1) Possession of a Dangerous Weapon with Intent to Commit Crime under RCC § 22E-4103;
 - (2) Possession of a Dangerous Weapon During a Crime under RCC § 22E-4104; and
 - (3) Any offense under Subtitle II of this title that includes as an element, of any gradation, that the person displayed or used a dangerous weapon.
- (c) Where subsection (a) or (b) of this section prohibits multiple convictions, the court shall enter a judgment of conviction in accordance with the procedures specified in [RCC § 22E-22E-214 (c)-(d)].²⁸
- (d) *Definitions.* The term “act” has the meaning specified in RCC § 22E-701.

RCC § 22E-22E-214 (c) and (d) state:

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

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

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

- (1) The time for appeal has expired; or
- (2) The judgment appealed from has been decided.

First, RCC § 22E-4119 (a) and (b) prohibit a court from entering a judgment of conviction for more than one of the specified weapons offenses. It is unclear how this will work in practice. A hypo may help explain the issue. The trier of fact finds the actor guilty of carrying a dangerous weapon in violation of RCC § 22E-4102. They also find the actor guilty of possession of an unregistered firearm, in violation of RCC § 7-2502.01A. Pursuant to RCC § 22E-4119 (a), the court cannot enter a judgment of conviction for both. So, pursuant to RCC § 22E-22E-214 (c) the court will only enter a conviction for carrying a dangerous weapon²⁹. If initially the court only enters a single conviction for carrying a dangerous weapon, then the trier of fact's finding the defendant was guilty of unregistered firearm would not be reviewed by the Court of Appeals. This makes RCC § 22E-22E-214 (d)'s merger provisions superfluous. To fix this issue, OAG has two recommendations. First, the text of RCC § 22E-4119 (a) and (b) should be amended to state that the trier of fact shall initially enter a judgment for more than one of the listed offenses based on the same act or course of conduct, however, pursuant to RCC § 22E-22E-214 (c) and (d) only the conviction for the most serious offense will remain after the time for appeal has run or an appeal has been decided. Second, to ensure that a defendant does not serve additional time pending an appeal, or for the time to appeal to have expired, OAG also recommends that any sentences issued pursuant to this paragraph run concurrently.

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

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

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

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

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

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

RCC § 22E-4201. Disorderly Conduct³¹

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

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

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

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

be amended to say:

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

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

RCC § 22E-4203. Blocking a Public Way

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

³² See RCC § 22E-4201 (a)(2) (B) and (D).

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

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

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

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

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

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

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

³⁴ See the Section-by-Section analysis regarding Section 2(a) contained in Report on Bill 18-425, the Disorderly Conduct Amendment Act of 2010.

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

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

RCC § 22E-4206. Indecent Exposure

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

RCC § 7-2502.15. Possession of a Stun Gun

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

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

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

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

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

ammunition that is conveniently accessible and within reach and is either:

- (i) More than is required to fully load the pistol twice; or
- (ii) More than 20 rounds;

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

RCC § 16-1022. Parental Kidnapping Criminal Offense

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

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

RCC § 22E-204. Causation Requirement

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

- (a) *Causation requirement.* No person may be convicted of an offense that contains a result element unless the person’s conduct is the factual cause and legal cause of the result.
- (b) *“Factual cause” defined.* A person’s conduct is the factual cause of a result if:
 - (1) The result would not have occurred but for the person’s conduct; or
 - (2) When the conduct of 2 or more persons contributes to a result, the conduct of each alone would have been sufficient to produce that result.
- (c) *“Legal cause” defined.* A person’s conduct is the legal cause of a result if:
 - (1) The result is reasonably foreseeable in its manner of occurrence; and
 - (2) When the result depends on another person’s volitional conduct, the actor is justly held responsible for the result.
- (d) *Definitions.*
 - (1) “Result element” has the meaning specified in RCC § 22E-201(d)(2).

³⁷ The Commentary does not address this issue.

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

OAG, App. C at 556-557, recommends that if RCC § 22E-204 retains paragraph (c)(2), that the term “volitional conduct” be defined in statute, and that the phrase “justly held responsible for the result” be amended to “articulate a discernible standard.” In its written comments OAG did not provide any recommended alternate language.

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

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

RCC § 22E-403. Defense of Self or Another Person

On page 13, comment 2, the CCRC stated:

OAG, App. C at 612, recommends revising the statutory text or commentary to clarify “what it means to ‘reasonably believe’ something in the heat of passion.”

- The RCC incorporates this recommendation by revising the commentary to state, “It may be reasonable for person acting in the heat of passion to believe a greater degree of force is necessary than would seem necessary to a calm mind.” This change clarifies the revised commentary.

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

RCC § 22E-501. Duress

On page 20, comment 2, the CCRC stated:

OAG, App. C at 614, recommends that the commentary on paragraph (b)(1) of the defense describe the contours of the phrase “brings about” and give examples of situations that fall within and without that requirement.

The RCC partially incorporates this recommendation by adding description in the commentary on the phrase “recklessly brings about the situation requiring a choice of harms.” Specifically, the commentary now includes the statement that, “The term ‘brings about’ requires that the actor caused the situation requiring the defense. The actor’s conduct must have been a but-for cause of the situation, and the situation must have been reasonably foreseeable. An actor can bring about the situation either by instigating others, or by placing him or herself in circumstances in which others pose a risk of harm.” Also, the commentary already states: “For example, if a defendant agrees to engage in a highly dangerous criminal endeavor, and a co-conspirator then threatens the defendant to commit an additional crime in furtherance of the conspiracy, the duress defense may not be available, if the defendant was aware of a substantial risk that a co-conspirator would compel him to commit an additional crime.” This change clarifies the RCC commentary. [footnotes omitted]

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

RCC § 22E-701. Generally Applicable Definitions

On page 46, comment 1, the CCRC stated:

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

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

On page 46, comment 2, the CCRC stated:

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

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

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

On page 59, comment 9, the CCRC stated:

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

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

RCC § 22E-1202. Assault

On page 75, comment 6, the CCRC stated:

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

³⁸ See

<https://www.bing.com/search?q=contractor+defined&form=PRLNC8&src=IE11TR&pc=LJSE>

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

RCC § 22E-1301. Sexual Assault

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

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

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

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

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

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

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

The RCC also partially incorporates this recommendation by requiring that the consented-to sexual activity between the complainant and the third party or between the complainant and another person violates the RCC sexual abuse of a minor statute. (The previous RCC version of this offense only required that the complainant be under the age of 18 years). The updated arranging statute language consequently excludes from the offense consented-to sexual activity that is legal. For example, the revised language excludes a parent giving effective consent to a 17 year old boyfriend to engage in consensual sexual activity with the parent’s 15 year old child, but includes a parent giving effective consent to a 17 year old boyfriend if the child were 12 years of age. This change improves the clarity, consistency, and proportionality of the revised offense. The commentary to the RCC arranging has been updated to reflect that this revision is a change in law. [emphasis added]

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

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

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

On page 178 , comment 4, the CCRC stated:

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

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

RCC § 22E-1801. Stalking

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

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

⁴⁰ This is the example cited by PDS on page 138 of First Draft of Report 68 – Appendix D2. Disposition of Advisory Group comments.

⁴¹ While the CCRC says the parent might be chargeable as an accomplice, that would only be true if the parent was acting in coordination with the actual perpetrator.

⁴²The same note applies wherever else this “other concerted activity” language is added.

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

RCC § 22E-1803. Voyeurism

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

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

On page 245, comment 21, the CCRC states:

OAG, App. C at 477, recommends redrafting paragraph (b)(2) to state, “Knowingly leaves custody without the effective consent of the law enforcement officer” instead of “Knowingly, without the effective consent of the law enforcement officer, leaves custody.”

- The RCC does not incorporate this recommendation because it would make the drafting of second degree escape from a correctional facility or officer inconsistent with the other degrees of the offense. Because there are multiple, alternative conduct elements for third degree escape, the circumstance element (“without effective consent”) precedes a list. First and second degree mirror this formulation to avoid questions about whether the similar circumstance elements should be read differently, which they should not.

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

⁴³OAG’s comment also applies to wherever else this language appears.

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

RCC § 22E-4401. Prostitution

On page 245, comment 21, the CCRC states:

OAG, App. C at 558-560, recommends revising a sentence in paragraph (c)(1) to read “Discharge and dismissal under this subsection shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained. The sealing of the nonpublic record shall be in accordance to, and subject to the limitations of D.C. Code § 16-803(1).” The current sentence in paragraph (c)(1) reads, “Discharge and dismissal under this subsection shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, such person qualifies under this subsection.” OAG states that the current sentence “does not, on its face, permit a prosecutor from retaining a copy of the records as a check on the court.” OAG states that, “[i]n contrast, D.C. Code § 16-803, the District’s sealing statute, addresses practical issues concerning the sealing of records and recognizes that law enforcement and prosecutors also need to retain and view nonpublic sealed records.” In addition, because paragraphs (c)(1) and (c)(2) “use the term ‘probation’ to describe a defendant’s supervision preadjudication,” OAG recommends that “the Commentary make clear that the court’s authority to expunge records pursuant to RCC § 22E-4401 is limited to situations where the person was not sentenced and that a person who was sentenced would have to avail themselves of the sealing provisions found in D.C. Code § 16-803.”

- The RCC does not adopt this recommendation at this time. The D.C. Council is currently considering new legislation that would potentially include broader changes to record sealing laws in the District. The CCRC may re-visit this issue to determine if further changes are warranted in light of changes to District law governing record sealing. In addition, as is discussed above in the first entry, the RCC prostitution statute deletes the provision for the courts retaining a nonpublic record solely for use in determining whether or not, in subsequent proceedings, a defendant qualifies for the deferred disposition provision.

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

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

On page 293, comment 2, the CCRC states:

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

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

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

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

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

On page 296, comment 7, the CCRC states:

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

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

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

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

On page 297, comment 7, the CCRC states:

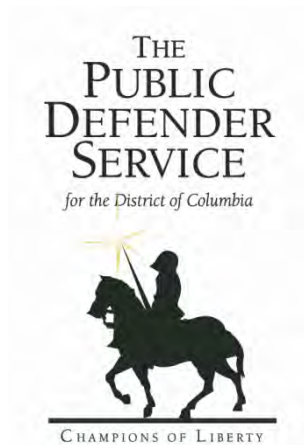
USAO, App. C at 633, recommends removing what was previously subsection (c): “An actor does not commit an offense under this section when, in fact, the conduct constituting a District offense or a comparable offense in another jurisdiction, constitutes an act of civil disobedience.” USAO states that “[a]lthough [this provision] tracks current law . . . it is unclear what would constitute ‘civil disobedience.’” USAO states it “is not aware of any legislative history or case law that would elucidate the definition of ‘civil disobedience’ in” the current D.C. Code contributing to the delinquency of a minor statute.

- The RCC partially incorporates this recommendation by narrowing the exclusion to liability for civil disobedience to conduct that, in fact, constitutes a trespass under RCC § 22E-2601, a public nuisance under RCC § 22E-4202, blocking a public way under RCC § 22E-4203, an unlawful demonstration under RCC § 22E-4204, or a comparable offense in another jurisdiction, by the complainant during a demonstration. The provision makes explicit that a parent or other person cannot be held liable for encouraging such activities protected by the First Amendment. The commentary to the revised CDM statute reflects that this is a possible change in law. This change improves the clarity of the revised statutes.

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

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

M E M O R A N D U M



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

From: Public Defender Service for the District of
Columbia

Date: January 29, 2021

Re: Comments on First Draft of Report No. 68,
Cumulative Update to the Revised Criminal
Code

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

1. §22E-215, De Minimis Defense. The commentary to de minimis defense, RCC § 22E-215, at footnote 23 provides that “a *de minimis* defense would be unavailable under subsection (d) where, in the absence of mitigating circumstances ... a person charged with fare evasion intentionally jumps over a turnstile for the purpose of evading payment of his or her metro fare.” Since, following the initial draft of the RCC’s commentary, the D.C. Council decriminalized fare evasion,¹ PDS suggests referencing a different code provision that criminalizes a minimal harm.
2. §22E-401, Lesser Harm, and §22E-402, Execution of Public Duty. Both of these defenses include provisions that disallow the respective defenses if the conduct constituting the offense is expressly addressed by another available defense, affirmative defense, or exclusion defense. See RCC § 22E-401(b)(3) and §22E-402(b)(1). PDS objects to these provisions and recommends eliminating them. The CCRC made this change to the duress defense in Report No. 68; the same policy reasons support also removing the provision from both §22E-401 and §22E-402. A defendant, consistent with their Sixth Amendment rights, should be able to present evidence of all applicable defenses and to have all available defenses go to the jury. There is no fair basis for depriving a defendant of the right to have a jury consider the entire circumstances of their case. Further, this limitation is particularly unjust given that the government is allowed to present various theories of liability, such as conspiracy and aiding and abetting in the same trial. The government is not limited in its presentation of evidence and the defense should not be either.
3. §22E-604, Authorized Fines. RCC § 22E-604 would allow fines of up to a million dollars to be imposed for class one felonies and up to \$10,000 fines for class nine felonies. Almost across the board, this represents a steep increase from the fines imposed under the Fine Proportionality Act.² The RCC commentary for § 22E-604³ seems to justify this difference by arguing that the

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

² See Fines for Criminal Offenses, D.C. Code § 22-3571.01.

³ Commentary to RCC § 22E-604, at 71.

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

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

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

In the commentary, the CCRC appears to justify the much higher fine structure on the basis that it provides a way of increasing fines for corporate defendants, by allowing the fines to be doubled for corporations⁵. The CCRC could more directly achieve the goal of holding corporations financially accountable for their criminal conduct by creating a separate table for corporate defendants or decreasing the base amount and allowing the statutory maximum for corporate defendants to be multiplied by a greater number.

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

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

⁵ *See* note 3.

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

5. § 22E-606, Repeat Offender Penalty Enhancement, and §22E-607, Pretrial Release Penalty Enhancement. PDS continues to object to the inclusion of RCC § 22E-606, the repeat offender penalty enhancement.⁷ If the RCC does not remove the prior offense enhancement and the offense committed while on release enhancement, the RCC should clarify that these enhancements are applied based on the class of the unenhanced base offense, not in relation to a class of the offense increased by the application of other enhancements.
6. §22E-701, Generally Applicable Definitions, definition of “Dwelling.” PDS recommends eliminating the most recent changes to the definition of “dwelling” and returning to the previous definition. The definition should read: “‘Dwelling’ means a structure that is either designed for lodging or residing overnight at the time of the offense or that is actually used for lodging or residing overnight, including in multi-unit buildings, communal areas secured from the general public.” According to the CCRC notes in Appendix D2, the most recent changes, most notably eliminating the phrase “at the time of the offense” were done to make the definition easier to read. The phrase “at the time of the offense” was critical to ensuring that a structure that was originally designed as a dwelling and that might even retain a number of design-elements common to dwellings - e.g., a bathtub in the bathroom - but that no longer serves the actual function of a dwelling would not be included in the definition of “dwelling.” A structure that was originally a residential rowhouse but that now functions only to “house” a restaurant or a charitable foundation should not be considered a “dwelling” for purposes of the RCC.
7. 22E-701, Generally Applicable Definitions, definition of “Position of trust and authority.” The RCC defines “position of trust and authority” to include a child of a parent’s sibling, whether related by blood, adoption, or marriage, domestic partnership either while the legal status exists or after such marriage or domestic partnership exists or an individual with whom such individual is in a romantic, dating, or sexual relationship. “Position of trust” also includes any individual with whom a biological half-sibling is in a romantic, dating, or sexual relationship. PDS believes

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

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

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

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

⁸ RCC Commentary to Offenses Against Persons at 270.

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

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

9. §22E-1102, Manslaughter. PDS makes the same objection to “felony manslaughter” as it does above to felony murder.
10. §22E-1301, Sexual Assault. PDS recommends making it a defense, rather than an affirmative defense, that in fact the actor reasonably believes that the complainant gives effective consent to the actor to engage in the conduct constituting the offense. This change would be identical to the change to the consent law made by D.C. Law 18-88. The law was changed because of the difficulty of instructing the jury when consent can be an aspect of the government’s failure to prove force beyond a reasonable doubt at the same time that consent is an affirmative defense. To resolve that inherent tension, D.C. Law 18-88, in a section proposed by the U.S. Attorney’s Office, effectively changed consent from an affirmative defense to a defense such that the government must disprove consent once it is raised by the defense. To prevent the same conundrum before juries and to properly allocate the burden on the government for this serious offense that carries lengthy periods of incarceration and the potential for lifetime sex offender registration, PDS recommends changing §22E-1301(e).
11. Marriage and domestic partnership defense, for example in §22E-1302, Sexual Abuse of a Minor. RCC § 22E-1302 defines sixth degree sexual abuse as consensual sexual contact between

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

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

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

12. §22E-1308, Incest. The conjunction between the second and third elements of first- degree incest should be “and,” not “or.” This is consistent with the RCC commentary.¹¹
13. §22E-1808, Possession of an Obscene Image of a Minor. PDS recommends adding an affirmative defense that the image is possessed with intent, exclusively and in good faith, to permanently dispose of the item, similar to the temporary possession affirmative defense at §22E-502(a)(1)(F).
14. The affirmative defenses in the distribution of sexual recording and obscene images offenses, specifically at §22E-1804(c), 22E-1805(c)(2), 22E-1806(c)(2), and 22E-1807, should be expanded to allow distribution with the intent to permanently dispose of the item, similar to the temporary possession defense at RCC §22E-502(a)(1)(F). Specifically, PDS proposes the affirmative defenses be rewritten as follows:

It is an affirmative defense to liability under this section, that the actor:

- (A) With intent, exclusively and in good faith, to report possible illegal conduct, ~~or~~ seek legal counsel from any attorney, or permanently dispose of the image or audio recording;
- (B) Distributed the image or audio recording to a person whom the actor reasonably believes is:
 - (i) A law enforcement officer, prosecutor, or attorney...

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

¹¹ RCC Commentary to Offenses Against Persons at 266.

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

16. §22E-4105, Possession of a Firearm by an Unauthorized Person. The commentary makes clear that the mental state of “knowingly” is to apply to the element “is a fugitive from justice” at §22E-4105(b)(2)(B). However, there is an intervening mental state of “in fact” buried in the preceding paragraph at (b)(2)(A); the rules of interpretation applicable to culpable mental states mean that the mental state for “is a fugitive from justice” then becomes “in fact,” rather than “knowingly.” PDS recommends switching the order so “is a fugitive from justice” is at (A) and the prior conviction paragraph is at (B).
17. §22E-4119, Limitation on Convictions for Multiple Related Weapon Offenses – Paragraph (3) of subsection (b) refers to “an element, of any gradation, that the person displayed or used a dangerous weapon.” This seems to be an outdated reference to the structure of many offenses prior to Report No. 68, where “displays or uses a dangerous weapon” was an element of a higher gradation. Now it is often, if not always, a penalty enhancement rather than a gradation. See e.g., §22E-1201(e)(4) (“The penalty classification for first, second, or third degree robbery is increased in severity by one penalty class when a person commits the offense ... by using or displaying what is, in fact, a dangerous or imitation dangerous weapon.”)

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

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

Memorandum

Michael R. Sherwin
Acting United States Attorney
District of Columbia



Subject: Comments to D.C. Criminal Code
Reform Commission for First Draft of Report
#68

Date: January 29, 2021

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

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

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

First Draft of Report #68—RCC Compilation

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

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

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

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

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

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

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

C. RCC § 22E-701. Definitions.

USAO recommends the following changes to the definition of “Consent.”

“Consent” means a word or act that:

- (A) Indicates, explicitly or implicitly, agreement to particular conduct or a particular result; and
- (B) Is not given by a person who:
 - (i) In fact, ~~is~~ legally incompetent to authorize the conduct charged to constitute the offense or to the result thereof; or
 - (ii) Because of youth, mental illness or disorder, or intoxication, ~~is believed by the actor to be~~ the actor knew or should have known is unable to make a reasonable judgment as to the nature or harmfulness of the conduct to constitute the offense or to the result thereof; and
- (C) Has not been withdrawn, explicitly or implicitly, by a subsequent word or act.

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

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

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

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

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

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

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

D. RCC § 22E-1101. Murder.

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

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

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

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

² Ala. Code 1975 13A-6-2(a)(3).

³ AS § 11.41.100(a)(2).

⁴ A.R.S. § 13-1105(A)(2).

⁵ A.C.A. § 5-10-102(a)(3).

⁶ West’s F.S.A. § 782.04(1)(a)(2)(h)

⁷ Ga. Code Ann., § 16-5-1(d).

⁸ I.C. § 18-4003(d).

⁹ I.C.A. § 707.2(1)(e).

¹⁰ K.S.A. 21-5402(c)(1)(G).

¹¹ LSA-R.S. 14:30(A)(1).

¹² M.C.L.A. 750.316(1)(B).

¹³ M.S.A. § 609.185(a)(5).

¹⁴ Miss. Code Ann. § 97-3-19

¹⁵ N.R.S. 200.030(1)(b).

¹⁶ NDCC, 12.1-16-01(1)(c).

¹⁷ 21 Okl. St. Ann. § 701.7(C).

¹⁸ O.R.S. § 163.115(1)(b)(J), (c).

¹⁹ T. C. A. § 39-13-202(a)(2).

²⁰ U.C.A. 1953 § 76-5-203(1)(b).

²¹ W.S.1977 § 6-2-101(a).

²² 18 U.S.C. § 1111(a).

²³ Code 1976 § 16-3-85.

²⁴ Following this decision, the Arkansas legislature amended the statute to define knowingly taking the life of a child under the age of 14 as first degree murder. A.C.A. § 5-10-102(a)(3).

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

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

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

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

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

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

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

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

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

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

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

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

F. RCC § 22E-1308. Incest.

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

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

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

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

USAO recommends removing subsection (b).

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

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

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

(b) *Second degree.* An actor commits second degree possession of a firearm by an unauthorized person when that actor:

- (1) Knowingly possesses a firearm; and
- (2) In addition:

- (A) Has a prior conviction for what is, in fact:

- (i) A District offense that is currently punishable by imprisonment for a term exceeding one year, or a comparable offense, within 10 years;
- (ii) An offense under Chapter 41 of this subtitle, or a comparable offense, within 5 years; or
- (iii) An intrafamily offense, as defined in D.C. Code § 16-1001(8), that requires as an element confinement, ~~sexual conduct~~, a sexual act, a sexual contact, bodily injury, or threats, or a comparable offense, within 5 years.

- (B) Is a fugitive from justice; or

- (C) Is, in fact, subject to a ~~final civil protection order issued under D.C. Code § 16-1005~~-court order that:

- (i) Requires the actor to relinquish possession of any firearms or ammunition, or to not own, possess, purchase, receive, or attempt to purchase or receive a firearm or ammunition while the order is in effect; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Public Safety Division



MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: February 16, 2021

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

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

COMMENTS ON THE DRAFT REPORT

RCC § 22E-602. Authorized Dispositions²

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

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

² Found at Appendix D3 – Disposition of Advisory Group Comments & Other Changes to Draft Documents (App. D3) page 1 and page 47 of the First Draft of Report #69 - Cumulative Update to Class Imprisonment Terms and Classification of RCC Offenses.

³ Throughout this memo, OAG will refer to the CCRC proposal as a “probation before judgment” or “PBJ” as that is familiar phrase for when the court places a defendant on probation without entering the conviction.

offenses. Instead, OAG recommends that the judge's authority to grant a PBJ, for the designated offenses - over the government's objection⁴- should be limited to one PBJ in any 10 year period and that if the defendant successfully completes the PBJ, that the law enforcement and court records associated with the PBJ be sealed – not expunged.

Paragraph (c) states:

Dismissal of proceedings.

- (1) When a person is found guilty of violation of any Class C, D, or E offense⁵, the court may, without entering a judgment of guilty and with the consent of the person, defer further proceedings and place the person on probation upon such reasonable conditions as it may require and for such period, not to exceed one year, as the court may prescribe. Upon violation of a condition of the probation, the court may enter an adjudication of guilt and proceed as otherwise provided. The court may, in its discretion, dismiss the proceedings against such person and discharge the person from probation before the expiration of the maximum period prescribed for such person's probation. If during the period of probation the person does not violate any of the conditions of the probation, then upon expiration of such period the court shall discharge such person and dismiss the proceedings against the person. Discharge and dismissal under this subsection shall be without court adjudication of guilt. Such discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime (including the penalties prescribed under RCC § 22E-606 for second or subsequent convictions) or for any other purpose.

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

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

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

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

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

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

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

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

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

The calculus is quite different, however, when the records to be sealed relate to an individual who may be or is guilty of a criminal offense. In such instances, there are strong reasons for preserving the ability of law enforcement agencies to access those records for legitimate law enforcement purposes. As the D.C. Circuit Court of Appeals has noted:

The government does ... have a legitimate need for maintaining criminal records to efficiently conduct future criminal investigations. Law enforcement authorities have an interest in knowing, for example, that a definite suspect in a crime under investigation had previously been arrested or convicted, especially if for a similar offense. Likewise, police investigators will be greatly assisted if they are able to check whether persons residing or having been observed at the situs of an offense involving a particular modus operandi had previously been arrested or convicted of an offense involving the same modus operandi.

Doe v. Webster, 606 F. 2d 1226, 1243 (D.C. Cir. 1979). Similarly, courts often consider criminal records in making a wide variety of decisions, ranging from pre-trial detention to sentencing decisions.⁷

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

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

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

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

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

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

d. *Process*. Deferred-adjudication provisions that do not require the consent of the prosecutor are relatively rare, but not unknown. See N.Y. Crim. Proc. Law § 170.56 ("Adjournment in contemplation of dismissal in cases involving marijuana"); Vt. Stat., title 13, § 7041 (trial court has authority to defer adjudication without agreement of prosecutor in specified circumstances). See also Ohio Rev. Code § 2935.36 (prosecutor must initiate pretrial diversion process based on prosecutor's belief that the defendant "probably will not offend again," although case law grants judges nonstatutory authority to devise their own similar programs; see *Lane v. Phillabaum*, 912 N.E.2d 35 113 (Ohio Ct. App. 2008)).

There is no general deferred-adjudication statute in New York, but courts have created a deferred-adjudication process under their own rules, allowing guilty pleas to be withdrawn with the consent of the prosecutor following successful completion of a period of probation. See N.Y. City Bar, *The Immigration Consequences of Deferred 4 Adjudication Programs in New York City* (2007), at 2-3, available at <http://www.nycbar.org/pdf/report/Immigration.pdf>; N.Y. Crim. Proc. Law §§ 160.5, 160.55. [emphasis added]

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

⁸See [mpcs_proposed_final_draft.pdf](#)

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

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

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

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

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

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

RCC § 22E-1201. Robbery¹¹

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

The penalty classification of second and third degree robbery is increased by:

- (A) One class when the actor commits the offense...
 - (II) Under sub-paragraphs (b)(3)(B), (c)(1)(B), (c)(1)(C), or (c)(1)(D) by using or displaying what is, in fact, a dangerous weapon or imitation dangerous weapon; or
- (B) Two classes when the actor commits the offense under sub-paragraph (b)(3)(A) or sub-paragraph (c)(1)(A) by recklessly displaying or using what, in fact, is a dangerous weapon.

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

The Commentary states, in relevant part:

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

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

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

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

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

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

RCC § 22E-2701. Burglary

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

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

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

- (a) *First degree.* An actor commits first degree burglary when that actor:
- (1) Reckless as to the fact that a person who is not a participant in the burglary is inside and directly perceives the actor or is entering with the actor;
 - (2) Knowingly and fully enters or surreptitiously remains in a dwelling, or part thereof;
 - (3) Without a privilege or license to do so under civil law;
 - (4) With intent to commit inside one or more District offenses that is, in fact, an offense under Subtitle II of this title or a predicate property offense.¹³

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

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

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

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

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

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

Therefore, while the current law provides a range of 5 years to 30 years for burglarizing an occupied residence, the CCRC recommends that the offense carry a maximum penalty of just 4 years. In addition, whereas committing an armed burglary of a residence, under current law carries a maximum penalty of 60 years and a 5 year mandatory minimum for a first offense¹⁵, the CCRC recommendation is that this offense, designated as enhanced 1st degree burglary, carry a maximum penalty of only 8 years. To recognize the seriousness of a burglary of an occupied residence, including the trauma and potential harm to a victim, OAG recommends that the CCRC amend the burglary penalty provision to increase, by one class the penalty for first degree burglary and enhanced first degree burglary.¹⁶

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

¹⁴ See pages 47 through 124 of the First Draft of Report 68 – Red-Ink Comparison.

¹⁵ See D.C. Code § 22-4502, additional penalty for committing crime when armed.

¹⁶ OAG’s recommendation is consistent with the recommendation previously made by USAO. It varies in that OAG is making a specific recommendation as to which penalty class should be assigned by to first degree and enhanced first degree burglary. See page 240 of Appendix D2: Disposition of Advisory Group Comments & Other Changes to Draft Documents.

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

For any felony committed on or after August 5, 2000, the court shall impose a sentence that:

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

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

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

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

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

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

¹⁷ See <https://lims.dccouncil.us/Legislation/B13-0696>.

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

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

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

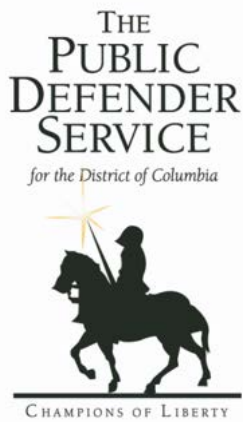
In addition, the Commentary should make it clear that the removal of the date is not intended (nor understood) to require resentencing for someone who has already been sentenced under the then existing statutory provision.

¹⁸ See

http://www.courtexcellence.org/uploads/publications/Restoring_Local_Control_of_Parole_Sign_On_Letter.pdf

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

M E M O R A N D U M



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

From: Public Defender Service for the District of
Columbia

Date: February 9, 2021

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

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

- 1. Reduce sentence length.** PDS acknowledges that the Commission reduced many maximum sentences from 60 years or life without release to 45 years or less. However, as conceded in the RCC commentary, 45 years still amounts to a life sentence and is more than the 39.2 years that the Bureau of Prisons considers to be a life sentence.¹ PDS understands the CCRC's point that maximum penalties of 45 and 40 years, though seemingly lower than the D.C. Code's maximum allowable prison sentences, are in fact comparable to life without possibility of release because the life expectancy for non-Hispanic Black men in the District is just under 69 years.² However, the notion that we would create a system that sets penalties based on ensuring the possibility that the punishment can be longer than the life of the person being punished is extremely troubling. PDS has repeatedly advocated³ against creating life sentences in the Revised Criminal Code and joins scholars and researchers who argue for setting the absolute maximum sentence for an offense at no more than 20 years of incarceration.⁴ In the District, long prison sentences are imposed almost exclusively on Black residents.⁵ This long-term incarceration traumatizes families and perpetuates poverty by depriving families of the support and wages of incarcerated

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

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

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

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

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

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

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

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

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

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

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

⁸ *Id.*

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

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

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

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

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

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

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

¹³ *Id.*

¹⁴ Data provided through the Criminal Justice Coordinating Council.

¹⁵ See *supra* note 3.

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

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

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

The dismissal procedure is also necessary to bring a measure of racial equity to the District's criminal legal system. As shown by the Sentencing Commission's felony sentencing data, more than 90 percent of the individuals sentenced on felonies are Black¹⁷, and any time spent in misdemeanor and traffic courtrooms in Superior Court shows that the same racial dynamics exist for misdemeanors. It is not that white residents do not commit offenses, rather they are diverted out of the system before they ever get to a courtroom. White defendants are not arrested, are given warnings, dismissal opportunities, and second chances. The non-arrests do not register in any database, are not counted against them and do not create barriers for employment, education, or housing. RCC § 22E-602(e) provides a way for Black defendants to have an opportunity to

¹⁶ D.C. Code § 48-904.01(e)(1).

¹⁷ See *supra* note 5.

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

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

- 5. Limit Enhancements.** PDS maintains its objection to enhancements based on prior convictions (RCC §22E-606) and on pre-trial release status (RCC §22E-607) and incorporates its previous arguments explaining why these enhancements are overly punitive and amplify the racial disparities and inequities of our criminal legal system.²⁰ Compounding the problems with those enhancements is the policy choice to allow stacking of enhancements. PDS continues to argue that allowing the stacking of enhancements undermines the commendable work of the CCRC to eliminate as much as possible sentences that are disproportionate to the person’s conduct and harm caused.²¹ For Report No. 69 in particular, PDS reiterates its recommendation that the repeat offender enhancement and the pre-trial release status enhancement, which both increase the statutory maximum for an offense add a certain number of years to increase the statutory maximum of an offense based on the class of the offense, add years based on the class of the unenhanced offense (e.g., 2nd Robbery) rather than on an already enhanced offense (e.g., enhanced 2nd Robbery (significant bodily injury by dangerous weapon)). If CRCC persists in the policy choice of increasing punishment based on the status of the offender rather than based only on the offender’s conduct, PDS strongly recommends that the status-punishment be minimal. In many cases, the enhanced offense and the unenhanced offense would receive the same status-punishment. For example, 1st Robbery is in class 6 and enhanced 1st Robbery is in class 5. The status-punishment based on prior convictions (RCC §22E-606) adds 2 years to the statutory maximum for an offense that is in either class 5 or class 6. In other cases, allowing the status-punishment on the enhanced offense would make a difference. For example, 2nd Robbery is in class 8. The significant bodily injury, dangerous weapon enhancement at RCC § 22E-606(e)(5)(B) adds two classes, class 6. The status-punishment based on prior convictions adds 1 year for a class 8 offense but adds 2 years for a class 6 offense. The punishment for the offense is already untethered from the conduct committed, allowing punishment that is disproportionate, the CCRC should not add to the disparity by increasing the punishment that is based only on status. For clarity, PDS recommends that the addition to the explanatory note for robbery²² include a footnote following the sentence that reads: “These penalty enhancements may apply in addition to any penalty enhancements authorized by RCC Chapter 6.” That footnote should

¹⁸ New York Criminal Procedure § 170.40.

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

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

²¹ See Appendix C at C678 – C679.

²² See Report #69 at 36.

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

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

Memorandum

Michael R. Sherwin
Acting United States Attorney
District of Columbia



Subject: Comments to D.C. Criminal Code
Reform Commission for First Draft of Report
#69

Date: February 16, 2021

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

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

The U.S. Attorney's Office for the District of Columbia (USAO) and other members of the Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the CCRC's First Draft of Report #69. USAO reviewed these documents and makes the recommendations noted below.¹

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

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

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

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

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

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

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

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

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

B. RCC § 22E-1101. Murder.

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

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

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

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

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

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

C. RCC § 22E-1201. Robbery.

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

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

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

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

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

USAO continues to oppose decreasing the penalty for carjacking.

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

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

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

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

USAO recommends increasing the penalties for Offensive Physical Contact.

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

E. RCC § 22E-1301. Sexual Assault.

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

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

F. RCC § 22E-1401. Kidnapping.

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

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

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

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

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

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

H. RCC Subtitle III. Property Offenses.

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

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

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

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

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

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

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

J. RCC § 4120. Endangerment with a Firearm.

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

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

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

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

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

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

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

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

APPENDIX D.
DISPOSITION OF ADVISORY GROUP COMMENTS
& OTHER CHANGES FROM DRAFT DOCUMENTS

Appendix D is a compilation of all CCRC written responses to Advisory Group members' written comments as well as an elaboration on any additional, substantive changes that were made to the drafts on CCRC initiative. This Appendix is organized in chronological order with the most recent responses and explanation of changes appearing at the end.

RCC § 22E-102. Rules of Interpretation.

- (1) *OAG, App. C. at 15-16, recommends adding the phrase “to determine the legislative intent” to the second sentence of subsection (a) so it reads “If necessary to determine legislative intent, the structure, purpose, and history of the provision also may be examined.”*
 - The RCC incorporates the language in the OAG recommendation. This added language is not intended to change current District case law, rather it reflects the fundamental tenet of all statutory interpretation that legislative intent is controlling. Per the first sentence of subsection (a), the first and usually definitive way of determining legislative intent is the plain language of the statute. This change clarifies the revised statutes.
- (2) *USAO, App. C at 24, recommends changing subsection (b) to read: “If 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.” USAO cites for support to United States Parole Comm’n v. Noble, 693 A.2d 1084, 1104 (D.C. 1997).¹*
 - The RCC incorporates the language in the USAO recommendation. This change clarifies the revised statutes.
- (3) *USAO, App. C. at 24, recommends the commentary reflect District case law recognizing that titles and captions may be of aid in interpreting ambiguous statutes.*
 - The RCC incorporates the USAO recommendation by amending the commentary to cite to relevant portions of *In re: J.W.*, 100 A.3d 1091, 1095 (D.C. 2014) and *Mitchell v. United States*, 64 A.3d 154, 156 (D.C. 2013). This change clarifies the revised statutes.
- (4) *USAO, App. C. at 24, says it believes a footnote in an earlier draft report concerning other jurisdictions’ provisions regarding codification of the effect of headings and captions is imprecise. USAO notes that while the draft report’s cited jurisdictions do have statutory provisions concerning the effect of headings and captions, these statutes prohibit reliance on headings.*
 - The RCC does not incorporate this comment because the commentary has been changed since to not include other jurisdiction references. Other jurisdiction references made in prior draft reports remain saved in an appendix to the RCC Commentary but are not updated to stay current with changing laws in other jurisdictions.
- (5) *USAO, App. C. at 25, recommends adding the phrase “otherwise ambiguous” to subsection (c) to clarify that headings and captions may only be of aid in interpreting “otherwise ambiguous” statutory language.*

¹ *U.S. Parole Comm’n v. Noble*, 693 A.2d 1084, 1104 (D.C. 1997), adhered to on reh’g en banc, 711 A.2d 85 (D.C. 1998) (“The rule of lenity, therefore, can “tip the balance in favor of criminal defendants only where, exclusive of the rule, a penal statute’s language, structure, purpose and legislative history leave its meaning genuinely in doubt.” *Lemon v. United States*, 564 A.2d 1368, 1381 (D.C.1989) (internal quotation marks omitted); see *Luck*, 617 A.2d at 515.”).

Appendix D. Disposition of Advisory Group Comments & Other Changes From Draft Documents (D1)

- The RCC incorporates the language in the USAO recommendation. This change clarifies the revised statutes.

RCC § 22E-103. Interaction of Title 22E With Other District Laws.

(1) *OAG, App. C. at 16, says that the statutory language and/or commentary needs to be “clarified or changed.” OAG notes that “[b]eing 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,” and questions whether case law establishing such estoppel is preserved by the RCC provision. OAG does not recommend any specific language to clarify or change the statute.*

- The RCC addresses this comment by amending the statute to begin “Unless expressly specified by this title or otherwise provided by law,…” and explaining in commentary that District civil statutes and civil case law may provide consequences for criminal convictions, or Title 22E provisions may expressly provide such consequences (by statute). This change clarifies the revised statutes.

RCC § 22E-104. Applicability of the General Part.

(1) *The CCRC recommends changing this statute to read “Unless otherwise expressly specified by statute, the provisions in Subtitle I of this title apply to all other provisions of this title.”*

- This change is not intended to substantively change the statute. However, this change clarifies that Subtitle I applies to all other provisions in Title 22, unless expressly specified by *statute*, as opposed to any other source of law.

RCC § 22E-201. Proof of Offense Elements Beyond a Reasonable Doubt.

(1) *The CCRC recommends generally specifying the burden of proof for exclusions from liability, defenses, and affirmative defenses in a new subsection (b). If there is any evidence of a statutory exclusion from liability at trial, the government must prove the absence of all elements of the exclusion from liability beyond a reasonable doubt. If there is any evidence of a statutory defense at trial, the government must prove the absence of all elements of the defense beyond a reasonable doubt. Unless otherwise expressly specified by statute, a defendant has the burden of proving an affirmative defense by a preponderance of the evidence.*

- This change improves the clarity and consistency of the revised statutes.

RCC § 22E-202. Conduct Requirement.

(1) *The CCRC recommends subdividing paragraph (c)(2) to include subparagraphs for each alternative element.*

- This change does not substantively change the revised statute.

RCC § 22E-203. Voluntariness Requirement.

- (1) *The CCRC recommends substituting the phrase “required for that offense” for the phrase “necessary to establish the offense,” consistent with other RCC General Part provisions.*
 - This change improves the consistency of the revised statute and does not substantively change its meaning.
- (2) *The CCRC amends the Definitions subsection to cross-reference RCC § 22E-202. The previous reference to RCC § 22E-201 was a typographical error.*
 - This change does not substantively change the revised statute.

RCC § 22E-204. Causation.

(1) PDS, App. C at 225-228, and USAO, App. C at 242-243,² both offer detailed recommendations concerning the definition of legal cause under RCC § 22E-204(c). Although there are material areas of disagreement between the agencies, there are two main propositions upon which both PDS' and USAO's comments converge. First, both agencies state that the RCC's use of the double negative, "not too unforeseeable" employed in the foreseeability prong of subsection (c) is problematic and should be avoided. Specifically, PDS describes this phraseology as "indeterminate," while USAO describes it as "needlessly indirect." Both PDS and USAO recommend, as a partial solution to these problems, rephrasing the foreseeability prong to read: "reasonably foreseeable in its manner of occurrence." Second, both agencies state that the RCC's reliance on the phrase "just bearing on the person's liability" in subsection (c) is problematic and should be avoided. Specifically, PDS explains that this language "injects a completely subjective element of moral judgment that would lead to arbitrary and unpredictable results." And USAO explains that this language manifests "imprecision," "practical opacity," and "vagueness." Both PDS and USAO therefore recommend eliminating the phrase "just bearing on the person's liability" from subsection (c) altogether.³

- The RCC incorporates PDS' and USAO's consensus recommendations in accordance with the rationales offered by both agencies, while making additional revisions consistent with the concerns underlying those recommendations. To start, and in order to ensure clarity of communication, RCC § 22E-204(c) is reorganized into two separate paragraphs. The first paragraph, (c)(1), rephrases the foreseeability prong along the lines recommended by both PDS and USAO: "reasonably foreseeable in its manner of occurrence." Rephrased in this way, the foreseeability prong now avoids use of the double negative. The second paragraph, (c)(2), rephrases the volitional conduct prong to omit reference to the "just bearing" language in accordance with both agencies' recommendations. Instead, the volitional conduct prong now reads: "not too dependent upon another's volitional conduct *to hold the person responsible for it.*" The italicized language, which replaces the phrase "to have a just bearing on the person's liability," more clearly states the principle upon which the volitional conduct prong rests, without inviting

² USAO's comment on legal causation was submitted on May 20, 2019. However, the deadline for comments on the First Draft of Report No. 35 was May 12, 2019.

³ While PDS and USAO agree on omission of the "just bearing" language, as well as revision of the reasonable foreseeability prong, the agencies disagree on what to do about the volitional conduct prong in subsection (c). For example, PDS recommends reframing it in terms of being "*directly dependent* upon another's volitional conduct," whereas USAO would simply eliminate it altogether. In addition, PDS recommends adding an entirely new prong to subsection (c), which focuses on evaluating whether the "connection between the conduct and the result is not otherwise remote, indirect, or purely contingent on other factual causes." In contrast, USAO recommends relying on the requirement of reasonable foreseeability as the sole basis for evaluating legal causation under the RCC.

unnecessarily broad considerations of justice into the fact finder's evaluative process.⁴

- These revisions do not further change current District law, and they improve the clarity and consistency of the revised statutes.

(2) *The CCRC recommends omitting all references in the Commentary to “urban gun battle liability,” and replacing them with references to “gun battle liability.” The term “urban” does not serve any useful explanatory purpose in this context and may be unnecessarily prejudicial. This revision is consistent with informal comments received from PDS.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(3) *The CCRC recommends omitting the final two sentences in the current District law section addressing legal causation, which may improperly suggest that legal causation under the RCC is only a matter of fairness, wholly detached from considerations of foreseeability or volitionality.⁵ This revision is consistent with informal comments received from PDS.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

⁴ USAO recommends deleting the volitional conduct prong in its entirety. In support of this deletion, the agency offers the following rationale, which reads (in its entirety): “Nor is [the volitional conduct prong] 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.” For a detailed explanation of why the reasonable foreseeability requirement does not, and cannot, adequately account for the causal influence of the volitional conduct of another person, see the Explanatory Note and Relation to Current District Law entry on RCC § 22E-204(c)(2).

⁵ These two sentences state that: “[The] inquiry [required by the RCC approach to legal causation] would not necessarily preclude the assignment of criminal liability upon X for D’s criminal conduct. But it would require the factfinder to consider the fairness of attributing criminal liability under such circumstances.”

RCC § 22E-205. Culpable Mental State Requirement.

(1) *The CCRC recommends deleting the phrase “or a comparable mental state specified in this Title” from the definition of culpable mental state in RCC § 22E-205(b)(1). This revision better accords with the Council’s ultimate authority to define criminal offenses (i.e., whatever culpable mental state the Council drafts is what applies to an offense, regardless of what a prior legislative provision of general application says). Corresponding to this revision, the CCRC also recommends revising the accompanying Explanatory Note to omit discussion of the now-deleted language. Both of these revisions are consistent with informal comments received from OAG.*

- These revisions do not change current District law, and they improve the clarity and consistency of the revised statutes.

RCC § 22E-207. Rules of Interpretation Applicable to Culpable Mental States.

- (1) *The CCRC recommends amending the distribution of culpable mental states provision to provide that, like the culpable mental states, any strict liability specified in an offense applies to all subsequent result elements and circumstance elements.*
- Offenses definitions have been amended to ensure this rule does not substantively change the revised offenses.

RCC § 22E-208. Mistake.

- (1) *The CCRC recommends reorganizing paragraph (c) so that paragraph (c)(1) is not left blank.*
 - This change improves the consistency of the revised statute and does not substantively change its meaning.
- (2) *The CCRC recommends rephrasing paragraph (d) so that the introductory sentence is clearer and the culpable mental state (purpose) appears before the conduct element in (d)(2), consistent with other provisions in the RCC.*
 - This change improves the consistency of the revised statute and does not substantively change its meaning.
- (3) *The CCRC recommends revising a footnote in the Explanatory Note accompanying RCC § 22E-208(c) to clarify the interaction between the RCC approach to culpability as to criminality under this subsection and the RCC approach to deliberate ignorance under RCC § 22E-208(d).⁶ This revision is consistent with informal comments received from OAG.*
 - This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.
- (4) *The CCRC recommends revising the Explanatory Note accompanying RCC § 22E-208(d) to address the substantial motivating factor requirement governing deliberate ignorance evaluations in the main text of the commentary, rather than in the footnotes. (Other than moving the footnote to the main text, no further changes to the relevant statement have been made.) This new placement better reflects the relative importance of the principle being stated and is consistent with informal comments received from PDS.*
 - This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

⁶ That footnote adds, in relevant part:

Another example of an implied culpability as to illegality element is reflected in the RCC general provision governing deliberate ignorance, RCC § 22E-208(d), which authorizes the factfinder to impute knowledge as to a circumstance where the government proves beyond a reasonable doubt that: (1) the actor was at least reckless as to whether the prohibited circumstance existed; and (2) the actor avoided confirming or failed to investigate the existence of the circumstance with the purpose of avoiding criminal liability. The second prong of this general provision entails proof of knowledge as to the illegality of the deliberately ignorant actor's conduct to the extent that such awareness of criminality is a necessary prerequisite to acting "*with the purpose of avoiding criminal liability.*" RCC § 22E-208(d)(2) (italics added).

RCC § 22E-209. Intoxication.

- (1) *The CCRC recommends revising the phrase “afford a general defense to a charge of crime,” as employed in RCC § 22E-209(d)(2), to more simply, succinctly, and clearly read: “establish a general defense.” This revision is consistent with informal comments received from OAG.*
 - This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.
- (2) *The CCRC recommends substantially expanding a footnote in the Explanatory Note addressing the definition of self-induced intoxication to both highlight and clarify the “pursuant to medical advice” exception under RCC § 22E-209(d)(2).⁷ This revision is consistent with informal comments received from OAG.*
 - This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.
- (3) *The CCRC recommends revising the self-induced intoxication provision to clarify that a person must act “at least” negligently. This clarifies that proof that a person acted intentionally or purposely is also sufficient.*
 - This change clarifies and does not substantively change the revised statute.
- (4) *The CCRC recommends revising the self-induced intoxication provision to specify that medical advice must be given by a “licensed health professional,” as defined in RCC § 22E-701.*
 - This change improves the clarity and consistency of the revised statutes and may eliminate an unnecessary gap in liability.
- (5) *The CCRC recommends replacing the pronouns “his or her” with gender-neutral references to “the person.”*
 - This change does not substantively change the revised state.

⁷ That footnote now adds, in relevant part:

Note[] that a person who knowingly consumes an intoxicating substance “pursuant to medical advice” falls outside the scope of the RCC definition of self-induced intoxication. RCC § 22E-209(d)(2)(C); *see, e.g.*, Model Penal Code § 2.08(5)(a) (excluding from definition of self-induced intoxication person who “introduces [intoxicating substances] pursuant to medical advice”); ROBINSON, *supra* note 6, at 2 CRIM. L. DEF. § 176 (“[T]hough a patient may voluntarily take prescription drugs, intoxication as a result of such use may be involuntary so long as it is done pursuant to medical advice.”). In contrast, where “medically prescribed drugs” are *not* “taken according to prescription,” then any intoxication resulting from their knowing consumption *could* be considered “self-induced” for purposes of RCC § 22E-209. *E.g.*, *State v. Gardner*, 230 Wis. 2d 32, 41–42 (Wis. Ct. App. 1999) (for this reason involuntary intoxication defense unavailable “where a patient knowingly takes more than the prescribed dosage, [] or mixes a prescription medication with alcohol or other controlled substances”) (collecting cases).

RCC § 22E-210. Accomplice Liability.

- (1) *The CCRC recommends clarifying that the accomplice must intend that “all” circumstance elements exist.*
- This change clarifies and does not substantively change the revised statute.

RCC § 22E-211. Liability for Causing Crime by an Innocent or Irresponsible Person.

- (1) *The CCRC recommends striking “causes” from the definitions subsection because “causes” is not a defined term in the RCC.*
- This change clarifies and does not substantively change the revised statute.

RCC § 22E-212. Exclusions from Liability for Conduct of Another Person.⁸

- (1) *The CCRC recommends retitling the provision to make clear that it is an exclusion from liability. Under RCC § 22E-201(b), if there is any evidence of a statutory exclusion from liability at trial, the government must prove the absence of all elements of the exclusion from liability beyond a reasonable doubt.*
 - This change clarifies the revised statute.
- (2) *The CCRC recommends replacing subsection (b) with a prefatory clause at the beginning of the provision that states, “Unless otherwise expressly specified by statute,” consistent with other RCC General Part provisions.*
 - This change improves the consistency of the revised statute and does not substantively change its meaning.

⁸ Previously titled “Exceptions to Legal Accountability.”

RCC § 22E-213. Withdrawal Defense to Legal Accountability.

- (1) *The CCRC recommends striking the burden of proof subsection as unnecessary in light of the revisions to RCC § 22E-201, which now specifies the burden of proof for all exclusions, defenses, and affirmative defenses in the RCC.*
 - This change improves the consistency of the revised statute.
- (2) *The CCRC recommends striking the word “otherwise” from paragraph (a)(2) as superfluous.*
 - This change clarifies and does not substantively change the revised statute

RCC § 22E-214. Merger of Related Offenses.

(1) *USAO, App. C at 233-234, recommends deleting RCC § 22E-214(a)(4), which provides for merger where: “One offense reasonably accounts for the other offense given the harm or wrong, culpability, and penalty proscribed by each.” USAO states that this “open-ended provision is vague and subjective, and thus contrary to the RCC’s overarching goal of stating the law clearly [], rather than relying upon common law [].” In addition, USAO notes that “[t]his subsection would likely exacerbate, rather than remedy, the historically ‘uneven treatment’ of merger issues that § 214 seeks to address,” while “confer[ring] a windfall upon defendants, who would surely invoke the Rule of Lenity in seeking its broad application.” Lastly, USAO states that, “[i]f 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.”⁹*

- The RCC does not incorporate USAO’s recommended deletion. Paragraph (a)(4) offers a fair and effective resolution of the unavoidable tension between proportionality, certainty, and administrative efficiency in merger evaluations. Removal of paragraph (a)(4), in contrast, would support the disproportionate multiplication of liability, and effectively provide for a *de facto* rule of severity in merger evaluations, with comparatively small efficiency gains. However, consistent with USAO’s comment, the current draft of the RCC special part incorporates a greater number of offense-specific merger rules, thereby circumscribing the situations in which reliance on paragraph (a)(4) will be necessary.
- The elements test (and comparable formulations¹⁰) purports to offer a wholly descriptive, bright-line rule for resolving merger evaluations. However, as outlined at length in the RCC commentary, legal practice both inside and outside the District has revealed two fundamental problems with the elements test. First, the requisite comparative analysis between offense elements is highly uncertain in difficult cases (of which there are many). Second, the elements test analysis is inherently narrow, and thus effectively creates a default presumption in favor of multiplying convictions and punishment for offenses that substantially (if not entirely) overlap. The first of these problems creates significant amounts of litigation (e.g., legal disputes over when the elements of one offense are necessarily included in another), while the second problem detrimentally impacts the administration of justice (e.g., by distorting the plea-bargaining process and leading to disproportionate collateral consequences).

⁹ USAO also states that the more expansive, fact-sensitive proportionality-based approaches to merger stated in the Report “do not support (a)(4) at all, in that they are based on a rationale that the RCC disavows.”

¹⁰ See RCC §§ 22E-214(a)(2)-(3) (stating merger principles similar to, or arising from, the elements test).

- There are a few paths for solving these problems. The first, and simplest, path is by limiting the government to one conviction per course of conduct, thereby avoiding the need for a comparison of offense elements (or application of any other merger standard). There are a few jurisdictions that appear to employ a categorical merger limitation of this nature. However, such an approach arguably supports disproportionate leniency,¹¹ while largely departing from current District practice.¹² For these reasons, the CCRC does not recommend pursuing this path.
- The second path is through offense-specific merger rules, which specify in advance the combinations of offenses that should, and should not, merge as a matter of law. This kind of approach, which is recommended by USAO, directly furthers the interests of clarity and consistency, and is employed by RCC to the greatest extent possible.¹³ However, this approach unfortunately does not offer a workable, long-term solution. There is a multitude of section-level, offense-specific merger combinations arising under any criminal code, which the legislative branch of government would need to resolve to comprehensively dispose of all proportionality-related issues raised by the elements test. And neither the RCC, nor any other criminal code, attempts to do this (though the RCC likely goes much farther than any other American criminal code in this respect).
- The question, then, is what to do about those combinations of substantially overlapping offenses that are neither disposed of *explicitly* by the RCC (through offense-specific rules) or *clearly* by the elements test. To deal with this narrower set of potential merger combinations, two policy alternatives present themselves. The first option, which follows from USAO’s recommended revision, is to do nothing (i.e., legislative silence).

¹¹ That is, where a single course of conduct satisfies the requirements of liability for two unrelated offenses (e.g., rape and theft), limiting the government to a single conviction ignores the distinct violation of a separate societal interest protected by the additional offense. *See also, e.g.,* Michael T. Cahill, *Offense Grading and Multiple Liability: New Challenges for A Model Penal Code Second*, 1 OHIO ST. J. CRIM. L. 599, 605 (2004) (noting that the problem with a system in which courts “impose concurrent sentences for multiple offenses of conviction [when such offenses do not overlap]” is that it “has the obvious and pervasive flaw of trivializing, to the point of complete irrelevance, every offense other than the most serious one. A sensible liability scheme should require, or at least allow, some additional punishment for each such harm—although perhaps incrementally reduced punishment instead of the equally crude alternative of full consecutive sentences for each offense.”).

¹² *But see* DCSG R. 6.2 (“The following sentences must be imposed concurrently: For offenses that are not crimes of violence: multiple offenses in a single event...”); RCC § 22E-214, Relation to Current District Law (“[Under this Rule,] multiple convictions for all non-violent offenses arising from the same course of conduct are to be sentenced concurrently. This appears to be true, moreover, without regard to whether there exists *any overlap* between the offenses of conviction in the first place. So, for example, a judge sentencing a defendant convicted of theft and carrying a dangerous weapon (CDW) based on the same course of conduct would, under this rule, impose concurrent sentences for each offense—notwithstanding the fact that CDW and theft are completely different offenses.”).

¹³ For example, RCC § 22E-214(a)(5) and (6) has always codified an assortment of categorical rules for dealing with merger of inchoate offenses, while the most recent draft of the RCC special part has been revised to incorporate a variety of chapter-specific merger rules.

In effect, this establishes a general presumption of multiple liability and punishment for any combinations of offenses that fail the formalistic (and therefore narrow) elements test. The second option, in contrast, is to adopt a standard that goes beyond the scope of elements test, and merges combinations of substantially (but not wholly) overlapping offenses for which multiple liability and punishment would be disproportionate.

- This kind of merger standard provides the third path for mitigating the problems associated with the elements test, and is reflected in the proportionality-based, fact-driven approaches applied in a number of jurisdictions. In practice, these approaches strive to ensure that relatively minor variances between offenses (that fail the elements test) do not disproportionately multiply liability and punishment. In so doing, however, these approaches may also bring with them costs of their own, namely, increased and more fact-intensive litigation, as well as uncertainty surrounding their scope of application. With that in mind, the RCC incorporates a modified proportionality-based approach that largely excludes factual considerations,¹⁴ while providing—through legislative text and accompanying commentary—significant clarity concerning its intended scope. This appears to be the best resolution of a difficult policy problem under the circumstances.
- (2) *OAG, App. C at 230, recommends revising RCC § 22E-214(d)(1) to clarify that the phrase “statutory maximum” refers to “statutory maximum sentence.” This addresses the current ambiguity regarding 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), 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.” Building on this recommendation, OAG recommends revising RCC § 22E-214(b) 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.” The current RCC language reads: “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.” In contrast, OAG suggests that the language be amended to state that: “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.”*

¹⁴ Paragraph (a)(4) circumscribes the factual analysis employed in other jurisdictions with comparable proportionality-based approaches in the interests of balancing considerations of proportionality with those of efficient judicial administration. It is therefore not the case that these other approaches are “based on a rationale that the RCC disavows.” USAO, App. C at 234. The RCC approach, like these other approaches, seeks to further the interests of proportionality; the only difference is that paragraph (a)(4) does not go quite as far given the sizeable administrative costs associated with fact-and-law-driven merger analyses.

- The RCC incorporates OAG’s first recommendation, but not OAG’s second recommendation. Specifically, RCC § 22E-214(d)(1) and accompanying commentary now reference “statutory maximum *term of incarceration*,” based on the rationale offered by OAG. In contrast, RCC § 22E-214(b) does not incorporate an additional exception for legislative intent-based departures from the rule of priority. As a matter of policy, it is unclear that “a much higher maximum fine” provides an appropriate basis for merging an offense subject to a greater statutory maximum sentence of incarceration. And, as a matter of statutory interpretation, it is even less clear that the language proposed by OAG would actually support OAG’s preferred outcome in such cases. Finally, as a matter of legislative drafting, the language proposed by OAG would add significant complexity to RCC § 22E-214(b).
 - This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.
- (3) *OAG, App. C at 230-231, recommends revising RCC § 22E-214(d)(2) to clarify the treatment of two merging offenses with the same statutory maximum penalty one of which has a mandatory minimum sentence. OAG states that: “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.” Specifically, the current language referenced by OAG reads: “When two or more convictions for different offenses arising from the same course of conduct merge, the offense that remains shall be...If the offenses have the same statutory maximum, any offense that the court deems appropriate.” In contrast, OAG recommends this latter language be amended to read: “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.”*
- The RCC does not incorporate OAG’s recommendation. The CCRC language allows judges to use their discretion as to which of any two offenses with the same statutory maximum is the most apt offense under the circumstances. The existence of a statutory minimum or mandatory minimum does not necessarily indicate a greater seriousness for an offense than an offense with the same maximum but no minimum. To the extent that the Council may, at any time, opt to apply a statutory or mandatory minimum to a particular offense, that decision may reflect procedural or other concerns that are distinct from the seriousness of the offense. Finally, judicial discretion allows consideration of sub-statutory, persuasive authorities as to the most serious offense, such as, for example, the District’s voluntary sentencing guidelines.
- (4) *OAG, App. C at 229 n. 3, and USAO, App. C at 234, offer similar, but distinct, revisions to RCC § 22E-214(e)(2), which currently reads: “The judgment appealed from has been decided.” OAG originally recommended this language; however, it now “believes that there is a better formulation of this concept,”*

which more clearly accounts for the fact that “[a]n appellate court does not technically decide a judgment; it decides an appeal.” With that in mind, and “[g]iven the lead-in language in section (e), OAG suggests that this phrase be tweaked to read, ‘The appeal of the conviction has been decided.’” USAO, in contrast, “recommends that, in paragraph (e)(2), the words ‘has been decided’ be replaced with the words ‘becomes final.’” USAO states that “[r]eplacing ‘has been decided’ with ‘becomes final’ would more accurately define what we believe is the RCC’s intended time when the appeal has ended.” USAO highlights two reasons in support. “First, the ‘judgment’ is by the trial court, and is the subject (not the result) of the appeal, so it already ‘has been decided.’” Second, “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,” USAO states, “subsection (e) is meant to allow multiple convictions to stand while the direct appeal plays out to its conclusion.” With that in mind, “[b]ecomes final’ would convey that the intended deadline is the end of the direct appeal.”

- The RCC incorporates USAO’s recommendation, such that paragraph (e)(2) now reads: “The judgment appealed from becomes final.” This revision is supported by USAO’s rationale; however, it also appears to adequately address OAG’s concerns.
 - This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.
- (5) *The CCRC recommends revising RCC § 22E-214(d)(1) to omit the phrase “among the offenses in question” as superfluous. Read in context, it is already clear that paragraph (d)(1) is referring to the “offenses in question,” so removing this language increases the brevity (and therefore accessibility) of the RCC.*
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.
- (6) *The CCRC recommends amending paragraph (a)(1) to clarify that one offense must be “necessarily” established by the other offense.*
- This change clarifies and does not substantively change the revised statute.
- (7) *The CCRC recommends replacing the phrase “lesser kind of culpability” with “lower culpable mental state under RCC § 22E-206.”*
- This change clarifies and does not substantively change the revised statute.
- (8) *The CCRC recommends striking the alternative elements provision as potentially confusing. In many instances, the “elements upon which a defendant’s conviction is based” are unknown because the jury delivers a general verdict.*
- This change clarifies the revised statute.
- (9) *The CCRC recommends amending the rule of priority to state that the “conviction” that remains is the “conviction for...,” as opposed to the “offense” that remains.*
- This change clarifies and does not substantively change the revised statute.

RCC § 22E-215. De Minimis Defense.

(1) OAG, App. C at 220-222, recommends incorporating into RCC § 22E-215 “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.”

- The RCC incorporates OAG’s recommendation, while also adding further specificity to it, through a new subsection (e), which reads: “The court shall state its specific findings of fact and law in open court or in a written decision or opinion regarding: (1) The availability of this affirmative defense in a jury trial or bench trial; and (2) The applicability of this affirmative defense in a bench trial.” In general policy terms, the proposed reason-giving requirement finds support in both national legislative practice and legal commentary surrounding *de minimis* provisions.¹⁵ However, the particular manner in which subsection (e) is implemented is both rooted in and supported by current District practice.¹⁶

¹⁵ See, e.g., Model Penal Code § 2.12 (“The Court shall not dismiss a prosecution under Subsection (3) of this Section without filing a written statement of its reasons.”) (citing subsection (3), which authorizes a *de minimis* dismissal when the defendant’s conduct “presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense”); *Id.*, cmt. at 404 (“Because the authority in Subsection (3) [is] stated in terms of such generality, it is appropriate to require that the court explain, in a written opinion, its reasons when exercising the authority that the subsection grants.”); see also ROBINSON, at 1 CRIM. L. DEF. § 67 (“The requirement of written reasons may be useful in many situations, but it seems particularly useful where, as here, the court is stating what it believes to be the legislature’s intent. These statements permit the legislature to easily review the court’s interpretation and to take legislative action to overrule it if the court’s interpretation is incorrect.”); compare *id.* at 1 CRIM. L. DEF. § 67 (“A few jurisdictions have extended this to require a written statement of reasons for a dismissal under any ground.”) (collecting state statutes).

¹⁶ Specifically, subsection (e) requires the court to “state its specific findings of fact and law in open court or in a written decision or opinion.” This phrase is drawn from, and intended to be construed in accordance with, the D.C. Superior Court Rules of Criminal Procedure. *Id.*, Rule 23(c) (“In a case tried without a jury, the court must find the defendant guilty or not guilty. If a party requests before the finding of guilty or not guilty, the court must state its *specific findings of fact in open court or in a written decision or opinion.*”) (italics added); see, e.g., *Saidi v. United States*, 110 A.3d 606, 612 (D.C. 2015) (“[S]pecial findings in a non-jury criminal trial inform an appellate court of the specific grounds relied on by the trial judge in reaching a verdict and enable the appellate court to undertake its review of the record with a clear understanding of the bases of the trial judge’s decision.”) (citations omitted).

Through such language, subsection (e) is also intended to further many of the same policy interests that underwrite the District’s current approach to special findings. As the DCCA has observed:

Special findings [] serve an important access to justice function and advance the goal of procedural fairness in the criminal justice system. A clear statement by a trial judge explaining the ruling in a case informs the parties of the reasons underlying the court’s decision and provides critical assurance to an unsuccessful litigant that positions advanced at trial have been considered fairly and decided on the merits in accordance with governing law. The resulting increase in transparency promotes acceptance of the court’s ruling and fosters compliance with its requirements.

Saidi, 110 A.3d at 612 (citing *United States v. Snow*, 484 F.2d 811, 812 (D.C. Cir. 1973) (“The requirement that a trial judge prepare findings which will cast light on his reasoning is not a trivial matter. It is an

- This revision does not further change current District law,¹⁷ and it improves the clarity and consistency of the revised statutes.
- (2) *The CCRC recommends incorporating into RCC § 22E-215 a new subsection (d), which establishes that: “This affirmative defense is unavailable in a situation reasonably envisioned by the legislature in forbidding the charged offense.” This revision is responsive to a general point offered by OAG in its comments:*

[A]ny *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.

Also consistent with OAG’s comment, the CCRC recommends revising the commentary to further expand upon the meaning of the new subsection (d) as follows:

This clarifies that a *de minimis* defense will only provide a basis for escaping liability in unusual circumstances, which go beyond what the legislative intent underlying passage of a given criminal statute can fairly be understood to reach. In contrast, where the defendant’s conduct is merely a typical instance of a statutory violation of a particular offense, it can be assumed that the legislature has itself made an authoritative judgment that such behavior is “[sufficiently blameworthy to warrant the condemnation of a criminal conviction under the circumstances.”¹⁸

Finally, the CCRC recommends adding to this new commentary the following statement: “The threshold determination presented by subsection (d) is a matter for judicial resolution.” This importantly clarifies that where the court

important element of fairness to the accused...The existence of a rationale may not make the hurt pleasant, or even just. But the absence, or refusal, of reasons is a hallmark of injustice.”).

¹⁷ Which is to say: because there’s no formally-recognized *de minimis* defense in the District, there’s no current District law to change by subjecting this new legislative defense—the recognition of which clearly would change current District law—to a special findings requirement.

¹⁸ An accompanying footnote further illustrates that:

Consistent with this reasoning, a *de minimis* defense would be unavailable under subsection (d) where, in the absence of mitigating circumstances: (1) a person charged with drug possession knowingly exercises control over a non-negligible amount of a controlled substance for the purpose of recreational use; or (2) a person charged with fare evasion intentionally jumps over a turnstile for the purpose of evading payment of his or her metro fare.

determines that the circumstances presented by a given case were “reasonably envisioned by the legislature in forbidding the charged offense,” the factfinder should not be instructed on, or (in a bench trial) consider, the de minimis defense.

- This revision does not further change current District law, and it improves the clarity and consistency of the revised statutes.
- (3) *The CCRC recommends expanding the Commentary’s Explanatory Note accompanying RCC § 22E-215 to provide more detailed explanations—including references to foundational principles, use of illustrative examples, and citations to supporting legal authority—on the de minimis defense. These explanations address, among other issues, questions raised by OAG in its comments.*¹⁹
- This revision does not further change current District law, and it improves the clarity and consistency of the revised statutes.

¹⁹ For example, OAG, App. C at 221, asks: (1) whether the “expressly identified factors the factfinder must consider [are] 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’)?”; and (2) “[w]hen a de minimis defense is raised, how does a judge decide what evidence can be excluded”?

Building on pre-existing commentary which already partially addresses these questions, the Explanatory Note now further clarify that:

[The expressly identified] factors are largely objective, rather than subjective, in nature. For example, in considering the “triviality” of the harm caused or threatened by the defendant’s conduct or the extent to which the defendant’s conduct furthered or was intended to further “legitimate” societal objectives, the factfinder should consider the community’s conception of triviality and the value that the community places upon particular types of activities, in contrast to the defendant’s view of harmfulness or the value that the defendant subjectively placed on particular kinds of activities. *See, e.g.*, RCC § 22E-206, Explanatory Note (discussing comparable blameworthiness analysis in the context of recklessness and negligence liability); Eric A. Johnson, *Beyond Belief: Rethinking the Role of Belief in the Assessment of Culpability*, 3 OHIO ST. J. CRIM. L. 503, 506 (2006) (same); *see also* David M. Treiman, *Recklessness and the Model Penal Code*, 9 AM. J. CRIM. LAW 281, 334 (1981) (“To determine whether a risk is justifiable [the requisite] balance must be based on societal values, not the actor’s personal gain”). Along similar lines, whether the defendant is “responsible” for an individual or situational factor that hindered his or her ability to follow the law hinges on an objective understanding of responsibility, in contrast to a subjective one. *See, e.g.*, RCC § 22E-209(d) and accompanying Explanatory Note (establishing principles for distinguishing between intoxication that is, and is not, self-induced).

In light of this analysis, it would be appropriate for the court to limit the presentation of evidence or argumentation in support of a *de minimis* defense when it conflicts with the proper construction of these factors as a matter of law. For example, in a case where the defendant, a white supremacist, premeditatedly and openly shoplifts chewing gum from a minority-owned store for the purpose of making the store’s owner feel unwelcome in the neighborhood (or to send some other toxic message to either the owner or the community), the court would be justified in constraining the factfinder from considering evidence offered by the defendant in support of the benefits of preserving racial or religious segregation. Likewise, if the defendant knowingly and voluntarily takes PCP before committing an assault, the court could preclude the defendant from arguing that an intoxicated state *for which he is not responsible* rendered him less blameworthy for committing that assault (i.e., given that the defendant is, in fact, *responsible* for that intoxicated state).

(4) *The CCRC recommends striking the burden of proof subsection as unnecessary in light of the revisions to RCC § 22E-201, which now specifies the burden of proof for all exclusions, defenses, and affirmative defenses in the RCC.*

- This change improves the consistency of the revised statute.

RCC § 22E-301. Criminal Attempt.

(1) USAO, *App. C* at 234-237, offers three revisions to the culpability of attempt liability. First, USAO “recommends that, in subsection (a)(1), the word ‘Planning’ be replaced by the words ‘With the intent.’” In support of eliminating the term “planning” from subsection (a)(1), USAO states that “a person’s ‘plan’ or ‘planning’ is not required by the controlling case law on attempt.” USAO further notes that “inclusion of a separate element requiring the defendant to have engaged in ‘planning’ [inappropriately] implies that the person must have thought through or contemplated his or her actions before acting.” Second, USAO recommends that “subsection (a)(2) be removed.”²⁰ In support of eliminating paragraph (a)(2), USAO states that “the proposed provision [] adds an additional culpability requirement that does not exist in current law.” USAO further notes that “[i]f 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.’” Third, USAO “recommends removing subsection (b).” In support of eliminating subsection (b), USAO states that the proposed provision is “both confusing and adds an additional culpability requirement that does not exist in current law.” Specifically, “[t]his 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.’” Viewed collectively, under USAO’s recommended revisions, the culpability of attempt liability would read in its entirety: “With the intent to engage in conduct constituting that offense.” USAO explains that “[t]his 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.”

- The RCC does not incorporate USAO’s recommended deletions.²¹ The phrase “With the intent to engage in conduct constituting that offense,”

²⁰ On June 19, 2019, USAO submitted a revision to its earlier comments, which states:

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.

This CCRC response focuses on the original version of the comment; however, the revised version of the comment raises similar issues. For example, even if subsection (a)(2) is preserved, it is still unclear under USAO’s proposal whether reckless or negligent attempt liability (as to result elements), which is barred in nearly every jurisdiction in America, would exist under the RCC. (See the commentary accompanying RCC § 22E-301 for a more extensive analysis of relevant legal trends.) It is also unclear how to interpret USAO’s new recommendation to preserve subsection (a)(2) in RCC § 22E-301 in light of USAO’s continued recommendation to *delete* identical language from the RCC general provisions on general solicitation and conspiracy liability under RCC §§ 22E-302 and 303.

²¹ *But see infra* (clarifying that “planning” does not necessarily entail proof of premeditation or deliberation through commentary, in accordance with USAO’s comments).

which USAO recommends as the sole legislative statement of the culpability of criminal attempts under the RCC, is open to multiple interpretations, including one that would create extremely expansive general attempt liability, and one that would create extremely narrow general attempt liability.²²

- However, to address USAO’s concerns regarding the term “planning,” the RCC clarifies in commentary that the term has the same substantive meaning as “intent,” and thus does not entail proof of premeditation or deliberation.
- The communicative and potential²³ policy problems presented by USAO’s recommended formulation can be appreciated by the following hypothetical, which is drawn from the RCC commentary. Police stop a demolition operator just in the nick of time from destroying an apparently abandoned building that, unbeknownst to this cautious operator, is occupied by an elderly homeless person who stealthily snuck into the building and would have died in the ensuing demolition had the operator been able to carry out his planned course of conduct. Assume the operator is subsequently prosecuted for attempting to commit a manslaughter offense, which prohibits anyone from: “Recklessly killing a person, negligent as to whether that person is over 65 years of age.”
- Under the current RCC language, the government’s burden of proof as to the requisite culpability is clear. First, it must be proven that defendant planned to engage in conduct that, if carried out, would have resulted in the victim’s death (i.e., the demolition of the building).²⁴ Second, it must be proven that the defendant intended to cause the result element of the target offense, the death of a person.²⁵ And third, it must be proven that the defendant possessed, at minimum, negligence as to the circumstance element of the target offense, that the victim be older than 65.²⁶ This clear statement follows directly from the current RCC language, and is generally consistent with the attempt policies employed in every jurisdiction in America. It also ensures the appropriate outcome as applied to the above facts, namely, that the blameless demolition operator cannot be convicted of attempting to commit manslaughter.
- Under USAO’s recommended formulation, in contrast, the government’s burden of proof is susceptible to multiple constructions. The phrase “an intent to engage in conduct constituting that offense” mirrors the first of the three requirements explicitly addressed by the RCC approach (i.e., “planning” to engage in conduct constituting an offense). However, USAO’s recommended formulation is silent on the requisite state of mind

²² See *infra* (discussing first and third constructions of USAO’s proposed formulation).

²³ See *infra* (discussing third construction of USAO’s proposed formulation, which would not necessarily create any policy problems).

²⁴ RCC § 22E-301(a)(2).

²⁵ RCC § 22E-301(b).

²⁶ RCC § 22E-301(a)(1).

that must be proven as to the result and circumstance elements of the target offense (i.e., death or age of the victim). Three potential constructions of the proposed language exist.

- Under the first construction the result and circumstance elements of the target offense are not subject to any culpability requirement at all. In effect, this would allow for proof of a bare intent to engage in conduct that would culminate in the results and/or circumstances of the target offense to suffice for attempt liability. If adopted, such an approach would reduce the culpability requirement for all attempt offenses to what practically amounts to strict liability. This, in turn, would constitute an unprecedented policy shift both inside and outside the District given that every jurisdiction in America requires: (1) at minimum, proof of culpability this is at least as demanding as that required by the target offense; and (2) for many offenses (i.e., those that require proof of negligence or recklessness as to result elements) proof of an elevated form of culpability, above and beyond that required by the target offense.²⁷ Beyond that, this approach would support convicting the otherwise blameless demolition operator depicted in the above fact pattern.²⁸
- Under the second construction the result and circumstance elements of the target offense are subject to a default requirement of recklessness, per the RCC’s explicit rule for implying a recklessness culpable mental state when no other culpability requirement (or strict liability) is specified.²⁹ This approach has little support in District law and national legal trends.³⁰ With respect to result elements, for example, it would expand liability beyond that provided for in nearly every American jurisdiction by allowing an attempt conviction to rest on mere recklessness as to a result. And, as discussed at length in the Explanatory Note, this approach brings with it detrimental policy consequences (e.g., by turning endangerment activity into multiple serious felonies). As to circumstance elements, in contrast, such an approach would narrow liability beyond that provided for in nearly every American jurisdiction by *requiring* for an attempt conviction *at least* recklessness as to a circumstance. Although lacking support in national legal trends, this treatment of circumstance elements is supported by important policy considerations, such as the increased risk of false positives for inchoate conduct. And, at the very least, this collective treatment of result and circumstance elements would preclude the

²⁷ See the commentary accompanying RCC § 22E-301 for a more extensive analysis of relevant legal trends.

²⁸ This is so because the operator clearly did possess the only culpable mental state that USAO’s formulation would explicitly require: intending to engage in conduct—i.e., the demolition of the building—which, if carried out, would have resulted in the death of the elderly homeless person.

²⁹ See RCC § 22E-207(c) (“*Determination of When Recklessness Is Implied*. A culpable mental state of “recklessly” applies to any result element or circumstance element not otherwise subject to a culpable mental state under RCC § 22E-207(a), or subject to strict liability under RCC § 22E-207(b).”).

³⁰ See the commentary accompanying RCC § 22E-301 for a more extensive analysis of relevant legal trends.

blameless operator discussed above from liability for attempted manslaughter.

- Under a third construction the result and circumstance elements of the target offense are subject to a requirement of intent. Per this construction, USAO’s proposal is that there be a single, categorical intent requirement as to every objective element of the target offense, without regard to the level of culpability governing the completed version (i.e., “an intent to *commit the actus reus* of the target offense”). With respect to result elements, this approach appears to be consistent with current District law, and it reflects the approach taken in nearly every jurisdiction in America.³¹ With respect to circumstance elements, in contrast, this approach entails culpability elevation by requiring intent as to circumstance elements, whereas the RCC and current District law would allow for the culpable mental state requirement governing the target offense to suffice. Although lacking support in District law or national legal trends, this treatment of circumstance elements is supported by important policy considerations, such as the increased risk of false positives for inchoate conduct. Finally, this collective treatment of result and circumstance elements would preclude the blameless operator discussed above from liability for attempted manslaughter.³²
- These three potential constructions of USAO’s proposed formulation highlights the importance of clearly addressing the relationship between the culpability of an attempt and the objective elements of an offense through a general legislative formulation such as that currently offered by RCC § 22E-301. And they also highlight the clarificatory import of the “planning” requirement incorporated into subsection (a)(2) in particular, which effectively distinguishes between an attempter’s non-culpable objective to engage in *conduct* constituting the target offense, and an attempter’s culpability—i.e., purpose, intent, recklessness, or negligence—as to the result and circumstance elements of the target offense. That being said, in light of USAO’s comments, the RCC does recommend clarifying in commentary that the term “planning” (1) is not substantively different than “intending” and (2) does not necessarily entail proof of premeditation or deliberation.³³

³¹ See the commentary accompanying RCC § 22E-301 for a more extensive analysis of relevant legal trends.

³² Note, however, that even under the third construction, USAO’s recommendation to delete RCC § 22E-301(a)(2), which requires that the person act “With the culpability required by that offense,” risks treating less culpable forms of homicide more severely, while ignoring important distinctions in blameworthiness. For example, two intentional *completed* killings may be graded quite differently on the basis that one was committed in the presence of mitigating circumstances (e.g., provocation/manslaughter) whereas the other was not (e.g., no provocation/murder). The same distinctions should accordingly be made in the context of attempted intentional homicide; however, USAO’s proposed revisions would seem to ignore them, by simply requiring an “intent to engage in conduct constituting that offense,” without recognition of broader aspects of culpability.

³³ Specifically, a pre-existing passage in the relevant Explanatory Note has been revised and expanded to read:

- (2) USAO, at App. C at 236, recommends that, in subsection (a)(3), the words “completing” and “completion” be replaced with the words “committing” and “commission.” USAO states that “[t]his 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.” USAO notes that “[t]he current comments to the jury instructions for Attempt also reflect this view that ‘committing’ is clearer in this context than ‘completing.’”
- The RCC does not incorporate USAO’s recommended revisions. An earlier draft of RCC § 22E-301(a) utilized the terms “committing” and “commission”; however, those terms were replaced so as to “avert confusion about the point at which the target offense has been ‘committed.’”³⁴ In addition, the CCRC notes that the revised robbery offense does not incorporate an asportation requirement.
- (3) USAO, App. C at 236-237, “opposes repealing the ‘assault with intent’ (“AWI”) class of crimes, contrary to the CCRC’s suggestion.” Specifically, USAO states

This planning requirement is to be distinguished from the voluntariness requirement under section 203. See RCC § 22E-203(a) (“No person may be convicted of an offense unless the person voluntarily commits the conduct element necessary to establish liability for the offense.”). The voluntariness requirement, which implicates what is sometimes referred to as a “*present* conduct intention,” can be “satisfied simply by showing that the actor did in fact intend to perform the bodily movements that he performed.” Robinson, *supra* note 2, at 864. In contrast, the planning requirement, which implicates what is sometimes referred to as a “*future* conduct intention,” “serves to show that the actor is planning to do more than what he has already done.” *Id.*

In this sense, the term “planning” as employed in this section is substantively identical to the term “intent” under RCC § 22E-206(c), and thus should not be read to incorporate additional requirements such as premeditation or deliberation (i.e., a person who, having been provoked, is stopped by police immediately prior to firing his weapon in retaliation has “planned” to kill). Paragraph (a)(1) could have just as easily been drafted to state “intending to engage in conduct constituting [an] offense”; however, this would fail to clearly distinguish between the planning requirement and the culpability requirement derived from the target offense. See RCC § 22E-301(a)(2) (defendant must act “[w]ith the culpability required by [the target] offense”).

For example, an actor may plan to carry out a course of conduct that, if completed, would cause the prohibited result of death without being culpable at all—as would be the case where a demolition operator is stopped just before destroying an apparently abandoned building that, unbeknownst to the operator, is occupied by a person who would have died in the ensuing destruction. Alternatively, that same demolition operator may have sought to cause that result culpably, e.g., if the operator knew that a person was residing in the building and acted with the intent to kill. In both versions of the hypothetical, the question of whether the operator acted with the culpable mental state requirement of murder (i.e., whether the operator intended to kill the occupant) is a separate and distinct question from whether the operator “planned to engage in conduct constituting” murder (i.e., whether the operator planned to demolish the building, which was in fact occupied). Use of the term “planning,” as opposed to “with intent,” in paragraph (a)(1) helps to distinguish these concepts. See *infra* notes 5-8 and accompanying text (discussing culpability required by target offense).

³⁴ PDS, App. C at 048 (requesting change, and providing quoted rationale).

that the RCC general attempt statute “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.” To illustrate, USAO offers the following example:

[I]f 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.

USAO additionally notes that “under current law, AWI an offense is sometimes punished more severely than an attempt to commit that same offense.”

- The RCC does not incorporate USAO’s recommended revisions for two reasons. First, as a matter of liability, RCC § 22E-301(a) criminalizes all conduct captured by AWI offenses. And second, as a matter of punishment, the proportionate approach to grading incorporated into RCC § 22E-301(c) fairly addresses AWI conduct.
- The elements of AWI offenses are captured by the elements of general attempt liability under subsection (a). With respect to *mens rea*, for example, “there is no meaningful difference between” the culpable mental state requirement governing both general attempt liability and AWI offenses.³⁵ In contrast, there is a potentially meaningful difference between the conduct requirement of an AWI offense, an assault, and that of general attempt liability under subsection (a), dangerous proximity to completion. However, that difference illustrates the comparative breadth of general attempt liability, namely, it is well established in both case law and commentary that the dangerous proximity standard can be satisfied

³⁵ *Flanagan v. State*, 675 S.W.2d 734, 749 (Tex. Crim. App. 1982) (“point[ing] out that there is no meaningful difference between [assault with intent to murder and] attempted murder.”).

Under current District law, both categories of offenses require proof of “specific intent.” *See, e.g., Nixon v. United States*, 730 A.2d 145, 148 (D.C. 1999); *Riddick v. United States*, 806 A.2d 631, 639 (D.C. 2002); *Snowden v. United States*, 52 A.3d 858, 868 (D.C. 2012); *Robinson v. United States*, 50 A.3d 508, 533 (D.C. 2012); *Jones v. United States*, 124 A.3d 127, 132–34 (D.C. 2015) (Beckwith, J., concurring) (discussing, among other cases, *Sellers v. United States*, 131 A.2d 300 (D.C.1957); *Wormsley v. United States*, 526 A.2d 1373 (D.C. 1987); and *Fogle v. United States*, 336 A.2d 833, 835 (D.C. 1975)); compare D.C. Crim. Jur. Instr. § 4.110-12 (jury instructions on AWI offenses) with D.C. Crim. Jur. Instr. § 7.101 (jury instruction on criminal attempts).

An extensive discussion of the meaning of “with intent” under both current District law and the RCC is provided in the Commentary accompanying RCC § 22E-206. *See* Explanatory Note and Relation to Current District Law on Purpose, Knowledge, and Intent.

prior to reaching the present ability requirement of assault necessary for an AWI conviction.³⁶

- Within the District, this distinction is most clearly illustrated by the DCCA’s decision in *Jones v. United States*, 386 A.2d 308, 312 (D.C. 1978), which held that an armed bank robber arrested blocks away from his intended target has committed an attempt to commit armed bank robbery under the dangerous proximity standard.³⁷ The commentary accompanying RCC § 22E-301(a) explicitly endorses this construction of the dangerous proximity standard, while providing numerous other examples, which clearly illustrate that AWI offenses are necessarily subsumed by general attempt liability under subsection (a).³⁸

³⁶ As the Maryland Court of Appeals has observed:

Because the overt act necessary for an attempt is frequently an assault, the two crimes have a significant overlap. But the overlap is not complete, because an overt act can qualify as an attempt and yet not rise to the level of an assault. For example, an attempted poisoning would qualify as attempted murder, but it would not be an assault, especially if the poison did not come in contact with the victim. *See Bittle v. State*, 78 Md. 526, 28 A. 405 (1894). An aborted attempt to bomb an airplane would not be an assault, but it would be attempted murder. *See People v. Grant*, 105 Cal.App.2d 347, 233 P.2d 660 (1951). [] A person who fires a shot at an empty bed where he mistakenly believes the victim is sleeping has committed attempted murder, but not an assault. *State v. Mitchell*, 170 Mo. 633, 71 S.W. 175 (1902).

Hardy v. State, 301 Md. 124, 129, 482 A.2d 474, 477 (1984); *see, e.g.*, R. PERKINS, *Criminal Law* 578 (2d ed. 1969) (“The law of assault crystallizing at a much earlier day than the law of criminal attempt in general, is much more literal in its requirement of ‘dangerous proximity to success’ (actual or apparent) than is the law in regard to an attempt to commit an offense other than battery.”)

It is notable that, contrary to national trends, the DCCA has indicated that the dangerous proximity test can, at least in certain instances, be more or less the same as the conduct requirement of an AWI offense. *Frye v. United States*, 926 A.2d 1085, 1099 (D.C. 2005) (“Short of some assaultive conduct or some other specific effort to inflict harm on the victim, it is difficult to discern any overt act which would cross the threshold from mere preparation to an actual attempt for [aggravated assault].”). However, there is no indication—either in District law or otherwise—that the dangerous proximity test is *narrower* than the conduct requirement for an AWI offense.

Note also that, in some instances, evidence of dangerous proximity may corroborate intent in a significant way as compared to AWI offenses, which may allow a factfinder to infer intent based on stereotypes.

³⁷ Thus, although District case law has not yet addressed USAO’s specific sex crime fact pattern, it seems clear based on this DCCA opinion that a person who has succeeded in physically assaulting someone while stating an intention to commit rape has committed attempted rape under current District law.

³⁸ Specifically, a footnote in the Explanatory Note states:

So, for example, an armed bank robber arrested blocks away from his intended target has committed an attempt to commit armed bank robbery under this standard. *See Jones*, 386 A.2d at 312 (upholding attempt liability on such facts). Along similar lines, the dangerous proximity standard could also be established in the following illustrative contexts: (1) the attempted murder prosecution of a person whose pistol accidentally slips from that person’s hand and breaks as he or she, with the intent to kill, is walking towards the front door of the victim’s residence; (2) the attempted felony assault prosecution of a person who suffers a debilitating heart attack minutes before he or she plans to walk

- With respect to punishment, both current District law and national legal trends support the conclusion that the proportionate approach to grading attempts incorporated into RCC § 22E-301(c) fairly addresses the seriousness of AWI conduct.
- The DCCA has observed that the District’s varied AWI offenses, enacted in 1901, were “created to allow a court to impose a more appropriate penalty for an assaultive act that results from an unsuccessful attempt to commit a felony or some other proscribed end.”³⁹ At the time, these policies were necessary to supplement the “relatively trivial sanctions” afforded by criminal attempt offenses employed at common law.⁴⁰ Since then, however, the modern trend—rooted in the recommendations of the Model Penal Code—has been to grade criminal attempts more severely/proportionately, while simultaneously eliminating AWI offenses.⁴¹ Specifically, and as the DCCA approvingly observed in *Perry v. United States*: “[T]he drafters of the Model Penal Code eliminated crimes of the ‘assault-with-intent-to’ variety because they recognized that ‘[m]odern grading of attempt according to the gravity of the underlying offense has rendered laws of this...type unnecessary...’”⁴²
- Given that the RCC similarly adopts the modern approach of proportionately grading attempts according to the gravity of the underlying offense, the same rationale supports elimination of AWI offenses in the District.⁴³

(4) *The CCRC recommends substantially expanding a footnote in the Explanatory Note addressing impossible attempts to clarify that the phrase “the situation [] as the person perceived it” under RCC § 22E-301(a)(3)(A)(ii) is not intended to authorize punishing someone for attempting to achieve a non-criminal objective mistakenly believed to be criminal.*⁴⁴ *This revision is consistent with informal*

across the street and repeatedly beat, with the intent to cause significant bodily injury, a neighbor mowing her front lawn; and (3) the attempted arson prosecution of a person who is arrested at the site of a building she intends to burn down upon exiting her vehicle with flammable materials in her trunk.

³⁹ *Perry v. United States*, 36 A.3d 799, 809 (D.C. 2011).

⁴⁰ Model Penal Code § 211.1 cmt. at 181-82. At common law, as the *Perry* court observes, “attempts to commit serious offenses like rape and murder, which may have come very close to completion and thus provided evidence of extreme dangerousness on the part of the actor, were not graded at a level that appropriately measured the seriousness of the actor’s conduct.” *Perry*, 36 A.3d at 809 (quotations and citation omitted).

⁴¹ See Model Penal Code § 211.1 cmt. at 181-82.

⁴² 36 A.3d 799, 811 (D.C. 2011) (quoting Model Penal Code cmt. § 211.1).

⁴³ LAFAVE, *supra*, at 2 SUBST. CRIM. L. § 16.2. (“virtually all modern codes” have followed suit based on the recognition that “the problem [AWI offenses were created to solve] has been resolved by grading the crime of attempt according to the seriousness of the objective crime.”) Note: the drafters of the 1978 D.C. revision recommended following a similar course. That is, having treated criminal attempts as “an offense of the class next below that of the crime attempted,” they abandoned AWI offenses. 1978 D.C. CODE REV. § 22-201(c).

⁴⁴ That footnote now adds, in relevant part:

comments received from OAG, which highlight that the relevant phrase could be construed to criminalize attempts to commit imaginary offenses in the absence of further clarity in the Commentary.

- (5) *The CCRC recommends reorganizing subsection (a) so that paragraph (a)(3) is not empty, consistent with the District's legislative drafting manual.*
 - This change improves the logical organization of the revised statute and does not substantively change its meaning.
- (2) *The CCRC recommends clarifying that the person must intend "all" of the result elements of the offense, instead of "any" one element.*
 - This change improves the clarity and consistency of the revised statute.
- (6) *The CCRC recommends replacing the word "punishment" with "penalty."*
 - This change improves the consistency of the revised statute and does not substantively change its meaning.

Note that the phrase 'the situation [] as the person perceived it,' for purposes of the subjective approach incorporated into RCC § 22E-301(a)(3)(A)(ii), does *not* include a defendant's (inculpatory) mistaken belief that his or her (innocent) conduct is criminalized. *See infra* note 18 (explaining that the legality principle precludes convicting someone of an imaginary crime, and, therefore, pure legal impossibility remains a viable theory of defense under the RCC)."

RCC § 22E-302. Solicitation.

(1) *USAO, App. C at 237-238, offers two revisions to the culpability of solicitation liability. First, USAO “recommends that, in subsection (a), the words ‘acting with the culpability required by that offense’ be removed.” In support of this revision, USAO states that the relevant language “adds an additional culpability requirement that does not exist in current law,” and which “is both confusing and not an accurate statement of the current law.” Further, USAO explains that “applying this additional [culpability] requirement to various offenses could lead to problematic results,” such as, for example, in the situation of a defendant “charged with solicitation to commit first-degree murder,” which “requires premeditation and deliberation.” Here, “[t]he government need not prove premeditation to solicit the murder for the defendant to be guilty of solicitation to commit first-degree murder.” Instead, “the solicitation itself could be used to help prove that the murder was committed with premeditation and deliberation.”* Second, *USAO recommends “removing subsection (b).” USAO recommends deleting subsection (b) “[f]or many of the same reasons as discussed with respect to subsection (a),” namely, “subsection (b) is both confusing and adds an additional culpability requirement that does not exist in current law.” Further, “[b]ecause 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.” Viewed collectively, USAO’s recommended revisions would have paragraph (a)(1) state the culpability of solicitation in its entirety: “Purposely commands, requests, or tries to persuade another person to engage in [conduct constituting an offense]...”*

- The RCC does not incorporate USAO’s recommended revisions. The purpose requirement in paragraph (a)(1), which USAO’s deletions would leave as the sole legislative statement of the culpability of criminal solicitation under the RCC, is open to multiple interpretations, including one that would create extremely expansive general solicitation liability and one that would create extremely narrow general solicitation liability.⁴⁵
- The communicative and potential policy problems presented by USAO’s recommended formulation can be appreciated by the following modified demolition hypothetical (see *supra*, attempts), which is drawn from the RCC commentary. On May 14, the general contractor for a large development project hires a demolition operator to destroy an apparently abandoned building on Tuesday, May 15, at 2:00pm. Thereafter, at 1:45pm on the 15th, the police stop the demolition operator from destroying the building, which, unbeknownst to either the general contractor or the cautious operator, is occupied by an elderly homeless person who stealthily snuck into the building and would have died in the ensuing demolition had the operator been able to carry out his planned course of conduct. Assume the contractor is subsequently prosecuted for the solicitation of aggravated murder, which prohibits anyone from:

⁴⁵ See *infra* (discussing first and third constructions of USAO’s proposed formulation).

“intentionally killing a person, negligent as to whether that person is over 65 years of age, in the absence of mitigating circumstances.”

- Under the current RCC language, the government’s burden of proof as to the requisite culpability is clear. First, it must be proven that the contractor purposely requested the operator to engage in specific conduct that, if carried out, would have resulted in the victim’s death (i.e., the demolition of the building).⁴⁶ Second, it must be proven that the contractor intended to cause the result element of the target offense, the death of a person.⁴⁷ Third, it must be proven that the contractor possessed, at minimum, negligence as to the circumstance element of the target offense, that the victim be older than 65.⁴⁸ And fourth, it must be proven that the solicitation occurred in the absence of mitigating circumstances.⁴⁹ This clear statement follows directly from the current RCC language, and is generally consistent with the solicitation policies employed in every jurisdiction in America. It also ensures the appropriate outcome as applied to the above facts, namely, that the blameless contractor cannot be convicted of soliciting aggravated murder.
- Under USAO’s recommended deletions, in contrast, the government’s burden of proof is susceptible to multiple constructions. The remaining culpability phrase “Purposely commands, requests, or tries to persuade another person to engage in [conduct constituting an offense]” simply addresses the first of the four requirements explicitly addressed by the RCC approach. It is therefore silent on the requisite state of mind that must be proven as to the result and circumstance elements of the target offense (i.e., death or age of the victim). Three potential constructions of the proposed language exist.
- Under the first construction, the result and circumstance elements of the target offense are not subject to any culpability requirement at all. In effect, this would allow for proof of a bare purpose to solicit conduct that would culminate in the results and/or circumstances of the target offense to suffice for solicitation liability. If adopted, such an approach would reduce the culpability requirement for all solicitation offenses to what practically amounts to strict liability. This, in turn, would constitute an unprecedented policy shift both inside and outside the District given that every jurisdiction in America requires: (1) at minimum, proof of culpability this is at least as demanding as that required by the target offense; and (2) for many offenses (i.e., those that require proof of negligence or recklessness as to result elements) proof of an elevated form

⁴⁶ RCC § 22E-302(a)(1).

⁴⁷ RCC § 22E-302(b).

⁴⁸ RCC § 22E-302(b).

⁴⁹ This is due to the requirement in the prefatory clause of subsection (a), which requires that the defendant act “with the culpability required by the [target offense].” See RCC § 22E-201(d)(3) (“‘Culpability requirement’ includes . . . Any other aspect of culpability specifically required by an offense.”); *id.*, at Explanatory Note (noting that “premeditation, deliberation, and absence of mitigating circumstances” would so qualify).

of culpability, above and beyond that required by the target offense.⁵⁰ Beyond that, this approach would support convicting the otherwise blameless contractor depicted in the above fact pattern.⁵¹

- Under the second construction, the result and circumstance elements of the target offense are subject to a default requirement of recklessness, per the RCC’s explicit rule for implying a recklessness culpable mental state when no other culpability requirement (or strict liability) is specified.⁵² Applying recklessness to all result and circumstance elements of the target offense has little support in District law and national legal trends.⁵³ With respect to result elements, for example, it would expand liability beyond that provided for in nearly every American jurisdiction by allowing a solicitation conviction to rest on mere recklessness as to a result. And, as discussed at length in the Explanatory Note, this general approach brings with it detrimental policy consequences (e.g., by turning endangerment activity into multiple serious felonies). At the very least, however, this collective treatment of result and circumstance elements would preclude the blameless contractor discussed above from liability for solicitation to commit aggravated murder.
- Under the third construction, the result and circumstance elements of the target offense are subject to a requirement of purpose. Per this construction, USAO’s proposal is that there be a single, categorical purpose requirement as to every objective element of the target offense, without regard to the level of culpability governing the completed version (i.e., “a purpose to *commit the actus reus* of the target offense”). With respect to result elements, this approach appears to be consistent with current District law, and it reflects the approach taken in most jurisdictions in America.⁵⁴ With respect to circumstance elements, in contrast, this approach entails culpability elevation beyond that required by any jurisdiction.⁵⁵ Although lacking support in District law or national legal trends, this treatment of circumstance elements is supported by important policy considerations, such as the increased risk of false positives for inchoate conduct. Finally, this collective treatment of result and

⁵⁰ See the commentary accompanying RCC § 22E-302 for a more extensive analysis of relevant legal trends.

⁵¹ This is so because the contractor clearly did possess the only culpable mental state that the singular purpose requirement would explicitly require: intending to bring about conduct—i.e., the demolition of the building—which, if carried out, would have resulted in the death of the elderly homeless person.

⁵² See RCC § 22E-207(c) (“*Determination of When Recklessness Is Implied.* A culpable mental state of “recklessly” applies to any result element or circumstance element not otherwise subject to a culpable mental state under RCC § 22E-207(a), or subject to strict liability under RCC § 22E-207(b).”).

⁵³ See the commentary accompanying RCC § 22E-302 for a more extensive analysis of relevant legal trends.

⁵⁴ See the commentary accompanying RCC § 22E-302 for a more extensive analysis of relevant legal trends.

⁵⁵ See the commentary accompanying RCC § 22E-302 for a more extensive analysis of relevant legal trends.

circumstance elements would preclude the blameless contractor discussed above from liability for solicitation to commit aggravated murder.⁵⁶

- These three potential constructions highlight the importance of explicitly addressing the relationship between the culpability of a solicitation and the objective elements of an offense through a general legislative formulation such as that currently depicted in RCC § 22E-302.

(2) *USAO, App. C at 238, “recommends that, in subsection (a)(1), the word ‘specific’ be removed.”*⁵⁷ *USAO states that, “[a]s used here, the word ‘specific’ implies that the defendant must specify how the offense will be carried out to be found guilty of solicitation.” To illustrate, USAO notes that, “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.” Instead, USAO states that “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.”*

⁵⁶ Note, however, that even under the third construction, USAO’s recommendation to delete from the prefatory clause the phrase “With the culpability required by that offense” risks treating less culpable forms of homicide more severely, while ignoring important distinctions in blameworthiness. Specifically, USAO points to the situation of a defendant “charged with solicitation to commit first-degree murder,” which “requires premeditation and deliberation.” Here, “[t]he government need not prove premeditation to solicit the murder for the defendant to be guilty of solicitation to commit first-degree murder.” The CCRC disagrees with this policy statement.

It is well-established in District law, national legal trends, and broader Anglo-American jurisprudence that a premeditated purposeful murder, committed in the absence of mitigating circumstances, is more culpable/should be graded more severely than a purposeful murder that is not premeditated and is committed in the presence of mitigating circumstances. The same considerations of proportionality that support these trends carry over to the grading of solicitations; however, USAO’s proposed revisions would seem to ignore them, by simply requiring the purposeful solicitation of homicide, without recognition of broader aspects of culpability.

As LaFave explains in the comparable context of accomplice liability:

To determine the kind of homicide of which the accomplice is guilty, it is necessary to look to his state of mind; it may have been different from the state of mind of the principal and they thus may be guilty of different offenses. Thus, because first degree murder requires a deliberate and premeditated killing, an accomplice is not guilty of this degree of murder unless he acted with premeditation and deliberation. And, because a killing in a heat of passion is manslaughter and not murder, an accomplice who aids while in such a state is guilty only of manslaughter even though the killer is himself guilty of murder. Likewise, it is equally possible that the killer is guilty only of manslaughter because of his heat of passion but that the accomplice, aiding in a state of cool blood, is guilty of murder.

LAFAVE, at 2 SUBST. CRIM. L. § 13.2(c); *see generally* RCC § 22E-210(c): Explanatory Note (discussing similar point in the context of accomplice liability).

⁵⁷ With USAO’s changes, RCC § 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 . . .”

- The RCC does not incorporate USAO’s recommended revision. The specific conduct standard furthers important free speech principles and would likely be satisfied by the fact pattern presented by USAO.
- Given the centrality of speech to persuasion/promotion, solicitation liability implicates a criminal defendant’s First Amendment rights.⁵⁸ And while the U.S. Supreme Court recently clarified that “[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection,”⁵⁹ it also reaffirmed the “important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality.”⁶⁰ The specific conduct standard incorporated into paragraph (a)(1)—which is derived from the Model Penal Code approach to solicitation⁶¹—respects this distinction by requiring that the defendant solicit another person to engage in “*specific conduct*” constituting an offense.⁶²
- To satisfy this standard, it is *not* necessary that the defendant have gone into great detail as to the manner in which the crime encouraged is to be committed. All that must be proven is that the defendant’s communication, when viewed in the context of the knowledge and position of the intended recipient, carries meaning in terms of some concrete course of conduct that, if carried to completion, would constitute a criminal offense.⁶³
- In light of this explanation (which is also articulated in the accompanying RCC commentary), the specific conduct standard presumably would be satisfied if—per USAO’s hypothetical—“a defendant instructed another person to murder a [specific] complainant.” And there is certainly no need

⁵⁸ See, e.g., Eugene Volokh, *The “Speech Integral to Criminal Conduct” Exception*, 101 CORNELL L. REV. 981 (2016); Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095 (2005).

⁵⁹ *United States v. Williams*, 553 U.S. 285, 297 (2008) (citing *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 388 (1973); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)).

⁶⁰ *Williams*, 553 U.S. at 298-99 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (*per curiam*); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928-929 (1982)).

⁶¹ See, e.g., Model Penal Code § 5.02(1) (“A person is guilty of solicitation to commit a crime if,” *inter alia*, he or she “commands, encourages, or requests another person to engage in *specific conduct* that would constitute such crime . . .”) (italics added).

⁶² See, e.g., Model Penal Code § 5.02(1) (“A person is guilty of solicitation to commit a crime if,” *inter alia*, he or she “commands, encourages, or requests another person to engage in *specific conduct* that would constitute such crime . . .”) (italics added). This is consistent with accomplice liability under section 210, which similarly employs a “specific conduct” standard where complicity is based on encouragement. RCC § 22E-210(a)(2) (“Purposely encourages another person to engage in specific conduct constituting that offense.”); see, e.g., Model Penal Code § 2.06(3)(a)(i) (“A person is an accomplice of another person in the commission of an offense if,” *inter alia*, he or she “*solicits* such other person to commit it[.]”) (italics added).

⁶³ E.g., Model Penal Code § 5.02 cmt. at 376; LAFAVE, *supra*, at 2 SUBST. CRIM. L. § 11.1. So, for example, general, equivocal remarks—such as the espousal of a political philosophy recognizing the purported necessity of violence—would not be sufficiently concrete to satisfy section 302. Commentary on Haw. Rev. Stat. Ann. § 705-510. Nor would a general exhortation to “go out and revolt.” *State v. Johnson*, 202 Or. App. 478, 483 (2005).

under the RCC approach, that the defendant in a solicitation of murder case—again, per USAO’s hypothetical—“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.” That said, the specific conduct standard *would* preclude holding the defendant liable for attempting to persuade others of the overarching virtues of killing other people in general.⁶⁴

(3) *USAO, App. C at 238, recommends that, in subsection (c), the word “plans” be replaced by the word “intends.”*⁶⁵ *Specifically, “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.”*

- The RCC does not incorporate USAO’s recommended revision for the same reasons discussed in the disposition of USAO’s comment on attempt liability. However, the RCC commentary on attempt liability does incorporate new language addressing USAO’s concerns in both contexts.⁶⁶

⁶⁴ See generally *Williams*, 553 U.S. at 300 (distinguishing statements such as “I believe that child pornography should be legal” or even “I encourage you to obtain child pornography” with the recommendation of a particular piece of purported child pornography).

⁶⁵ 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.”

⁶⁶ Specifically, a pre-existing passage in the relevant Explanatory Note has been revised and expanded to read:

This planning requirement is to be distinguished from the voluntariness requirement under section 203. See RCC § 22E-203(a) (“No person may be convicted of an offense unless the person voluntarily commits the conduct element necessary to establish liability for the offense.”). The voluntariness requirement, which implicates what is sometimes referred to as a “*present* conduct intention,” can be “satisfied simply by showing that the actor did in fact intend to perform the bodily movements that he performed.” Robinson, *supra* note 2, at 864. In contrast, the planning requirement, which implicates what is sometimes referred to as a “*future* conduct intention,” “serves to show that the actor is planning to do more than what he has already done.” *Id.*

In this sense, the term “planning” as employed in this section is substantively identical to the term “intent” under RCC § 22E-206(c), and thus should not be read to incorporate additional requirements such as premeditation or deliberation (i.e., a person who, having been provoked, is stopped by police immediately prior to firing his weapon in retaliation has “planned” to kill). Paragraph (a)(1) could have just as easily been drafted to state “intending to engage in conduct constituting [an] offense”; however, this would fail to clearly distinguish between the planning requirement and the culpability requirement derived from the target offense. See RCC § 22E-301(a)(2) (defendant must act “[w]ith the culpability required by [the target] offense”).

For example, an actor may plan to carry out a course of conduct that, if completed, would cause the prohibited result of death without being culpable at all—as would be the case where a demolition operator is stopped just before destroying an apparently abandoned building that, unbeknownst to the operator, is occupied by a person who would have died in the ensuing destruction. Alternatively, that same demolition operator may have sought to cause that result culpably, e.g., if the operator knew that a person was residing in the building and acted with the intent to kill. In both versions of

- (4) *USAO, App. C at 238-239, “recommends that, throughout these provisions, the word ‘defendant’ be changed to the word ‘actor.’” This revision “is not meant to be substantive, and is meant to align the language in these sections with the language used throughout the RCC.”*
- The RCC does not incorporate USAO’s recommended revision. The CCRC believes that the term “defendant” is more accessible and clear than “actor” given the different kinds of actors referenced in the RCC’s general inchoate and legal accountability provisions.
- (5) *The CCRC recommends that the term “a crime of violence” be replaced with the words “an offense against persons as defined in Subtitle II of Title 22E.”*
- The term “crime of violence” is not yet defined in the RCC, and specifying that solicitation only applies to offenses against persons in Subtitle II improves the clarity of the revised statute.
- (6) *The CCRC recommends clarifying that the person must intend “all” of the result and circumstance elements of the offense, instead of “any” one element.*
- This change improves the clarity and consistency of the revised statute.
- (7) *The CCRC recommends replacing the word “punishment” with “penalty.”*
- This change improves the consistency of the revised statute and does not substantively change its meaning.
- (8) *The CCRC recommends including a subsection for definitions.*
- This change improves the consistency of the revised statute and does not substantively change its meaning.

the hypothetical, the question of whether the operator acted with the culpable mental state requirement of murder (i.e., whether the operator intended to kill the occupant) is a separate and distinct question from whether the operator “planned to engage in conduct constituting” murder (i.e., whether the operator planned to demolish the building, which was in fact occupied). Use of the term “planning,” as opposed to “with intent,” in paragraph (a)(1) helps to distinguish these concepts. *See infra* notes 5-8 and accompanying text (discussing culpability required by target offense).

RCC § 22E-303. Conspiracy.

(1) USAO, *App. C* at 239-240, offers two revisions to the culpability of conspiracy liability. First, “USAO recommends that, in subsection (a), the words ‘acting with the culpability required by that offense’ be removed.” In support of this revision, USAO states that “[t]he proposed provision adds an additional culpability requirement that does not exist in current law.” USAO further explains that “[t]o provide an additional mens rea requirement by referring to the culpability required by the underlying offense makes the statute more confusing.” USAO also notes that “applying this additional requirement to various offenses can lead to problematic results,” such as, for example, in the situation of a defendant “charged with conspiracy to commit first-degree murder, first-degree murder requires premeditation and deliberation.” Second, USAO recommends “removing subsection (b).” In support of eliminating subsection (b), USAO points to “many of the same reasons as discussed with respect to subsection (a),” namely, “subsection (b) is both confusing and adds an additional culpability requirement that does not exist in current law.” Specifically, USAO states that, “[t]o 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.” USAO acknowledges that “[i]t is implicit that, by intending to enter into an agreement to commit the charged offense, [the parties] desire the offense to take place.” However, USAO believes “this subsection makes the conspiracy language more confusing than if the Conspiracy section were to simply track the legal elements set forth above.” Viewed collectively, USAO’s recommended revisions would have paragraph (a)(1) state the culpability of conspiracy in its entirety as: “Purposely agree to engage in or aid the planning or commission of conduct [constituting an offense].”

- The RCC does not incorporate USAO’s recommended revisions. The purpose requirement in paragraph (a)(1), which USAO’s deletions would leave as the sole legislative statement of the culpability of criminal conspiracy under the RCC, is open to multiple interpretations, including one that would create extremely expansive general conspiracy liability, and one that would create extremely narrow general conspiracy liability.⁶⁷
- The communicative and potential⁶⁸ policy problems presented by USAO’s recommended formulation can be appreciated by the following modified demolition hypothetical (see *supra*, attempts), which is drawn from the RCC commentary. On May 14, the general contractor for a large development project hires a demolition operator to destroy an apparently abandoned building on Tuesday, May 15, at 2:00pm. (Note: both parties agree to the arrangement.) Thereafter, at 1:45pm on the 15th, the police

⁶⁷ See *infra* (discussing first and third constructions of USAO’s proposed formulation).

⁶⁸ See *infra* (discussing third construction of USAO’s proposed formulation, which would not necessarily create any policy problems).

stop the demolition operator from destroying the building, which, unbeknownst to either the general contractor or the cautious operator, is occupied by an elderly homeless person who stealthily snuck into the building and would have died in the ensuing demolition had the operator been able to carry out his planned course of conduct. Assume the contractor is subsequently prosecuted for the solicitation of aggravated murder, which prohibits anyone from: “intentionally killing a person, negligent as to whether that person is over 65 years of age, in the absence of mitigating circumstances.”

- Under the current RCC language, the government’s burden of proof as to the requisite culpability is clear. First, it must be proven that the contractor purposely agreed with the operator to facilitate conduct that, if carried out, would have resulted in the victim’s death (i.e., the demolition of the building).⁶⁹ Second, it must be proven that the contractor intended to cause the result element of the target offense, the death of a person.⁷⁰ Third, it must be proven that the contractor possessed, at minimum, negligence as to the circumstance element of the target offense, that the victim be older than 65.⁷¹ And fourth, it must be proven that the agreement occurred in the absence of mitigating circumstances.⁷² This clear statement follows directly from the current RCC language, and is generally consistent with the conspiracy policies employed in every jurisdiction in America. It also ensures the appropriate outcome as applied to the above facts, namely, that the blameless contractor cannot be convicted of conspiracy to commit aggravated murder.
- Under USAO’s recommended deletions, in contrast, the government’s burden of proof is susceptible to multiple constructions. The remaining culpability phrase “agree to engage in or aid the planning or commission of conduct [constituting an offense]” simply addresses the first of the four requirements explicitly addressed by the RCC approach. It is therefore silent on the requisite state of mind that must be proven as to the result and circumstance elements of the target offense (i.e., death or age of the victim). Three potential constructions of the proposed language exist.
- Under the first construction the result and circumstance elements of the target offense are not subject to any culpability requirement at all. In effect, this would allow for proof of a bare purpose to agree to bring about conduct that would culminate in the results and/or circumstances of the

⁶⁹ RCC § 22E-303(a)(1).

⁷⁰ RCC § 22E-303(b). The operator must have also possessed this intent, as well as the other mental states discussed *infra*; however, for purposes of simplicity, this entire response merely refers to the contractor’s state of mind.

⁷¹ RCC § 22E-303(b).

⁷² This is due to the requirement in the prefatory clause of subsection (a), which requires that the defendant and another person act “with the culpability required by the [target offense].” See RCC § 22E-201(d)(3) (“‘Culpability requirement’ includes . . . Any other aspect of culpability specifically required by an offense.”); *id.*, at Explanatory Note (noting that “premeditation, deliberation, and absence of mitigating circumstances” would so qualify).

target offense to suffice for conspiracy liability. If adopted, such an approach would reduce the culpability requirement for all conspiracy offenses to what practically amounts to strict liability. This, in turn, would constitute an unprecedented policy shift both inside and outside the District given that every jurisdiction in America requires: (1) at minimum, proof of culpability this is at least as demanding as that required by the target offense; and (2) for many offenses (i.e., those that require proof of negligence or recklessness as to result elements) proof of an elevated form of culpability, above and beyond that required by the target offense.⁷³ Beyond that, this approach would support convicting the otherwise blameless contractor depicted in the above fact pattern.⁷⁴

- Under the second construction the result and circumstance elements of the target offense are subject to a default requirement of recklessness, per the RCC’s explicit rule for implying a recklessness culpable mental state when no other culpability requirement (or strict liability) is specified.⁷⁵ This approach has little support in District law and national legal trends.⁷⁶ With respect to result elements, for example, it would expand liability beyond that provided for in nearly every American jurisdiction by allowing a conspiracy conviction to rest on mere recklessness as to a result. And, as discussed at length in the Explanatory Note, this general approach brings with it detrimental policy consequences (e.g., by turning endangerment activity into multiple serious felonies). At the very least, however, this collective treatment of result and circumstance elements would preclude the blameless contractor discussed above from liability for conspiracy to commit aggravated murder.
- Under a third construction the result and circumstance elements of the target offense are subject to a requirement of purpose. Per this construction, USAO’s proposal is that there be a single, categorical purpose requirement as to every objective element of the target offense, without regard to the level of culpability governing the completed version (i.e., “a purpose to *commit the actus reus* of the target offense”). With respect to result elements, this approach appears to be consistent with current District law, and it reflects the approach taken in most jurisdictions in America.⁷⁷ With respect to circumstance elements, in contrast, this approach entails culpability elevation beyond that required by any jurisdiction.⁷⁸ Although lacking support in District law or national legal

⁷³ See the commentary accompanying RCC § 303 for a more extensive analysis of relevant legal trends.

⁷⁴ This is so because the contractor clearly did possess the only culpable mental state that the singular purpose requirement would explicitly require: intending to bring about conduct—i.e., the demolition of the building—which, if carried out, would have resulted in the death of the elderly homeless person.

⁷⁵ See RCC § 22E-207(c) (“*Determination of When Recklessness Is Implied*. A culpable mental state of “recklessly” applies to any result element or circumstance element not otherwise subject to a culpable mental state under RCC § 22E-207(a), or subject to strict liability under RCC § 22E-207(b).”).

⁷⁶ See the commentary accompanying RCC § 303 for a more extensive analysis of relevant legal trends.

⁷⁷ See the commentary accompanying RCC § 303 for a more extensive analysis of relevant legal trends.

⁷⁸ See the commentary accompanying RCC § 303 for a more extensive analysis of relevant legal trends.

trends, this treatment of circumstance elements is supported by important policy considerations, such as the increased risk of false positives for inchoate conduct. Finally, this collective treatment of result and circumstance elements would preclude the blameless contractor discussed above from liability for conspiracy to commit aggravated murder.⁷⁹

- These three potential constructions highlight the importance of explicitly addressing the relationship between the culpability of a conspiracy and the objective elements of an offense through a general legislative formulation such as that currently depicted in RCC § 22E-303.
- (2) *OAG, App. C at 231-232, recommends replacing the term “conspiracy” in the overt act requirement, RCC § 22E-303(a)(2), with “agreement.” OAG states that the reference to “conspiracy” in the overt act requirement “suffer[s] from being a circular definition.” Further, “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) [flows] more clearly from (a)(1).” Finally, OAG points out that “the previous version of RCC § 22E-303(a)(2)” used “agreement” instead of “conspiracy.”*
- The RCC incorporates OAG’s recommendation, such that paragraph (a)(2) substitutes the term “agreement” for “conspiracy,” for the reasons referenced by OAG.

⁷⁹ Note, however, that even under the third construction, USAO’s recommendation to delete from the prefatory clause the phrase “With the culpability required by that offense” risks treating less culpable forms of homicide more severely, while ignoring important distinctions in blameworthiness. Specifically, USAO points to the situation of a defendant “charged with conspiracy to commit first-degree murder, first-degree murder requires premeditation and deliberation.” Here, “[t]he government need not prove premeditation to engage in the agreement for the defendant to be guilty of conspiracy to commit first-degree murder.” The CCRC disagrees with this policy statement.

It is well-established in District law, national legal trends, and broader Anglo-American jurisprudence that a premeditated purposeful murder, committed in the absence of mitigating circumstances, is more culpable/should be graded more severely than a purposeful murder that is not premeditated and is committed in the presence of mitigating circumstances. The same considerations of proportionality that support these trends carry over to the grading of conspiracies; however, USAO’s proposed revisions would seem to ignore them, by simply requiring a purposeful conspiracy to commit homicide, without recognition of broader aspects of culpability.

As LaFave explains in the comparable context of accomplice liability:

To determine the kind of homicide of which the accomplice is guilty, it is necessary to look to his state of mind; it may have been different from the state of mind of the principal and they thus may be guilty of different offenses. Thus, because first degree murder requires a deliberate and premeditated killing, an accomplice is not guilty of this degree of murder unless he acted with premeditation and deliberation. And, because a killing in a heat of passion is manslaughter and not murder, an accomplice who aids while in such a state is guilty only of manslaughter even though the killer is himself guilty of murder. Likewise, it is equally possible that the killer is guilty only of manslaughter because of his heat of passion but that the accomplice, aiding in a state of cool blood, is guilty of murder.

LAFAVE, *supra*, at 2 SUBST. CRIM. L. § 13.2(c); *see generally* RCC § 210(c): Explanatory Note (discussing similar point in the context of accomplice liability).

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.
- (3) *OAG, App. C at 232, recommends “redrafting [RCC § 22E-303 (b)(1) to] read, ‘[i]ntend to cause any result required by that offense.’” OAG notes that, while the current version of RCC § 22E-303 (b)(1) says conspirators must “[i]ntend to cause any result element required by that offense,” it is nevertheless the case that “one does not cause a result element; one causes a result.”*
- The RCC does not incorporate OAG’s recommendation. “Result element,” not “result,” is statutorily defined in Chapter 2 of the RCC, which is what is “required by [an] offense” under RCC § 22E-303(b)(1). Further, it does make sense to speak of causing a “result element,” particularly given that one must “plug” in the referent, which is generally understood to be sound drafting practice. For example, the “result element” of murder is “death,” which is a consequence that a person can (and indeed must) intend to cause to be convicted of the offense.
- (4) *USAO, App. C at 240, “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.’” USAO states that “[t]his change is not intended to be substantive, but to clarify the language used in this heading.” In addition, “[t]he proposed edit also aligns the language of the heading of the subsection with the language in the subsection.”*
- The RCC incorporates USAO’s recommended revisions, such that the heading of subsection (d) now reads: “Jurisdiction When Object of Conspiracy is to Engage in Conduct Located Outside the District of Columbia,” for the reasons referenced by USAO.
 - This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.
- (5) *The CCRC recommends changing the heading of RCC § 22E-303(f) from “Legality of Conduct in Other Jurisdiction Irrelevant” to “Legality of Conduct in Other Jurisdiction No Defense.” This revision better reflects a substantive change made to the relevant statutory provision in the Cumulative Update, and is consistent with informal comments received from PDS.*
- (6) *The CCRC recommends revising paragraphs (b)(1) and (b)(2) to clarify that the person must intend “all” of the result and circumstance elements of the offense, instead of “any” one element.*
- This change improves the clarity and consistency of the revised statute.
- (7) *The CCRC recommends amending the phrase “can be established” to “are proven,” to clarify that the government prove the elements of the conspiracy occurred.*
- This change improves the consistency of the revised statute and does not substantively change its meaning.
- (8) *The CCRC recommends including a subsection for definitions.*
- This change improves the consistency of the revised statute and does not substantively change its meaning.

RCC § 22E-304. Exceptions to General Inchoate Liability.

- (1) *USAO, App. C at 240, “recommends that, in subsection (a)(1), the word ‘victim’ be changed to the words ‘intended victim.’” “USAO agrees with the general principle that certain victims should not be deemed guilty of conspiracy or solicitation.”⁸⁰ At the same time, “[h]owever, there are instances where individuals who could be considered a victim should be deemed guilty of conspiracy or solicitation.” In support, USAO offers the following illustration:*

[I]f 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.

Based on this analysis, “USAO believes that eliminating liability only for an ‘intended victim’ would remedy these situations and clarify the law.”

- The RCC does not incorporate USAO’s recommended revision because the issue identified is already addressed by the proposed statutory language, RCC § 22E-304(a)(1). Under USAO’s examples, there is no plausible claim that the injuries sustained by Persons B and D qualify them as “a victim of the *target offense*.” The victim of the *target offense* in the first hypothetical is clearly Person C (and not B), while in the second hypothetical it is clearly Person E (and not D).
- (2) *USAO, App. C at 241, recommends redrafting paragraph (a)(2), which currently reads: “The person’s criminal objective is inevitably incident to commission of the target offense as defined by statute.” USAO suggests revising this language to state: “The offense, as defined by statute, is of such a nature as to necessarily require the participation of two people for its commission.” This “alternative proposal” stems from USAO’s “belie[f] that the current wording of (a)(2) is confusing,” and, as such, “is intended to be a clarification, not a substantive modification.” USAO also “believes [this alternate proposal to be] a more accurate statement of Wharton’s Rule, as set forth in the comments to the current jury instructions.”*
- The RCC does not incorporate USAO’s recommended revision. USAO’s alternative proposal would constitute a substantive modification of paragraph (a)(2), which would also be a misstatement of Wharton’s Rule as construed by the DCCA.

⁸⁰ “For example,” as USAO states, “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.”

- The current RCC approach bars solicitation and conspiracy liability where the defendant’s “criminal objective is inevitably incident to commission of the target offense as defined by statute.” As applied, this merely precludes holding (for example) the purchaser in a drug sale criminally liable for conspiring in the commission of drug distribution because the purchaser’s criminal objective—the *acquisition* of controlled substances—is inevitably incident to the *distribution* of controlled substances.⁸¹
- Under USAO’s recommended revision, in contrast, a conspiracy (or solicitation) to commit drug distribution (or other target offenses such as bribery or trafficking in stolen property) could never be charged because the acts of distribution (or bribery or trafficking in stolen property) “is of such a nature as to necessarily require the participation of two people for its commission.”
- USAO’s recommended approach is substantively consistent with the most expansive interpretation of Wharton’s Rule; however, this interpretation has been subject to significant criticism.⁸² Under the narrower and more defensible reading, in contrast, Wharton’s Rule merely “supports a presumption” that, “absent legislative intent to the contrary,” charges for conspiracy and a substantive offense that requires “concerted criminal activity” should “merge when the substantive offense is proved.”⁸³
- This latter approach is recommended by most commentators.⁸⁴ And it appears to most clearly reflect current District law, under which: “Wharton’s Rule [merely] bar[s] convictions for both the substantive offense and conspiracy to commit that same offense,” so, “[e]ven if the rule applies, initial dismissal of the conspiracy count is not required because the purpose of the rule is avoidance of dual punishment.”⁸⁵
- This is also the approach followed by the RCC through the combination of section 304(a)(2), as currently drafted, in combination with the RCC’s general merger provision.⁸⁶

⁸¹ In contrast, paragraph (a)(2) would not preclude holding the dealer liable for conspiring to *distribute* controlled substances based on an agreement with the purchaser. This is because the dealer’s criminal objective—the *distribution* of controlled substances—is not inevitably incident to commission of the target offense, but rather, actually *constitutes* the target offense (i.e., provides the actual basis for a drug distribution charge).

⁸² See, e.g., Model Penal Code § 5.04(2) cmt. at 481 (“[Such an approach] completely overlooks the functions of conspiracy as an inchoate crime. That an offense inevitably requires concert is no reason to immunize criminal preparation to commit it.”); LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.4(c)(4).

⁸³ *Iannelli v. United States*, 420 U.S. 770, 785–86 (1975).

⁸⁴ See, e.g., LAFAVE, at 2 SUBST. CRIM. L. § 12.4(c)(4) (“To the extent [Wharton’s Rule simply] avoids cumulative punishment for conspiracy and the completed offense, [the doctrine] makes sense.”); Model Penal Code § 5.04(2) cmt. at 481 (“[Wharton’s] rule is supportable only insofar as it avoids cumulative punishment for conspiracy and the completed substantive crime, for it is clear that the legislature would have taken the factor of concert into account in grading a crime that inevitably requires concert.”).

⁸⁵ *Pearsall v. United States*, 812 A.2d 953, 962 & n.11 (D.C. 2002).

⁸⁶ See RCC § 22E-214(a)(4) (establishing presumption of merger whenever “[o]ne offense reasonably accounts for the other offense given the harm or wrong, culpability, and penalty proscribed by each”); *id.*, Explanatory Note (“For example, where D, a drug dealer, is convicted of both conspiracy to commit drug

(3) *The CCRC recommends replacing subsection (b) with a prefatory clause at the beginning of the provision that states, “Unless otherwise expressly specified by statute,” consistent with other RCC General Part provisions.*

- This change improves the consistency of the revised statute and does not substantively change its meaning.

distribution and drug distribution, and those convictions arise from the same course of conduct (e.g., a single drug deal with purchaser X), the conspiracy charge would merge with the drug distribution charge, since the latter, by effectively requiring an agreement to distribute as a precursor, ‘reasonably accounts’ for the former.”).

RCC § 22E-305. Renunciation Defense to General Inchoate Liability

- (1) USAO, App. C at 241, “recommends removing § 22E-305 in its entirety.” USAO offers this recommendation based on its “belie[f] that this section does not accurately reflect the state of the law.” Specifically, “[c]ompletion of the target offense is never required for the offenses of attempt, conspiracy, and solicitation.” USAO acknowledges that, “[i]f 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.” At the same time, “[h]owever[,] the fact that the offense was not completed does not affect his already completed culpability for attempt, conspiracy, and solicitation.” In support, USAO offers the following illustration:

[I]f 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.

That being said, however, “[i]f the CCRC is inclined to codify a defense in this section, USAO recommends that the RCC codify a withdrawal defense.” Importantly, though, “[u]nder the withdrawal defense [recommended by USAO] 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.”

- The RCC does not incorporate USAO’s recommended revisions. The renunciation defense codified in section 305 is supported by national legal trends and compelling policy considerations. It also fills an important gap in District law in a manner that is generally consistent with District law.
- A “majority of American jurisdictions recognize some form of renunciation defense to an attempt to commit an offense,” while “[n]early every jurisdiction permits some form of renunciation defense to a charge of criminal solicitation” and “to a charge of conspiracy.”⁸⁷
- Widespread recognition of “renunciation as an affirmative defense to inchoate crimes” is often said to be driven by “two basic reasons”:

First, renunciation indicates a lack of firmness of that purpose which evidences criminal dangerousness. The same rationale underlies the reluctance to make merely “preparatory” activity a basis for liability in criminal attempt: the criminal law does not seek to condemn where there is an insufficient showing that the defendant has a firm purpose to bring about the conduct or result which the

⁸⁷ PAUL H. ROBINSON, 1 CRIM. L. DEF. § 81 (Westlaw 2019); see, e.g., Daniel G. Moriarty, *Extending the Defense of Renunciation*, 62 TEMP. L. REV. 1 (1989).

penal law seeks to prevent. Where the defendant has performed acts which indicate, *prima facie*, sufficient firmness of purpose, the defendant should be allowed to rebut the inference to be drawn from such acts by showing that the defendant has plainly demonstrated the defendant's lack of firm purpose by completely renouncing the defendant's purpose to bring about the conduct or result which the law seeks to prevent.

Second, it is thought that the law should provide a means for encouraging persons to abandon courses of criminal activity which they have already undertaken. In the very cases where the first reason becomes weakest, this second reason shows its greatest strength. That is, in the penultimate stage, where purpose is most likely to be firmly set, any inducement to desist achieves its greatest value.⁸⁸

- The current state of District law concerning the renunciation defense is unclear. The D.C. Code does not codify any general defenses to criminal conduct, including renunciation. There also does not appear to be any District case law directly addressing the issue in the context of attempt, solicitation, or conspiracy. At the same time, some District authority relevant to the renunciation defense exists in the context of general inchoate crimes, providing modest support for its recognition.⁸⁹

⁸⁸ Commentary on Haw. Rev. Stat. Ann. § 705-530 (citing Model Penal Code § 5.01 cmt. at 361); *see, e.g.*, Moriarty, *supra*, at 5-6 (observing that a renunciation defense is “[a] cost-effective technique to . . . concentra[ting] our resources on those who seem most likely to commit crime, and to target our measures of social defense at those persons who are most dangerous.”); Moriarty, *supra*, at 5 (“Just as the degree structure of criminal [provides] greater deterrence for the higher degrees of crime [through more severe punishments], so too can the reward of remission of punishment motivate persons who have not yet caused the more aggravated species of harm to abandon their enterprise and refrain from causing more damage than they have already.”).

Perhaps a better explanation of the renunciation defense's recognition, though, is “[r]etributively oriented,” namely, that voluntary and complete renunciation “makes us reassess our vision of the defendant's blameworthiness.” Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 612 (1981). As numerous legal authorities have recognized:

All of us, or most of us, at some time or other harbor what may be described as a criminal intent to effect unlawful consequences. Many of us take some steps—often slight enough in character—to bring the consequences about; but most of us, when we reach a certain point, desist, and return to our roles as law-abiding citizens.

Hernandez-Cruz v. Holder, 651 F.3d 1094, 1103 (9th Cir. 2011) (quoting WAYNE R. LAFAYE, 2 SUBST. CRIM. L. § 11.4 (3d ed. Westlaw 2019) which in turn quotes Robert H. Skilton, *The Requisite Act in a Criminal Attempt*, 3 U. PITT. L. REV. 308, 310 (1937)); *see, e.g.*, PAUL H. ROBINSON & JOHN DARLEY, INTUITIONS OF JUSTICE & THE UTILITY OF DESERT 247-57 (2014) (finding strong support in public opinion for renunciation defense).

⁸⁹ In the attempt context, District courts apply a conduct requirement that, in drawing the line between preparation and perpetration, seems to imply the absence of renunciation. This so-called probable desistance test requires proof of conduct which, “*except for the interference of some cause preventing the carrying out of the intent*, would have resulted in the commission of the crime.” *E.g., Wormsley v. United*

- In the absence of District authority directly addressing the viability of a renunciation defense to the general inchoate crimes of attempt, conspiracy, and solicitation, the most relevant aspect of District law is the intersection between withdrawal and accomplice liability. The DCCA appears to recognize that a complete withdrawal defense is available to those being prosecuted as aiders and abettors.⁹⁰ Which is to say, an accomplice that “take[s] affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete disassociation” cannot be convicted of the crime for which he or she has been charged with aiding and abetting.⁹¹
- Recognition of a withdrawal defense to accomplice liability is congruent with recognition of a renunciation defense to general inchoate crimes. This is clearest in the context of conspiracy and solicitation liability given that the elements of accomplice liability are nearly identical—indeed,

States, 526 A.2d 1373, 1375 (D.C. 1987) (quoting *Sellers v. United States*, 131 A.2d 300, 301-02 (D.C. 1957)) (emphasis added); see also *In re Doe*, 855 A.2d 1100, 1107 and n.11 (D.C. 2004) (quoting *Wormsley* but noting this formulation is “imperfect” in the sense that “failure is not an essential element of criminal attempt”). As various commentators have observed, this formulation of attempt liability appears to be part and parcel with a renunciation defense in the sense that a “voluntary abandonment demonstr[ates] that the agent would not have ‘committ[ed] the crime except for’ extraneous intervention.” R.A. DUFF, CRIMINAL ATTEMPTS 395-96 (1996); see, e.g., Model Penal Code § 5.01 cmt. at 357-58; LAFAVE, *supra*, at 2 SUBST. CRIM. L. § 11.5. Which is to say, the fact that a defendant genuinely repudiates his or her criminal plans establishes that, with or without external interference, the outcome would have been the same: failure to consummate the target offense.

In the conspiracy context, the DCCA has addressed an issue closely related to renunciation: withdrawal. Withdrawal, unlike renunciation, does not speak to when an actor is relieved from conspiracy liability. Instead, it addresses when an actor may be relieved from the *collateral consequences* of a conspiracy. PAUL H. ROBINSON, 1 CRIM. L. DEF. § 81 (Westlaw 2018) (collecting authorities). For example, “a defendant may attempt to establish his withdrawal as a defense in a prosecution for substantive crimes subsequently committed by the other conspirators.” LAFAVE, *supra*, at 2 SUBST. CRIM. L. § 12.4. Or the defendant “may want to prove his withdrawal so as to show that as to him the statute of limitations has run.” LAFAVE, *supra*, at 2 SUBST. CRIM. L. § 12.4. On these kinds of collateral issues, DCCA case law recognizes a withdrawal defense, under which the defendant “must take affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete disassociation.” *Bost v. United States*, No. 12-CF-1589, 2018 WL 893993, at *28 (D.C. Feb. 15, 2018) (quoting *Harris v. United States*, 377 A.2d 34, 38 (D.C. 1977) (citing *Hyde v. United States*, 225 U.S. 347, 369 (1911); *United States v. Chester*, 407 F.2d 53, 55 (3rd Cir. 1969)); see, e.g., *Kelly v. United States*, 639 A.2d 86, 91 (D.C. 1994); *Baker v. United States*, 867 A.2d 988, 1007 (D.C. 2005). And, “[i]n the event that a defendant claims that he or she withdrew from the conspiracy and the evidence warrants such an instruction,” the criminal jury instructions indicate that the burden is on the “government to prove that the defendant was a member of the conspiracy and did not withdraw it.” COMMENTARY ON D.C. CRIM. JUR. INSTR. § 7.102.

⁹⁰ See *Plater v. United States*, 745 A.2d 953, 958 (D.C. 2000) (“Legal withdrawal [as a defense to accomplice liability] has been defined as ‘(1) repudiation of the defendant’s prior aid or (2) doing all that is possible to countermand his prior aid or counsel, and (3) doing so before the chain of events has become unstoppable.’”) (quoting LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3).

⁹¹ *In re D.N.*, 65 A.3d 88, 95 (D.C. 2013) (“Withdrawal is no defense to accomplice liability unless the defendant takes affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete disassociation.”) (quoting *Harris v. United States*, 377 A.2d 34, 38 (D.C. 1977)); see *In re D.N.*, 65 A.3d at 95 (“Even if D.N. regretted the unfolding consequences of the brutal robbery in which he participated, that does not relieve him of criminal liability.”).

soliciting or conspiring with another person to commit a crime are two ways of aiding and abetting its commission.⁹² But it is also true in the context of attempts, given the broader sense in which holding someone criminally responsible as an aider and abettor effectively “constitute[s] a form of inchoate liability.”⁹³ And, perhaps most importantly, the elements of a withdrawal defense are not only similar to, but are necessarily included within, the more stringent elements of a renunciation defense, which typically requires *non-consummation* of the target offense under circumstances manifesting a *voluntary* and *complete* repudiation of criminal intent.⁹⁴ Arguably, then, the failure to recognize a renunciation defense to general inchoate crimes would be “inconsistent with the doctrine allowing an analogous defense in the complicity area.”⁹⁵

- (2) *The CCRC recommends incorporating the term “Renunciation” into the heading of RCC § 22E-305(b), such that it now reads: “Scope of Voluntary and Complete Renunciation.” This revision describes the operative principle more clearly and is consistent with informal comments received from OAG.*
 - This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.
- (3) *The CCRC recommends striking the burden of proof subsection and instead specifying the burden of proof for all defenses in RCC § 22E-201.*
 - *This change improves the consistency of the revised statutes and does not further change District law.*
- (4) *The CCRC recommends including a subsection for definitions.*
 - This change improves the consistency of the revised statute and does not substantively change its meaning.

⁹² See, e.g., *Tamm v. United States*, 127 A.3d 400, 499 n.11 (“Generally, it may be said that accomplice liability exists when the accomplice intentionally encourages or assists, in the sense that his purpose is to encourage or assist another in the commission of a crime as to which the accomplice has the requisite mental state.”) (quoting LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.2); *United States v. Simmons*, 431 F. Supp. 2d 38, 48 (D.D.C. 2006), *aff’d sub nom. United States v. McGill*, 815 F.3d 846 (D.C. Cir. 2016) (“Convictions for first degree murder while armed . . . may be based on evidence that he solicited and facilitated the murder.”) (citing *Collazo v. United States*, 196 F.2d 573, 580 (D.C. Cir. 1952)); see also Adam Harris Kurland, *To “Aid, Abet, Counsel, Command, Induce, or Procure the Commission of an Offense”: A Critique of Federal Aiding and Abetting Principles*, 57 S.C. L. REV. 85 (2005); Model Penal Code § 2.06(3).

⁹³ Michael T. Cahill, *Defining Inchoate Crime: An Incomplete Attempt*, 9 OHIO ST. J. CRIM. L. 751, 756 n.14 (2012).

⁹⁴ As one commentator phrases the distinction:

“Withdrawal,” commonly used in reference to the collateral consequences of conspiracy, tends to require only notification of an actor’s abandonment to his confederates. “Renunciation” generally requires not only desistance, but more active rejection, and usually contains specific subjective requirements, such as a complete and voluntary renunciation.

ROBINSON, *supra*, at 1 CRIM. L. DEF. § 81.

⁹⁵ Model Penal Code § 5.03 cmt. at 457.

RCC § 22E-408. Special Responsibility Defenses.⁹⁶

(1) *USAO, App. C at 274, recommends that subsection (a)(1)(B) be rewritten to codify current in loco parentis law.⁹⁷ USAO states that the provision, “person acting in the place of a parent per civil law” is confusing and should be eliminated. 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 (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...”*

- The CCRC does not incorporate this recommendation because it may result in disproportionate penalties, would be inconsistent with other RCC provisions, and may be confusing by addressing guardians in this manner (without definition). The revised statute uses a term defined in RCC 22E-701: ““Person acting in the place of a parent under civil law” means both a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption, and any person acting by, through, or under the direction of a court with jurisdiction over the child.” This short, defined term more clearly states what constitutes a “guardian” and is used in multiple RCC provisions without repeating the longer phrasing suggested by USAO. The RCC also broadens availability of the defense beyond those having a formal parental or guardian status to others who may be recognized under civil law (in contrast to the USAO recommendation to limit the defense to those who “*both assuming parental status and by discharging the duties and obligations of a parent toward a child*”). However, the RCC still limits availability of the defense to those who are responsible for the health, welfare, or supervision of the complainant.

(2) *USAO, App. C at 274-275, 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.”⁹⁸ USAO states that it is clearer to point out some of the most relevant considerations in this analysis.*

- The RCC partially incorporates this recommendation by revising the commentary to specifically note with regard to the phrase “under all the circumstance” that “The determination of whether a person’s actions are reasonable in manner and degree “under all the circumstances” may

⁹⁶ Previously titled “Special Responsibility for Care, Discipline, or Safety Defense.”

⁹⁷ Criminal Jury Instructions for the District of Columbia, No. 4.121 (5th ed. Rev. 2018).

⁹⁸ See Criminal Jury Instructions for the District of Columbia, No. 4.120 (5th ed. Rev. 2018). USAO also suggests including the word “size,” which is not included in the jury instructions.

include a complainant'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, or other relevant factors." The RCC defense requires simply that, "under all the circumstances" the actor's conduct be reasonable in manner and degree. The determination of reasonableness in manner and degree may or may not be aided by the listed circumstances such as age.

- (3) *The CCRC recommends adding to the persons who may claim a special responsibility defense persons who are reasonably mistaken that they have the effective consent of a relevant person with legal authority. In the parental defense this change expands the defense to include a person who "reasonably believes that they are acting with the effective consent of a parent or person acting in the place of a parent under civil law, who is responsible for the health, welfare, or supervision of the complainant," instead of the prior language referring only to "Someone acting with the effective consent of such a parent or person." Similarly, this change expands the persons who may claim a guardian defense to a person who "reasonably believes that they are acting with the effective consent of a court-appointed guardian to the complainant" instead of the prior language referring only to "Someone acting with the effective consent of such a guardian." Also, this change expands the persons who may claim an emergency health professional defense to a person who "reasonably believes that they are acting at a licensed health professional's direction," replacing the prior language referring only to "a person acting at a licensed health professional's direction." It appears unjust to deny this defense to a nurse or other person acting under a reasonable mistake that they have the effective consent of a relevant person with legal authority.*
- *This change improves the proportionality of the revised statutes.*
- (4) *The CCRC recommends adding "in fact" to specify that there is no culpable mental state for elements of the special responsibility defenses where none were previously specified in the draft defenses, not including subparagraphs (c)(5)-(c)(7) of the emergency health professional defense (discussed below).*
- *This revision does not further change current District law, and it improves the clarity and consistency of the revised statutes.*
- (5) *The CCRC recommends a culpable mental state of acting "with intent" apply to subparagraphs (c)(5)-(c)(7) of the emergency health professional defense. This requires proof that the actor believed to a practical certainty that the medical procedure was administered or authorized in an emergency, that no person who was permitted under District law to consent to the medical procedure on behalf of the complainant could be timely consulted, and that there was no legally valid standing instruction by the complainant declining the medical procedure.*
- *This revision does not further change current District law, and it improves the clarity and consistency of the revised statutes.*
- (6) *The CCRC recommends replacing "wishing to safeguard the welfare of the complainant" in the emergency health professional defense with "desiring to safeguard the welfare of the complainant." This revision uses terminology that*

tracks the definition of a “purposeful” culpable mental state described elsewhere in the revised statutes.

- *This revision does not further change current District law, and it improves the clarity and consistency of the revised statutes.*
- (7) *The CCRC recommends that the special responsibility offenses be available for conduct under: Forced Labor or Services (RCC § 22E-1601); Trafficking in Labor or Services (RCC § 22E-1603); and Chapter 18 offenses, other than Creating or trafficking an obscene image of a minor (RCC § 22E-1807) when charged under subparagraphs (a)(1)(B) and (a)(1)(E) or subparagraphs (b)(1)(B) and (b)(1)(E) and Arranging a live performance of a minor (RCC § 22E-1809).*
- (8) *The CCRC recommends that the special responsibility offenses not be available for conduct under: Creating or trafficking an obscene image of a minor (RCC § 22E-1807) when charged under subparagraphs (a)(1)(B), (a)(1)(E), (b)(1)(B) or (b)(1)(E); and Arranging a live performance of a minor (RCC § 22E-1809).*
- (9) *The CCRC recommends striking the burden of proof paragraph in the defense provision and instead specifying the burden of proof for all defenses in RCC § 22E-201.*
- *This change improves the consistency of the revised statutes and does not further change District law.*

RCC § 22E-409. Effective Consent Defense.

- (1) *The CCRC recommends adding “in fact” to specify that there is no culpable mental state for elements of the effective consent defense where none were previously specified in the draft defense.*
 - This revision does not further change current District law, and it improves the clarity and consistency of the revised statutes.
- (2) *The CCRC recommends striking the burden of proof paragraph in the defense provision and instead specifying the burden of proof for all defenses in RCC § 22E-201.*
 - *This change improves the consistency of the revised statutes and does not further change District law.*

RCC § 22E-701. Generally Applicable Definitions.

“Amount of damage”

(1) *The CCRC recommends codifying a definition of “amount of damage” that applies to the RCC criminal damage to property offense (RCC § 22E-2503). This is in response to a recommendation OAG made for the RCC criminal damage to property offense. The definition is generally consistent with DCCA case law for the current malicious destruction of property offense and is discussed in detail in the commentary to RCC § 22E-701.*

- This change improves the clarity and consistency of the revised criminal damage to property offense.

“Attorney General”

(1) *The CCRC recommends striking this definition as unnecessary and potentially confusing. Where applicable, the language “Attorney General for the District of Columbia” is substituted in the statutory text.*

- This change clarifies, but does not substantively change, the revised code.

“Block”

(1) *OAG, App. C at 245-246, seeks clarification of the definition of the term “block,” posing the question, “Why is rendering a space impassable without unreasonable hazard ‘blocking’ but rendering impassable with an unreasonable hazard is not?”*

- The RCC incorporates this recommendation to clarify the definition of “block.” The definition is amended to state, “‘Block’ and other parts of speech, including ‘blocks’ and ‘blocking,’ mean render safe passage through a space difficult or impossible.” This change clarifies the meaning of the revised definition.
- (2) *OAG, App. C at 246, notes that although the Explanatory Note says, “similar language” to this definition “is used in the current crowding, obstructing, or incommoding statute,” current D.C. Code § 22-1307 does not include any language comparable to the revised definition.*
- The RCC incorporates this recommendation to clarify the explanatory note for the definition of “block.” The relevant sentence is revised to state, “The RCC definition of ‘blocks’ is new; the term is not currently defined in Title 22 of the D.C. Code (although a similar word, ‘obstruct,’ is used in the current crowding, obstructing, or incommoding statute).⁹⁹” This change clarifies the revised commentary.

⁹⁹ D.C. Code § 22-1307.

“Bodily injury”

- (1) *OAG, App. C at 246, recommends revising the definition of “bodily injury” to specifically include “scratch, bruise, abrasion” so that the definition reads “‘bodily injury’ means physical pain, illness, scratch, bruise, abrasion, or any impairment of physical condition.” As currently drafted, OAG states that the language “impl[ies] that something actually has to be impaired.”*
 - The RCC partially incorporates this recommendation by specifying “physical injury” in the definition, as opposed to specific physical injuries, so that the revised definition reads “physical pain, physical injury, illness, or any impairment of physical condition.” In addition, the commentary to the definition lists a scratch, a bruise, and an abrasion as examples of physical injury. This change improves the clarity of the revised statutes.
- (2) *USAO, App. C at 276, recommends revising the definition of “bodily injury” to include “a contusion, an abrasion, a laceration, or other physical injury” so that the definition reads “‘bodily injury’ means physical pain, illness, a contusion, an abrasion, a laceration, or other physical injury, or any impairment of physical condition.” USAO states that including these injuries clarifies the statute, avoids potential future litigation, and is consistent with the RCC definitions of “significant bodily injury” and “serious bodily injury.”*
 - The RCC partially incorporates this recommendation by specifying “physical injury” in the definition, as opposed to specific physical injuries, so that the revised definition reads “physical pain, physical injury, illness, or any impairment of physical condition.” In addition, the commentary to the definition lists a contusion, an abrasion, and a laceration as examples of physical injury. This change improves the clarity of the revised statutes.

“Class A contraband”

- (1) *USAO, App. C at 277, recommends adding a catch-all provision to include any item that is “otherwise designed or intended to facilitate an escape.” USAO explains that inclusion of this provision will make it easier to prosecute possession of homemade implements.*
 - The RCC does not incorporate this recommendation. Subsection (G) of the revised definition broadly includes any tool—whether machine-made or handmade—that is “created or specifically adapted for picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door.” However, criminalizing possession of any item that is *intended* to facilitate an escape would broadly include objects that have not yet been adapted, objects that are not objectively useful, and objects that have other legitimate purposes. Consider, for example, a person who intends to escape by writing a note to a corrections officer, begging for compassionate release. Under USAO’s proposed language, that person commits a contraband offense the moment she obtains a pencil or a piece of paper. As the commentary to the definition of “Class A

Contraband” explains, “The revised language creates a more objective basis for identifying contraband—rather than making the subjective intent to facilitate escape the sole criterion for whether any object is Class A contraband—and is consistent with language in the revised possession of tools to commit property crime offense.”

(2) *USAO, App. C at 277, recommends criminalizing possession of civilian clothing because it can be used to facilitate an escape.*

- The RCC does not incorporate this recommendation. A person who possesses civilian clothing may be subject to disciplinary action¹⁰⁰ but not an additional conviction. Wearing “a law enforcement officer’s uniform, medical staff clothing, or any other uniform” is punishable as first degree correctional facility contraband.¹⁰¹ Wearing civilian clothing together with department-issued inmate clothing—e.g., undergarments, tennis shoes—is unlikely to facilitate an escape. Wearing a full civilian clothing outfit to impersonate a visitor may constitute an attempted escape.¹⁰²

(3) *USAO, App. C at 277, recommends including stun guns in the definition.*

- The RCC does not incorporate this recommendation because the definition already includes stun guns by including any “dangerous weapon,” which is defined in RCC § 22E-701 to include stun guns.

(4) *USAO, App. C at 277, recommends including controlled substances and marijuana in the definition of Class A Contraband. Alternatively, USAO recommends adding an intermediate class of contraband for controlled substances and marijuana, graded less severely than weapons and escape implements but more severely than alcohol and drug paraphernalia. USAO explains that these drugs affect the physical and mental stability of incarcerated people and are a potential touchstone for conflict.*

- The RCC does not incorporate this recommendation because it would result in a disproportionate penalty. The RCC recommends marijuana and controlled substances constitute Class B contraband rather than Class A contraband, carrying a potential punishment for Second Degree Correctional Facility Contraband rather than First Degree Correctional Facility Contraband.
- In the First Draft of Report #37 (July 12, 2019), the CCRC recommended that the RCC criminalize simple possession and trafficking of controlled substances. Any person who possesses a controlled substance—as an inmate or otherwise, for personal use or to use as currency—is subject to prosecution under RCC §§ 48-904.01a (regardless of weight) and 48-904.01b (depending on weight). Subsequently, in the First Draft of Report #41 (October 3, 2019), the CCRC recommended penalty classifications for drug offenses and first and second degree correctional facility contraband.

¹⁰⁰ See, e.g., Department of Corrections, *Inmate Handbook 2015-2016* at Page 22 (available at https://doc.dc.gov/sites/default/files/dc/sites/doc/publication/attachments/DOC%20PS%204020.1C%20Inmate%20HandBook%202015_0.pdf).

¹⁰¹ RCC § 22E-701 (“Class A contraband”).

¹⁰² RCC § 22E-301 (Criminal Attempt); RCC § 22E-3401 (Escape from a Correctional Facility or Officer).

Under the RCC penalty classifications, an incarcerated person who possesses any amount of a controlled substance could be charged with second degree correctional facility contraband and subject to a Class A penalty, which is significantly more severe than the corresponding Class C or Class D penalties for a civilian possessing any amount of a controlled substance under RCC § 48-904.01a. Where the amount of a controlled substance possessed by an incarcerated person is such as to indicate an intent to distribute, such conduct may be prosecuted under RCC § 48-904.01b, which may be more severely punished than second degree correctional facility contraband depending on the nature of the controlled substance.

- The inclusion of controlled substances in the RCC definition of Class B Contraband ensures more severe punishment for incarcerated persons who merely possess a controlled substance or marijuana (as compared to civilians) but does not equate possession of such drugs with possession of weapons and tools for escape. In addition, anyone incarcerated may be subject to disciplinary action for possession of a controlled substance or marijuana.¹⁰³

(5) *USAO, App. C at 277, recommends reclassifying portable electronic communication devices as Class A contraband. USAO states, "Cell phones can be used by inmates to coordinate escape or violent actions against correctional officers."*

- The RCC does not incorporate this recommendation because it would result in a disproportionate penalty. Consistent with current D.C. Code § 22-2603.01(3)(A)(iii), the revised correctional facility contraband offense¹⁰⁴ punishes possession of a portable electronic communication device as Class B contraband. Cell phones have many uses other than facilitating an escape or violence. Though prohibited and subject to criminal punishment in the RCC as Second Degree Correctional Facility Contraband, behaviors such as listening to music, reading the news, conducting legal research, and corresponding with acquaintances do not pose a danger commensurate with the danger posed by weapons and other escape implements. In addition, a person who uses a cell phone to coordinate an escape or an act of violence may be guilty of aiding,¹⁰⁵ attempting,¹⁰⁶ soliciting,¹⁰⁷ or conspiring,¹⁰⁸ to commit the underlying offense of escape from a correctional facility or officer,¹⁰⁹ assault,¹¹⁰ or rioting.¹¹¹

¹⁰³ See Department of Corrections, *Inmate Handbook 2015-2016* at Page 22 (available at https://doc.dc.gov/sites/default/files/dc/sites/doc/publication/attachments/DOC%20PS%204020.1C%20Inmate%20HandBook%202015_0.pdf).

¹⁰⁴ RCC § 22E-3403.

¹⁰⁵ RCC § 22E-210.

¹⁰⁶ RCC § 22E-301.

¹⁰⁷ RCC § 22E-302.

¹⁰⁸ RCC § 22E-303.

¹⁰⁹ RCC § 22E-3401.

- (6) *The CCRC recommends replacing the phrases “capable of” and “designed or intended” in subsections (F) – (I) with the phrase “designed or specifically adapted for.” The revised language creates a more objective basis for identifying contraband—rather than making the person’s subjective intent the sole criterion for whether any object is Class A contraband—and is consistent with language in the revised possession of tools to commit property crime offense.*
- This change improves the clarity, consistency, and proportionality of the revised definition.

“Class B contraband”

- (1) *The CCRC recommends replacing the phrases “capable of” and “designed or intended” with the phrase “designed or specifically adapted for.” This clarifies that an everyday item that could foreseeably be used unlawfully (e.g., spoon or straw) is not contraband per se.*
- This change improves the clarity, consistency, and proportionality of the revised definition.

“Coercive threat”

- (1) *The CCRC recommends deleting the words “explicit or implicit” from the definition of “coercive threat.” Instead, specific offenses that include coercive threats will specify whether explicit and implicit coercive threats are included.*
- This change improves the clarity of the revised statute.
- (2) *PDS at App C. 268-269, recommends redrafting the commentary to clarify that coercive threats predicated on exposing secrets only includes threats to reveal secrets that would have constituted blackmail.*
- The RCC incorporates this recommendation by amending the commentary to clarify the scope of coercive threats as recommended by PDS. However, the commentary also will clarify that there is at least one type of secret that constitutes a coercive threat that arguably would not have constituted traditional blackmail. “Coercive threat” includes exposing a secret, publicizing an asserted fact, or distributing a photograph, video, or audio recording that tends to *perpetuate* hatred, contempt, ridicule, or other significant injury to personal reputation. For example, threats to publish sexually explicit photos of an adult film performer may still constitute a coercive threat, even though similar photos are already publicly available. It is unclear whether these types of threats would constitute blackmail under current District law. This change clarifies the RCC commentary.
- (3) *USAO, at App C. 277, recommends changing the term “coercive threat” to “coercion” and separately addressing in the definition both a “threat” and “an act.”*

¹¹⁰ RCC § 22E-1202.

¹¹¹ RCC § 22E-4301.

- The RCC does not adopt USAO’s proposed language separating a threat from an act because drafting statutes in such a manner is inconsistent with the RCC general approach of including within threats gestures and other conduct. This RCC approach is consistent with the plain language meaning of “threaten” as including menacing a person with a weapon.¹¹² To separately address an “act” that is “intended to induce the complainant’s compliance” may suggest that threats ordinarily do *not* include acts such as gestures, or that a significant difference is intended between a threat that is verbal or non-verbal.¹¹³ The RCC consistently uses threats to include non-verbal conduct.
- (4) *USAO, at 278-279, recommends that the term “coercion” should categorically include facilitate[ing] or control[ing] a person’s access to an addictive or controlled substance.” USAO also recommends removing the requirements that the substance is a controlled substance, or that the person owns the substance.*
- The RCC does not incorporate this recommendation because it would authorize disproportionate penalties. Subparagraph (F) of the RCC definition of “coercive threat” includes as one type a threat to: “Restrict a person’s access to a controlled substance that the person owns.” This language is narrowly tailored to exclude otherwise legal, socially acceptable activities. In contrast, the USAO recommendation to include facilitating or controlling a person’s access to addictive substances in the definition of “coercive threats” may improperly criminalize consensual agreements involving addictive substances. For example, the revised forced labor or services offense is defined as causing a person to engage in labor or services by means of a coercive threat. If “coercive threat” were to include facilitating a person’s access to an addictive substance, providing beer in exchange for a friend’s help in moving a couch would appear to constitute forced labor depending on whether alcohol is deemed an “addictive” substance, an undefined term. Similarly, everyday conduct of a pharmacist dispensing prescription medications would constitute “coercion” under the USAO definition.
- (5) *USAO, at 278, recommends categorically including “fraud or deception” in the definition of “coercion.”*
- The RCC does not incorporate this recommendation because it would make the revised statutes less clear and authorize disproportionate penalties. The RCC decouples fraud and deception from a definition of “coercion” because it is conceptually and factually distinct, but the RCC also consistently and appropriately refers to deception alongside a coercive threat as a way of defeating a person’s effective consent. The

¹¹² See Merriam-Webster online dictionary definition of “threaten” (providing as one of the definitions “to cause to feel insecure or anxious” and listing as the first example of a use of the word, “The mugger threatened him with a gun.”) (last visited 12-29-19).

¹¹³ For example, it is unclear what work the phrase “intended to induce” is doing in the USAO’s proffered language—for example is “induce” different from “cause” or “intended” imply there is a separate culpable mental state in the definition?— and whether or how such requirement differs from a verbal threat.

RCC separately defines the term “deception” and also defines “effective consent” as consent other than consent induced by physical force, a coercive threat, or deception. The RCC codifies a separate definition because in many contexts, there are meaningful distinctions between obtaining consent through coercive threats, and through fraud or deception. For example, second degree sexual assault is defined as causing a person to engage in or submit to a sexual act by a coercive threat. Under the USAO’s suggestion, which appears to be based on a definition of “coercion” limited to human trafficking, using any deception to induce a person to engage in a sexual act would appear to constitute second degree sexual assault.

(6) *USAO at App. C. 278, recommends that the use of force be included in the definition of “coercion.”*

- The RCC does not incorporate this recommendation because it would make the revised statutes less clear and may authorize disproportionate penalties. The RCC decouples force from a definition of “coercion” because it is conceptually and factually distinct, but the RCC also consistently and appropriately refers to physical force alongside a coercive threat as a way of defeating a person’s effective consent. The RCC defines “effective consent” as consent other than consent induced by physical force, a coercive threat, or deception. Including the use of force is unnecessary, and may make the revised definition less clear. The RCC codifies a separate definition because in many contexts, there are meaningful distinctions between obtaining consent through coercive threats, and through physical force. For example, the RCC second degree sexual assault is defined as causing a person to engage in or submit to a sexual act by a coercive threat, whereas first degree sexual assault is defined in terms of use of physical force or certain threats to kill or kidnap. This framework tracks the grading in the current D.C. Code sexual abuse statutes. Under the USAO’s suggestion, which appears to be based on a definition of “coercion” limited to human trafficking, it is unclear if using force to induce a person to engage in a sexual act would constitute first or second degree sexual assault. Moreover, the “coercive threat” definition includes a threat that any person will engage in conduct that constitutes any offense against persons. The definition does not require that threats be issued verbally or explicitly; gestures or other forms of conduct may suffice. In any case in which a person coerces another person through the use of force, there is at least an implicit threat of additional or continued use of force.

(7) *USAO, at App. C. 278, recommends including in the definition of “coercion”: “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” in the definition of “coercion.”*

- The RCC does not incorporate this recommendation because it would make the revised statutes less clear. The USAO recommendation,

apparently drawn from the human trafficking context but recommended for the general definition of coercion, does not appear to add to the scope of the definition beyond a very specific type of deception. And, as addressed above, the RCC provides liability in many offenses for deception, which undermines effective consent. In addition to deception, when a person coerces another by making that person believe he or she is property of another, other forms of coercive threats also may have also been used. In particular, people who have been led to believe they are property of another would also presumably believe that failure to comply with their ostensible “owner’s” demands would result in some form of bodily injury, or other “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”—types of coercive threats specifically addressed in the revised definition.

“Commercial Sex Act”

- (1) *The CCRC recommends adding a definition of the term “commercial sex act” to RCC § 22E-701.*
 - The RCC incorporates this recommendation by defining “commercial sex act” in RCC § 22E-701 to mean “any sexual act or sexual contact on account of which or for which anything of value is given to, promised to, or received by any person.” This change clarifies the revised statute.

“Comparable Offense”

- (1) *USAO, App. C at 286, notes the term “comparable offense” appears to be superfluous, as the term is no longer used in the RCC.*
 - The RCC does not incorporate this recommendation because, as of the First Draft of Report #39 (August 5, 2019), the definition of “comparable offense” now appears in RCC § 22E-4105, possession of a firearm by an unauthorized person.

“Correctional facility”

- (1) *USAO, App. C at 279-280, recommends adding buildings operated by the U.S. Marshal’s Service to the definition of “correctional facility,” so that people who escape from the cell block at the Superior Court for the District of Columbia are punished as severely as people who escape from the Central Detention Facility and the Central Treatment Facility.*
 - The RCC partially incorporates this recommendation by revising the first degree escape from an institution or officer offense¹¹⁴ to include an escape

¹¹⁴ RCC § 22E-3401(a).

from a cellblock operated by the U.S. Marshal's Service. The definition of "correctional facility" remains limited to facilities that are correctional in nature. This change reduces a gap in liability.

"Court"

- (1) *The CCRC recommends striking this definition as unnecessary and potentially confusing. Where applicable, the language "the Superior Court for the District of Columbia" is substituted in the statutory text.*
 - This change clarifies, but does not substantively change, the revised code.

"Dangerous Weapon"

- (1) *OAG, App. C at 246, recommends clarifying that the phrase "with a blade over 3 inches in length" modifies the word "knife" but does not modify the word "sword" or the word "razor."*
 - The RCC already incorporated this recommendation in the First Draft of Report #39 (August 5, 2019), by reordering the list of sharp force trauma instruments in the definition of "dangerous weapon." The relevant paragraph has been revised to state, "(C) A knife with a blade longer than 3 inches, sword, razor, stiletto, dagger, or dirk." This change clarifies the meaning of the revised definition.
- (2) *OAG, App. C at 246, recommends revising the sentence in the commentary (p. 205) that states, "The RCC definition, by contrast, clarifies that a person's integral body parts, including teeth, nails, feet, hands, etc., categorically cannot constitute a dangerous weapon." OAG explains the word "integral" does not appear in the statutory language and is unclear.*
 - The RCC already incorporated this recommendation in the First Draft of Report #39 (August 5, 2019) by striking the confusing term "integral." The relevant sentence has been revised to state, "The RCC definition, by contrast, clarifies that a person's body parts, including teeth, nails, feet, hands, etc., categorically cannot constitute a dangerous weapon." This change clarifies the meaning of the revised definition.
- (3) *USAO, App. C at 397-398, recommends revising the definition to include stationary objects, contrary to current District law in Edwards v. United States.¹¹⁵ USAO explains that the RCC "should recognize the moral equivalence of injuring someone with a stationary or non-stationary object."¹¹⁶*
 - The RCC does not incorporate this recommendation because it may result in confusion and disproportionate penalties. The RCC assault statute¹¹⁷ and other offenses that provide enhanced penalties for committing the crime by displaying or using a dangerous weapon seek to provide additional punishment beyond the degree of injury suffered, in limited

¹¹⁵ 583 A.2d 661 (D.C. 1990).

¹¹⁶ "Morally, running a victim into a spike is as culpable as stabbing him with a dagger." *Id.* at 667.

¹¹⁷ RCC § 22E-1202.

cases of great concern. Including stationary objects in the definition of dangerous weapon, however, would greatly expand the category of “dangerous weapon” and result in some counterintuitive and disproportionate outcomes. For example, it is not clear how offenses such as carrying a dangerous weapon¹¹⁸ would be construed if all stationary objects constitute dangerous weapons. Including stationary objects could also make conduct such as a push that causes a person to trip and fall on a hard surface punishable not according to the degree of injury sustained, but equivalent to the display or use of a firearm or knife.

“Deceive” and “Deception”

(1) *USAO, at App. C. 280, recommends deleting subsection (e), which excludes puffing statements, from the definition.*

- The RCC does not incorporate this recommendation because it would make the definition less clear and complete, and may authorize disproportionate penalties. The revised statute in subsection (e) codifies that in cases involving *only* puffing statements as the purported basis of deception, criminal penalties are not warranted. In the civil and criminal contexts, courts have long recognized that puffery does not constitute fraud.¹¹⁹ Omitting puffing statements from the definition of deception would risk criminalizing a broad array of statements that, while technically misleading, do not warrant criminal sanction. For example, a diner manager who places a sign in the window stating “world’s best coffee,” could be subject to criminal liability if the coffee is not actually the best coffee in the world.
- The USAO expresses concern that the exception for puffery would preclude liability in security fraud cases, stating that “defendants commonly present their victims with false promises of out-sized investment returns.” However, as specified in the RCC, material misrepresentations may still serve as the basis for securities fraud. For example, an executive who overstates a company’s earnings in order to deceive investors may still be found guilty of fraud. On the other hand, if puffing statements are included in the definition of deception, securities fraud could conceivably include an executive who falsely promises that “this company will change the world.”

“Detection device”

(1) *The CCRC substitutes the phrase “location tracking capability” for “electronic monitoring,” to clarify the type of monitoring included in the definition. This revision makes the definition more closely resemble the definition of “monitoring equipment or software.”*

¹¹⁸ RCC § 22E-4102(c).

¹¹⁹ See generally, David A. Hoffman, *The Best Puffery Article Ever*, 91 Iowa L. Rev. 1395, 1402 (2006).

- This revision does not substantively change current District law, and it improves the clarity and consistency of the revised statutes.

“District official”

(1) *OAG, App. C at 246-247, recommends excluding specified District of Columbia Excepted Service employees and Council employees from the definition of “District official.” The RCC definition of “District official” is identical to the definition of “public official” in D.C. Code § 1-1161.01(47). This D.C. Code definition of “public official” establishes who must file a public financial disclosure statement under District Board of Ethics and Government Accountability rules.¹²⁰ OAG states that while pay and ethics rules “may be useful for determining who must file a public financial disclosure statement . . . there is no reason why these people are deserving of more protection than other government employees.” With OAG’s revisions, the RCC definition of “District official” would be limited to paragraphs (A) – (H) of the D.C. Code definition of “public official,”¹²¹ and paragraphs (I) and (J) of the D.C. Code definition of “public official,” pertaining to specified District of Columbia Excepted Service employees and Council employees,¹²² would be deleted.*

- The RCC incorporates this recommendation by limiting the RCC definition of “District official” to paragraphs (A) – (H) of the D.C. Code definition of “public official” in D.C. Code § 1-1161.01(47). This change improves the clarity, consistency, and proportionality of the revised statutes.

¹²⁰ D.C. Code § 1-1162.24.

¹²¹ D.C. Code § 1-1161.01(47) (“‘Public official’ means: (A) A candidate; (B) The Mayor, Chairman, and each member of the Council of the District of Columbia holding office under Chapter 2 of this title; (C) The Attorney General; (D) A Representative or Senator elected pursuant to § 1-123; (E) An Advisory Neighborhood Commissioner; (F) A member of the State Board of Education; (G) A person serving as a subordinate agency head in a position designated as within the Executive Service; (G-i) Members of the Washington Metropolitan Area Transit Authority Board of Directors appointed by the Council pursuant to § 9-1107.01(5)(a); (G-ii) A Member or Alternate Member of the Washington Metrorail Safety Commission appointed by the District of Columbia pursuant to Article III.B. of the Metrorail Safety Commission Interstate Compact enacted pursuant to D.C. Law 21-250; (H) A member of a board or commission listed in § 1-523.01(e).”).

¹²² D.C. Code § 1-1161.01(47) (“(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.”).

“Dwelling”

- (1) *The CCRC revises the definition to include communal areas secured from the general public, in light of the DCCA’s recent opinion in Ruffin v. United States.*¹²³
- This revision does not substantively change current District law, and it improves the clarity and consistency of the revised statutes.

“Effective consent”

- (1) *The CCRC recommends revising the definition of “effective consent” to include “an express or implied coercive threat,” as opposed to merely “a coercive threat.” With this revision, the definition of “effective consent” would read “consent other than consent induced by physical force, an express or implied coercive threat, or deception.” Rather than rely on the commentary, the RCC is codifying “express or implied” directly in statutes to specify that “threats” includes express or implied threats.*
- This change improves the clarity and consistency of the revised statutes.

“Financial Injury”

- (1) *PDS, App. C at 270, objects to expanding the definition of “financial injury” to include any natural person as long as the expenditure is “reasonably necessitated by the criminal conduct,” on grounds that it is overly broad and vague. PDS offers a hypothetical in which the neighbor of a stalking victim elects to install an improved security system. PDS recommends amending the revised definition to read, “‘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...”*
- The RCC does not incorporate this recommendation because it would leave a gap in liability for indirect injury caused to persons other than the complainant. The RCC definition is intended to include expenses that are *reasonably* incurred by a third party as a result of the criminal conduct, even if the third party is not “financially responsible for the complainant as a result of” the criminal conduct. For example, a friend, family member, or social services provider may voluntarily pay for temporary safe housing on behalf of a victim who is indigent.

¹²³ 15-CF-1378, 2019 WL 6200245, at *3 (D.C. Nov. 21, 2019).

“Halfway House”

- (1) *OAG, App. C at 247, recommends including a cross-reference to D.C. Code § 24-241.01 in the statutory language, to clarify the meaning of the phrase “work release program.”*
 - The RCC incorporates this recommendation by amending the definition to state, “‘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 *under D.C. Code § 24-241.01.*” (Emphasis added.) This change clarifies the meaning of the revised definition.

“Image”

- (1) *USAO, App. C at 452, recommends amending the definition to include images in any “other format,” to accommodate future technologies.*
 - The RCC incorporates this recommendation by adopting USAO’s proposed language. This change clarifies the revised definition and does not substantively change its meaning.¹²⁴

“Law enforcement officer”

- (1) *The CCRC recommends revising subparagraph (H) of the definition of “law enforcement officer” to refer to the officers specified in “subparagraphs (A)-(G)” of the definition instead of “subparagraphs (A), (B), (C), (D), (E), and (F).” Subparagraph (H) of the definition follows the catch-all provision in the definition of “law enforcement officer” in the current murder of a law enforcement officer statute, and that catch-all provision includes Metro Transit police officers.¹²⁵*
 - This change improves the clarity and consistency of the revised definition.
- (2) *USAO, App. C at 280, recommends adding “deputy marshals” to subsection (H) of the definition of “law enforcement officer.” Subsection (H) includes within the definition of “law enforcement officer” any “federal, state, county, or municipal officer” that performs “functions comparable to those performed by the officers” specified in the RCC definition. USAO states that “[a]lthough they may already be included” in the definition, “Deputy U.S. Marshals . . . are*

¹²⁴ The word “including” indicates the list of formats is not exhaustive.

¹²⁵ D.C. Code § 22-2106(b) (“For the purposes of subsection (a) of this section, the term: (1) “Law enforcement officer” means: (A) A sworn member of the Metropolitan Police Department; (B) A sworn member of the District of Columbia Protective Services; (C) The Director, deputy directors, and officers of the District of Columbia Department of Corrections; (D) Any probation, parole, supervised release, community supervision, or pretrial services officer of the Court Services and Offender Supervision Agency or The Pretrial Services Agency; (E) Metro Transit police officers; and (F) Any federal, state, county, or municipal officer performing functions comparable to those performed by the officers described in subparagraphs (A), (C), (D), (E), and (F) of this paragraph, including but not limited to state, county, or municipal police officers, sheriffs, correctional officers, parole officers, and probation and pretrial service officers.”).

essential law enforcement officers in the District who frequently interact with defendants, as they operate cellblocks in D.C. Superior Court.”

- The RCC does not incorporate this recommendation because it introduces ambiguity into the definition. Deputy U.S. Marshals already are included in the general language in subparagraph (H) and other federal law enforcement positions are not specifically referenced. As is discussed in the commentary to the RCC definition, the RCC definition of “law enforcement officer” largely follows the definitions of “law enforcement officer” in the current assault on a police officer statute (D.C. Code § 22-405) and murder of a police officer statute (D.C. Code § 22-2106). These definitions do not specify any federal law enforcement officers. Singling out Deputy U.S. Marshals in the RCC definition may suggest that other federal law enforcement officers are excluded. The commentary has been revised to note, however, that subparagraph (H) includes Deputy U.S. Marshals, among others.

“Obscene”

- (1) *USAO, App. C at 453, recommends striking the phrase “in sex” as redundant.*
 - The RCC does not incorporate this recommendation because it may reduce the clarity of the revised statutes. The revised definition incorporates the phrase “prurient interest in sex” from the United States Supreme Court’s decision in *Miller v. California*.¹²⁶ Some modern English dictionaries define “prurient” to broadly include other immoderate or unwholesome interests and desires.¹²⁷
- (2) *The CCRC recommends amending part (B) of the definition to state “Is patently offensive,” so that it is grammatically correct.*
 - This change does not substantively change the definition or District law.

“Payment card”

- (1) *USAO, at App. C. 281, recommends adding the words “whether tangible or digital” to the definition of “payment card.”*
 - a. The RCC incorporates this recommendation by adding the phrase suggested by USAO. This change improves the clarity of the revised criminal code.

“Person” for property offenses.

- (1) *OAG, App. C at 257, comments that, while it “has no comments concerning the text of the definition,” it is “concerned about its placement in subtitle III.” First, OAG states that “people who are unfamiliar with the RCC with look to RCC §*

¹²⁶ 413 U.S. 15 (1973).

¹²⁷ Merriam-Webster.com, “prurient”, 2020, available at <https://www.merriam-webster.com/dictionary/prurient>.

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,” particularly given that neither Subtitle II nor Subtitle IV of the RCC have a definition as the first statute. Second, “if people are interpreting offenses that occur in [Subtitle II or Subtitle IV], they will need to know that they should be looking to D.C. Code § 45-605 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.”

- The RCC incorporates these comments by moving the definition of “person” for property offenses from Subtitle III to the general definitions statute in RCC § 22E-701 and removing the phrase “Notwithstanding the definition of “person” in D.C. Code § 45-604”. This change improves the clarity of the revised statutes.

“Physically Following”

(1) *OAG, App. C at 247, recommends either incorporating or separately defining the meaning of the phrase “close proximity,” which is described in the commentary to refer 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.”*

- The RCC partially incorporates this recommendation by amending the definition to state, “‘Physically following’ means maintaining close proximity to a complainant, near enough to see or hear the complainant’s activities as they move from one location to another.” The commentary clarifies that the government is not required to prove that a person is able to make physical contact with the target of the following. This change clarifies the revised definition.

“Position of trust with authority over”

(1) *The CCRC recommends including in subsection (A) of the definition of “position of trust with or authority over” “or an individual with whom such a person is in a romantic, dating, or sexual relationship.” With this change, subsection (A) of the definition would read “A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption, or an individual with whom such a person is in a romantic, dating, or sexual relationship.” Subsection (A) of the current D.C. Code definition of “significant relationship”¹²⁸ and subsection (A) of the RCC definition include a “parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption.” Subsection (A) establishes a “per se” list of relatives, including these relatives’ spouses or domestic partners, regardless of whether these individuals*

¹²⁸ D.C. Code § 22-3001(10)(A) (defining “significant relationship” to include “A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption.”).

have any responsibility for the complainant. Subsection (C) of the current D.C. Code definition of “significant relationship”¹²⁹ and subsection (C) of the previous RCC version include the spouse, domestic partner, or “paramour” of “the person who is charged with any duty for the health, welfare, or supervision of the complainant.” To the extent that the specified relatives in subsection (A), for example, a parent, also have a responsibility for the complainant, subsection (A) and subsection (C) overlap for those relatives, and also for those relatives’ spouses or domestic partners. However, subsection (C) includes a “paramour” of the person with a responsibility for the health, welfare, or supervision of the complainant and subsection (A) does not. This apparent discrepancy means that the “paramour” of a biological parent that has a responsibility for the complainant would be included in subsection (C) of the definition, but the “paramour” of a biological parent who has no responsibility for the complainant in subsection (A) would not. There is no DCCA case law interpreting the definition of “significant relationship.” The RCC definition includes the “paramour” of a biological parent, regardless of the parent’s relationship with the complainant in the “per se” list of individuals specified in subsection (A) and also includes the “paramour” of the other individuals in subsection (A).

- This change improves the clarity of the revised definition and removes a possible gap in liability. The RCC commentary to the definition has been updated to reflect that this is a possible change in law.
- (2) *The CCRC recommends replacing “legal or de facto guardian” in subsection (B) of the definition of “position of trust with or authority over” with “person acting in the place of a parent per civil law,” a defined term in RCC § 22E-701. “A legal or de facto guardian” is undefined in the current sexual abuse statutes and there is no DCCA case law interpreting its scope in the current sexual abuse statutes. The RCC consistently uses the term “person acting in the place of a parent per civil law,” as defined in RCC § 22E-701.*
- This change improves the clarity and consistency of the revised definition. The RCC commentary to this definition has been updated to reflect that this is a clarificatory change in law.
- (3) *The CCRC recommends replacing “paramour” in subsection (B) of the definition of “position of trust with or authority over” with an individual with whom a specified person is “in a romantic, dating, or sexual relationship.” “Paramour” is undefined in the current sexual abuse statutes, not everyday language, and there is no DCCA case law interpreting its scope in the current sexual abuse statutes. “Romantic, dating, or sexual relationship” is identical to the language in the current D.C. Code definition of “intimate partner violence”¹³⁰ and is used throughout the RCC.*

¹²⁹ D.C. Code § 22-3001(10)(C) (defining “significant relationship” to include “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 victim at the time of the act.” (emphasis added).

¹³⁰ D.C. Code § 16-1001(7) (“‘Intimate partner violence’ means an act punishable as a criminal offense that is committed or threatened to be committed by an offender upon a person: (A) To whom the offender is or was married; (B) With whom the offender is or was in a domestic partnership; or (C) With whom the offender is or was in a romantic, dating, or sexual relationship.”).

- This change improves the clarity and consistency of the revised statutes. The RCC commentary to this definition has been updated to reflect that this is clarificatory change in law.
- (4) *The CCRC recommends replacing what was previously subsection (C) of the definition of “position of trust with or authority over” (“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”) with a revised subsection (B) (“A person acting in the place of a parent per civil law, the spouse or domestic partner of such a person, or an individual with whom such a person is in a romantic, dating, or sexual relationship”) and revised subsection (E) (“A person responsible under civil law for the health, welfare, or supervision of the complainant.”). In the previous subsection (C) of the RCC definition, the scope of a person “charged with any duty or responsibility for the health, welfare, or supervision of the complainant at the time of the offense” was unclear and, interpreted broadly, former subsection (C) would include the spouses, domestic partners, and significant others of any individual with any duty or responsibility for the health, welfare or supervision of the complainant, such as doctors, taxi drivers, etc. Substantively identical language exists in the current D.C. Code definition of “significant relationship” and there is no DCCA case law interpreting it.¹³¹ The CCRC recommends deleting what was previously subsection (C). A revised subsection (B) (“A person acting in the place of a parent per civil law, the spouse or domestic partner of such a person, or an individual with whom such a person is in a romantic, dating, or sexual relationship”) limits spouses, domestic partners, and significant others to those of a person acting in the place of a parent per civil law. Subsection (E) of the revised definition (“A person responsible under civil law for the health, welfare, or supervision of the complainant.”) continues to provide liability for any individual that has a duty under civil law for the health, welfare, or supervision of the complainant.¹³²*
- This language improves the clarity, consistency, and proportionality of the revised definition. The commentary to the RCC definition of “position of trust with or authority over” has been updated to reflect that this is a possible change in law.
- (5) *The CCRC recommends making “Any person, more than 4 years older than the complainant, who resides intermittently or permanently in the same dwelling as the complainant” its own subsection (C) rather than part of subsection (B). This is a category of individual that is a person in a “position of trust with or authority over” that is unrelated to the requirements of parent, guardian, etc. in subsection (B).*

¹³¹ D.C. Code § 22-3001(10)(C) (defining “significant relationship” to include 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 victim at the time of the act.”).

¹³² Subsection (E) of the revised definition does not specify “at the time of the offense” like current subsection (C) of the definition of “significant relationship” does because the RCC sexual abuse of a minor statute requires that the sexual act or sexual contact occur “while [the actor] is in a position of trust with or authority over the complainant.” The language is surplusage.

- This change improves the clarity of the revised definition.
- (6) *The CCRC recommends replacing “more than 4 years older” than the complainant with “at least 4 years older” than the complainant in subsection (C) of the RCC definition of “position of trust with or authority over.” The current definition of “significant relationship”¹³³ and the previous RCC version of the definition of “position of trust with or authority over” includes certain individuals “more than 4 years older than the complainant.” This is a difference of a day in liability compared to the current child sexual abuse statutes¹³⁴ and several RCC sex offenses that require “at least” a four year age gap between the defendant and a minor complainant.¹³⁵ There is no DCCA case law interpreting the current definition of “significant relationship” or the intended scope of “more than 4 years older.” The revised definition requires a gap of “at least four years older,” the same age gap that is in other RCC sex offenses, such as sexual abuse of a minor (RCC § 22E-1302).*
- The change improves the clarity and consistency of the revised statute and removes a possible gap in liability. The RCC commentary to the definition of “position of trust with or authority over” reflects that this is a clarificatory change.
- (7) *The CCRC recommends replacing “care” with “health, welfare” in the catch-all provision of the definition of “position of trust with or authority over” and making it a separate subsection (E). With this revision, subsection (E) of the definition would specify a “person responsible under civil law for the health, welfare, or supervision of the complainant” and this language would no longer be part of subsection (D) of the definition. The RCC consistently uses the phrase “person responsible under civil law for the health, welfare, or supervision of the complainant,” and the language is in subsection (B) of the current D.C. Code definition of “significant relationship.”¹³⁶ Making this provision a separate subsection clarifies that the individuals listed in subsection (D) of the definition do not have to have a responsibility under civil law for the health, welfare, or supervision of the complainant. The current D.C. Code definition of “significant relationship” is open-ended and defines the term as “includ[ing]” the specified*

¹³³ D.C. Code § 22-3001(10)(B) (defining “significant relationship” to include “A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim.”).

¹³⁴ D.C. Code §§ 22-3008 (first degree child sexual abuse prohibiting “[w]hoever, being at least 4 years older than a child, engages in a sexual act with that child or causes that child to engage in a sexual act.”); 22-3009 (second degree child sexual abuse statute prohibiting “[w]hoever, being at least 4 years older than a child, engages in sexual contact with that child or causes that child to engage in sexual contact.”); 22-3001(3) (defining “child” as a “person who has not yet attained the age of 16 years.”).

¹³⁵ For a complainant that is 15 years and 364 days old, an actor that is 19 years and 364 days old would be liable under the current child sexual abuse statutes because the complainant is under 16 years of age and the actor is “at least four years older” than the complainant. However, the actor would not be included in the current definition of “significant relationship” because the actor is not “more than four years older” than the complainant.

¹³⁶ D.C. Code § 22-3001(10)(C) (defining “significant relationship” to include the “person . . . who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act.”).

*individuals or “any other person in a position of trust with or authority over” the complainant.*¹³⁷ *There is no DCCA case law interpreting the definition of “significant relationship” and it is unclear whether a job title or specified relationship to the complainant is sufficient, or if a substantive analysis of the relationship between the actor and the complainant is required.*

- This change improves the clarity of the revised definition and its consistency with other RCC statutes. The RCC commentary to this definition has been updated to reflect that this is a possible change in law.
- (8) *USAO, App. C at 282, recommends revising subsection (D) of the definition of “position of trust with or authority over” to specifically include a “contractor.” USAO states that adding “contractor” “provides a more comprehensive definition of those responsible for the care and supervision of children at schools and other institutions” and that “[m]any organizations do not hire all of their employees directly; rather, they enlist contractors as part of that staffing.” USAO states that contractors “have the same interactions with children and responsibilities as many of the direct employees do, it makes no sense to distinguish them for purposes of liability.”*
- The RCC incorporates this recommendation by specifically including reference to a “contractor” in the revised definition. A contractor may have extensive or significant contact with the minors at a school or other institution, similar to an employee or volunteer. This change clarifies and may eliminate a gap in liability in the revised statutes. The commentary to the RCC definition has been updated to reflect that this is a possible change in law.
- (9) *USAO, App. C at 282, recommends deleting “under civil law” from the catch-all provision in the definition of “position of trust with or authority over” (now subsection (E)). With this revision, the catch-all provision would read “or other person responsible for the health, welfare, or supervision of the complainant.” USAO states that “under civil law” is “unnecessarily confusing, and needlessly requires a comprehension of civil law to interpret criminal law.”*
- The RCC does not incorporate this recommendation because it would reduce the clarity of the revised statute. Leaving ambiguous the basis for determining what relationships are “responsible for the health, welfare, or supervision of the complainant simply would leave courts to either look to civil law standards, or to create new, piecemeal standards for these relationships in a criminal context with no legislative guidance. Referring to civil law in the statute provides notice and specifies an objective standard for determining when an individual is responsible for a minor and clarifies the revised definition.

¹³⁷ D.C. Code § 22-3001(10)(D) (“Any employee 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 any other person in a position of trust with or authority over a child or a minor.*”) (emphasis added).

(10) *The CCRC recommends deleting “a school, church, synagogue, mosque” from “a school, church, synagogue, mosque, or other religious institution” in subsection (D) of the definition of “position of trust with or authority over.” With this revision subsection (D) will specify a “religious institution.” Including specific types of religious institutions is unnecessary and inconsistent with the general references to school, athletic program, etc. in the rest of the subsection.*

- This change improves the clarity of the revised definition. The commentary to the definition specifies that subsection (D) includes a school, church, synagogue, or mosque and that this is a clarificatory change to law.

(11) *The CCRC recommends requiring “has significant contact with the complainant or exercises supervisory or disciplinary authority over the complainant” in subsection (D) of the revised definition of “position of trust with or authority over” and deleting the phrase “including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff.” With this revision, subsection (D) of the revised definition would read “Any employee, contractor, or volunteer of a school, religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program that has significant contact with the complainant or exercises supervisory or disciplinary authority over the complainant.” Subsection (D) of the current D.C. Code definition of “significant relationship” specifies “any employee or volunteer” of a school, specified institution, etc., “including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.”¹³⁸ There is no DCCA case law interpreting the definition of “significant relationship.” It is unclear in the current D.C. Code subsection (D) whether “any other person in a position of trust with or authority over” a complainant modifies the preceding list of specified individuals and requires a substantive analysis of the relationship between the actor and the complainant, or if an actor holding a specified job title is sufficient. In current law and in the RCC, whether an actor that is 18 years of age or older is in a “position of trust with or authority over” or a “significant relationship” with the complainant is the basis of criminalizing otherwise consensual conduct with a complainant that is over the age of 16 years, but under the age of 18 years. Requiring the actor to have significant contact with the complainant or to exercise supervisory or disciplinary authority over the complainant ensures that the relationship between the actor and the complainant rises to the level of coerciveness necessary to make otherwise consensual sexual activity criminal.*

¹³⁸ D.C. Code § 22-3001(10)(D) (defining “significant relationship” to include “Any employee 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 any other person in a position of trust with or authority over a child or a minor.”).

- This change improves the clarity, consistency, and proportionality of the revised statute. The RCC commentary to this definition has been updated to reflect that this is a possible change in law.

“Possess”

(1) *USAO, App. C at 398, recommends revising the commentary to strike language stating, “Evidence of knowledge of an item’s location is required, but not necessarily sufficient, to demonstrate constructive possession.” USAO states that, “[i]f 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.”*

- The RCC partially incorporates this recommendation by clarifying the revised commentary. Under current District law, a person does not constructively possess an object that they have (temporarily or permanently) lost because they do not have the present *ability* to exercise dominion and control over that object.¹³⁹ However, a person may be said to know the location of an object if they are generally aware of its whereabouts, even without knowing its exact position. For example, a person who is practically certain that their keys are *somewhere* in a set of drawers constructively possesses their keys. The RCC commentary is updated to clarify this point and to cite the example given.

“Prohibited Weapon”

(1) *The CCRC removes this definition from RCC § 22E-701 because it is no longer used in the RCC.*

“Property”

(1) *USAO, App. C at 281, recommends revising the definition of “property” to include “money,” “captured or domestic animals,” and “documents evidencing ownership in or of property” 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 theft of money and domestic pets).”*

- The RCC partially incorporates this recommendation by adding “money” and “any paper or document that evidences ownership in or of property, an interest in or a claim to wealth, or a debt owed” to subparagraph (E) and

¹³⁹ See Crim. Jur. Instr. for D.C. 3.104 (2019) (“[A] person may exercise control over property not in his or her physical possession if that person has both the *power* and the intent at a given time to control the property. This is called ‘constructive possession.’ Mere presence near something or mere knowledge of its location, however, is not enough to show possession.” (Emphasis added.)).

“animal” to subparagraph (B). The RCC does not incorporate the modifier “captured or domestic” for an animal as it raises the question of when an animal is “captured,” and suggest that an animal must be captured to be something of “value,” as is required by the definition. This change improves the clarity and consistency of the revised definition. The commentary to the RCC definition of “property” has been updated to reflect that these are clarificatory changes to current law.

(2) *The CCRC recommends deleting “Debt” in subparagraph (E) of the definition of “property.”*

- As noted above, the revised definition has been updated to include “money” and “any paper or document that evidences ownership in or of property, an interest in or a claim to wealth, or a debt owed.” “Debt” is included in the current definition of “property.”¹⁴⁰ The term is not defined statutorily and there is no DCCA case law interpreting it. It is unclear, however, how “debt” can be “anything of value” that is required by the definition of “property.” This change improves the clarity and consistency of the revised definition by specifying types of property that satisfy the definition’s requirement of “anything of value.” The commentary to the RCC definition of “property” has been updated to reflect that this is a possible change in current law.

“Protected person”

(1) *OAG, App. C at 247, recommends revising the lead-in language to the definition of “protected person” so that it refers to a “complainant” instead of a “person.” OAG states that the definition otherwise consistently uses the term “complainant.”*

- The RCC incorporates this recommendation by replacing “person” with “complainant” in the lead-in language of the definition. This change improves the clarity and consistency of the revised definition.

(2) *The CCRC recommends in subsection (B) of the definition of “protected person” requiring that the actor is under 65 years of age. With this change, subsection (B) of the definition requires that the complainant is “65 years of age or older, when, in fact, the actor is under 65 years of age and at least 10 years younger than the complainant.” This change was proposed in the First Draft of Report #36, Cumulative Update to Chapters 3, 7 and the Special Part of the Revised Criminal Code (Report),¹⁴¹ but the revised statutory text for the definition omitted the requirement. This change preserves subsection (B) of the definition, and the enhanced gradations in RCC offenses that use the term, for predatory behavior targeting older complainants. It is also consistent with subsection (A) of the*

¹⁴⁰ D.C. Code § 22-3201(3).

¹⁴¹ First Draft of Report #36, *Cumulative Update to Chapters 3, 7 and the Special Part of the Revised Criminal Code (Report)*, Appendix D - Disposition of Advisory Group Comments & Other Changes to Draft Documents (4-1519).

definition, which requires that the actor be at least 18 years of age when the complainant is under 18 years of age.

- This change improves the clarity, consistency, and proportionality of the revised statute.
- (3) *USAO, App. C at 281, recommends removing the requirements for the age of the actor and the age gaps between the actor and the complainant in subsection (A) of the definition of “protected person.” With this change, subsection (A) would require only that the complainant is under the age of 18 years, without the additional requirements that the actor is at least 18 years of age and at least four years older than the complainant. USAO states that this change is “consistent with current law” in D.C. Code § 22-3611 (penalty enhancement for committing certain crimes against minors), “which focuses solely on the age and vulnerability of the complainant.” USAO compares the current penalty enhancement to the RCC sexual abuse of a minor statute and current child sexual abuse statutes, which generally require at least a four year age gap between the actor and the complainant for liability. USAO states that unlike the RCC sexual abuse of a minor statute and current child sexual abuse offenses, where the four year age gap is “the only thing that makes Sex Abuse of a Minor a crime at all,” the penalty enhancements “are already criminal, regardless of any age disparity.” There is no discussion specific to the requirement that the actor be at least 18 years of age.*
- The RCC does not incorporate USAO’s recommendation because the four year age gap improves the proportionality of the revised definition. The current penalty enhancement for crimes against minors requires that the defendant be at least 18 years of age¹⁴² and that there be at least a two year age gap between the defendant and a complainant under the age of 18 years.¹⁴³ As is discussed in the RCC commentary to the definition of “protected person,” the RCC increased the required age gap from two years to four years to match the required age gap in several current and RCC sex offenses. The four year age gap requirement reserves the penalty enhancement for predatory behavior targeting very young complainants.
- (4) *USAO, App. C at 281, recommends removing the required 10 year age gap between an actor that is 65 years of age or older and a younger complainant from subsection (B) of the definition of “protected person” so that the subsection requires that the complainant be under 65 years of age or older (subsection B)). USAO states that this change is “consistent with current law” in D.C. Code § 22-3601 (penalty enhancement for committing certain crimes against senior citizens), “which focuses solely on the age and vulnerability of the complainant.”*
- The RCC does not incorporate USAO’s recommendation because the 10 year age gap improves the proportionality of the revised definition. The

¹⁴² D.C. Code § 22-3611(c)(1) (defining “adult” for the purposes of the minor enhancement as “a person 18 years of age or older at the time of the offense.”).

¹⁴³ D.C. Code § 22-3611(a), (c)(3) (“Any adult, being at least 2 years older than a minor . . .” and defining “minor” as “a person under 18 years of age at the time of the offense.”).

age gap requirement reserves the penalty enhancement for predatory behavior targeting older complainants.

“Safety”

- (1) *The CCRC removes this definition from RCC § 22E-701 because it was included in error. This definition of “safety” applies only to the revised offenses of stalking¹⁴⁴ and electronic stalking.¹⁴⁵*

“Serious bodily injury”

- (1) *USAO, App. C at 282-283, recommends revising the definition of “serious bodily injury” to include as subparagraph (D) a “protracted loss of consciousness.” USAO agrees that under current DCCA case law, a brief loss of consciousness alone may not be sufficient for “serious bodily injury,” even though the current statutory definition of “serious bodily injury” includes “brief loss of consciousness.” However, USAO states that a “protracted loss of consciousness would qualify as a serious bodily injury under current law.”*

- The RCC incorporates this recommendation by codifying as subparagraph (D) a “Protracted loss of consciousness.” The commentary has been revised to note that this is a clear change to the current statutory definition of “serious bodily injury” and that “protracted” in this subparagraph is intended to have the same scope as “protracted” in subparagraphs (B) and (C) of the definition. This change improves the clarity of the revised definition and its consistency with the RCC definition of “significant bodily injury.”

“Sexual act”

- (1) *OAG, App. C at 247-248, recommends revising subsection (C) of the definition of “sexual act” to state “an actor’s body part, including a hand or finger” to make clear that body parts other than a hand or a finger are sufficient.*

- The RCC incorporates this recommendation by replacing “a hand or finger” with “any body part.” The RCC uses “any body part,” as opposed to the “actor’s” body part to include within the definition instances when the complainant or a third party does the penetration. The commentary to the RCC definition has been updated to reflect that this is a possible change in law. This change improves the clarity of the revised statute and removes a possible gap in liability.

- (2) *USAO, App. C at 283-84, recommends replacing the word “desire” with “intent” in subsection (C) of the definition of “sexual act” and what is now sub-subparagraph (B)(ii) of the definition of “sexual contact” so that the definitions require “with the intent to” sexually harass, etc., instead of “with the desire to.”*

¹⁴⁴ RCC § 22E-1801.

¹⁴⁵ RCC § 22E-1802.

USAO states that “intent” is used in the current definitions of “sexual act” and “sexual contact.” USAO states that “desire” is “ambiguous” and “intent” should be used because it is defined in the RCC and used throughout the RCC.

- The RCC does not incorporate this recommendation because it would introduce ambiguity into the revised statutes. “Intent” is a defined culpable mental state in RCC § 22E-206, and per the rule of construction in RCC § 22E-207, applies to every element that comes after it unless a different culpable mental state or strict liability is specified. If “intent” is included in an RCC offense through the definition of “sexual act” or “sexual contact,” that would complicate the interpretation of culpable mental states in that offense and future drafting. Moreover, while the current D.C. Code definitions of “sexual act” and “sexual contact” both refer to “an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person,” the meaning of “intent” in that language is undefined and unclear as to whether the meaning is more similar to the RCC § 22E-206 definition of “purpose” as “conscious[] desire” or “intent” as “practically certain.” The RCC references to “desire” in the definitions of sexual act and sexual contact track the higher culpable mental state in the RCC definition of “purpose” without triggering the rule of construction in RCC § 22E-207 that would complicate offense drafting and interpretation. The commentary to the RCC definition has been updated to reflect that this is a possible change in law.
- (3) *USAO, App. C at 283, states that it agrees with the definition of “sexual act” to the RCC definition of “sexual contact.” USAO states that this “makes a sexual contact a lesser-included of a sexual act [and] is an appropriate way to codify this principle.”*

“Sexual contact”

- (1) *USAO, App. C at 283-284, recommends replacing “degrade” in the definition of “sexual contact” with “abuse, humiliate, harass, degrade” so that the definition requires acting with “intent to abuse, humiliate, harass, degrade, sexually arouse, or sexually gratify any person.” USAO states that this language tracks the sexual intent language in subsection (C) of the RCC definition of “sexual act.” In addition, USAO states that “[s]exual assault prosecutions often rely on the ‘abuse, humiliate, harass, or degrade’ intent language” because “[a]bsent evidence of the defendant having an erection or outwardly manifesting sexual pleasure . . . the government may not be able to prove that the defendant’s actions were sexually arousing or gratifying” but the government “would be able to show that, at a minimum, the defendant intended to humiliate or harass the victim.” USAO gives as an example a scenario where the “defendant grabs the buttocks of a stranger” and the “victim . . . likely feel[s] sexually violated.” USAO states that this should be prosecuted as a sex offense.*
- The RCC does not incorporate this recommendation because it would reduce the clarity of the revised statute and may authorize disproportionate penalties. After the Advisory Group submitted written comments on the

First Draft of Report #36 – Cumulative Update to RCC Chapters 3, 7, and the Special Part, but before the CCRC reviewed them, the RCC definitions of “sexual act” and “sexual contact” were revised so that subsection (C) of the definition of “sexual act” and the definition of “sexual contact” required the same “desire to sexually abuse, humiliate, harass, degrade, abuse, or gratify any person.”¹⁴⁶ The definitions, and, by extension, the RCC offenses that use these terms, are limited to penetration and contact that is sexual in nature. It is disproportionate to include in the RCC sex offenses and similarly serious RCC offenses, like the human trafficking offenses in RCC Chapter 16, conduct that is not proven to be sexual in nature. The RCC provides liability for non-sexual conduct in the revised assault statute (RCC § 22E-1201) or offensive physical contact statute (RCC § 22E-1205).

- Notably, the ALI’s most recent revised definition of “sexual contact” requires the purpose of “sexual arousal, sexual gratification, sexual humiliation, or sexual degradation of any person.”¹⁴⁷ In addition, as was noted in the CCRC’s First Draft of Report #26, Sexual Assault and Related Provisions (issued September 26, 2018), only a small minority of reformed jurisdictions include a non-sexual intent in their definitions of “sexual contact” or a similar term.¹⁴⁸ The ALI’s revised definition of “sexual act” does not require an additional intent, but does exclude penetration “when done for legitimate medical, hygienic, or law-enforcement purposes.”¹⁴⁹

“Significant bodily injury”

(1) *USAO, App. C at 284, recommends changing “temporary loss of consciousness” in the definition of “significant bodily injury” to either “brief loss of consciousness” or “any loss of consciousness.” USAO states that “temporary”*

¹⁴⁶ Subsection (C) of the current D.C. Code definition of “sexual act” and the current definition of “sexual contact” both require an intent to “abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.” D.C. Code § 22-3001(8)(C), (9).

¹⁴⁷ American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.0(2)(c).

¹⁴⁸ Pages 41-45 of the CCRC’s First Draft of Report #26, Sexual Assault and Related Provisions (issued September 26, 2018) stated (with citations omitted for the purposes of this appendix):

At least 24 of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (reformed jurisdictions) define “sexual contact” or a similar term that encompasses sexual touching. Twenty-one of these reformed jurisdictions specify an additional intent or purpose requirement or require that the contact can be reasonably construed for a specified intent or purpose. Of these 21 reformed jurisdictions, two jurisdictions include an intent or purpose to abuse and jurisdictions include an intent or purpose to humiliate. None of the 21 reformed jurisdictions specifically include an intent or purpose to “harass,” but one of the jurisdictions requires an intent to “terrorize” and two additional reformed jurisdictions require an “aggressive” intent or the purpose of arousing or satisfying “aggressive desires.”

¹⁴⁹ American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.0(2)(a). This definition was approved by the membership in May 2017.

is “vague” because “[u]nless a victim dies or falls into an irreversible coma, any loss of consciousness is, by definition, temporary.”

- The RCC incorporates this recommendation by replacing “temporary loss of consciousness” with “brief loss of consciousness.” This change improves the clarity of the revised definition and its consistency with the RCC definition of “serious bodily injury.”
- (2) *The CCRC recommends revising the definition of “significant bodily injury” to replace “caused by” with “sustained during” in the final sentence of the definition. With this revision, the definition would include in the list of “per se” significant bodily injuries “a contusion, petechia, or other bodily injury to the neck or head sustained during strangulation or suffocation.” In the previous version of this definition, “caused by” created ambiguity by suggesting that RCC causation requirements applied (RCC § 22E-204).*
- This change improves the clarity of the revised definition. The commentary to the RCC definition of “significant bodily injury” has been updated to state that there is no requirement that the strangulation or suffocation cause the contusion or other bodily injury to the neck or head.
- (3) *USAO, App. C at 284-285, recommends changing “a contusion or other bodily injury to the neck or head caused by strangulation or suffocation” in the definition of “significant bodily injury” to “a contusion, petechia, or other bodily injury to the neck or head, including the eyes or face, caused by strangulation or suffocation.” This would add “petechia” as a specified type of bodily injury sustained during strangulation or suffocation and specify the “eyes and face” in addition to the “neck and head.” USAO states that petechiae (plural of petechia) “often develop on a victim’s face or neck as a result of strangulation or suffocation” and that although they may be included in “other bodily injury,” the definition should specify petechiae to eliminate future confusion and litigation. Similarly, USAO states that “neck and eyes” are likely included in “head,” but “specifically listing them reduces potential future confusion and litigation.”*
- The RCC partially incorporates this recommendation by including “petechia” in the list of specified injuries to the head or neck sustained during strangulation or suffocation.¹⁵⁰ The RCC does not specify “neck and eyes” because “head and neck” are already specified in the current RCC definition and it may lead to confusion over whether injuries to other parts of the “head and neck are included (e.g. the mouth or tongue). The commentary to the revised definition makes clear that “neck and eyes” are included in the scope of “neck and head.”
- (4) *The CCRC recommends revising the definition of “significant bodily injury” so that the second sentence listing the “per se” injuries begins with “In addition.” This revision further clarifies that an injury that constitutes one of the “per se” injuries is sufficient for “significant bodily injury” independent of the first sentence.*
- This change improves the clarity of the revised statute.

¹⁵⁰ As is discussed elsewhere in this Appendix, the RCC definition of “significant bodily injury” replaces “caused by” with “sustained during” in the strangulation or suffocation provision of the definition.

(5) *USAO, App. C at 285-286, recommends including in the definition of “significant bodily injury” “a laceration for which the complainant required or received stitches, sutures, staples, or closed-skin adhesives.” The RCC definition of “significant bodily injury” includes as a per se significant bodily injury “a laceration that is at least one inch in length and at least one quarter inch in depth.” USAO states that under current law, lacerations requiring stitches are sufficient proof of significant bodily injury and that there is no size requirement for these types of lacerations. USAO states that “a layperson will likely not know the size of his or her laceration” and “[e]ven 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. USAO states that medical professionals “often do not even measure the depth of a laceration.” USAO states that requiring a certain size of laceration means that “every case involving this type of significant bodily injury would require medical testimony” and that “medical testimony should not be required in every case to prove whether a significant bodily injury is present.” Including the USAO proposed language, it says, would allow “a layperson to testify about the types of injuries he or she sustained.”*

- The RCC does not incorporate this recommendation because it would introduce ambiguity into the definition by including comparatively less serious injuries in the list of “per se” significant bodily injuries. The list of “per se” significant bodily injuries in the RCC definition is reserved for injuries that clearly meet the high threshold for “significant bodily injury” under DCCA case law. As is discussed in the commentary to the RCC definition, the RCC definition generally codifies the requirements of this case law— a bodily injury that, to prevent long-term physical damage or to abate severe pain, requires hospitalization or immediate medical treatment beyond what a layperson can personally administer. It is possible that a laceration that receives stitches, sutures, etc. does not meet these requirements, so it is not a per se significant bodily injury. In addition, under both DCCA case law¹⁵¹ and the RCC definition, the fact that medical treatment is received is not dispositive of whether it was “required.” DCCA case law does not establish a per se rule that lacerations requiring stitches are sufficient for “significant bodily injury.” The case law is limited to fact-specific determinations of a laceration, combined with other evidence of injury or treatment received.¹⁵²

¹⁵¹ See, e.g., *Teneyck v. United States*, 112 A.3d 906, 910 (D.C. 2015) (“Again, the standard is an objective one, and the fact that medical treatment occurred does not mean that medical treatment was required.”); *Wilson v. United States*, 140 A.3d 1212, 1219 (D.C. 2016) (“Even assuming [the complaining witness] did receive some form of treatment in the hospital, therefore, the fact that medical treatment occurred does not mean that medical treatment was required.” (internal quotation marks omitted) (citing *Teneyck v. United States*, 112 A.3d 906, 910 (D.C. 2015))).

¹⁵² See, e.g., *Rollerson v. United States*, 127 A.3d 1220, 1232 (D.C. 2015) (finding that an injury that was sustained in a “violent group attack” and “[a]s a result, in addition to bruises and abrasions, [the individual] suffered ‘gashes to her face’ going down to the ‘white meat,’ and was a bleeding ‘mess’” and received nine stitches was sufficient for “significant bodily injury.”); *In re R.S.*, 6 A.3d 854, 859 (D.C. 2010) (“Here,

Although lay persons and medical professionals may not have the measurements of a given laceration, such a laceration may still qualify under the first part of the RCC definition of “significant bodily injury.” As with any other injury, medical professional testimony may be helpful or, in some cases, necessary to establish that an injury satisfies the definition.

“Significant Emotional Distress”

(1) *OAG, App. C at 248, recommends redrafting the sentence “It must rise significantly above the level of uneasiness, nervousness, unhappiness or the like which is commonly experienced in day to day living.” Although the sentence is taken from a judicial opinion, the meaning of the phrases “the like” and “commonly experienced” are unclear. OAG recommends substituting the phrase “similar feeling” for “the like” and further explaining the meaning of “commonly experienced” in commentary.*

- The RCC incorporates this recommendation by replacing the phrase “the like” with “similar feeling” and clarifying in commentary the meaning of “commonly experienced.” The phrase “commonly experienced,” borrowed from recent District case law,¹⁵³ is explained in the commentary as incorporating a reasonableness standard as to the experience of an average person. For example, per “commonly experienced” unhappiness is not to be assessed by the experience of a chronically depressed person. The word “commonly” is generally understood to mean “of or relating to a community at large.”¹⁵⁴ Factfinders are often required to judge reasonableness and community standards.¹⁵⁵

“Value”

(1) *USAO, App. C at 286, recommends deleting subsection (C) from the definition of “value,” which establishes a fixed dollar value for a payment card and for an unendorsed check. USAO states that this subsection is “plainly at odds with D.C. law” and, as the RCC commentary acknowledges, has not been adopted in other jurisdictions.*

- The RCC does not incorporate this recommendation because it would introduce ambiguity into the definition and risk disproportionate penalties. Under the current statutory definition of “value,” the “value” of a payment

where the injury to the ear required four to six stitches and left a scar and where treatment was sought and administered with reasonable promptness, we have no difficulty in sustaining the trial court’s conclusion that the injury [constituted “significant bodily injury”].

¹⁵³ *Coleman v. United States*, 202 A.3d 1127, 1145 (D.C. 2019).

¹⁵⁴ Merriam-Webster.com, “commonly”, 2018, available at <https://www.merriam-webster.com/dictionary/commonly>.

¹⁵⁵ See, e.g., *Miller v. California*, 413 U.S. 15 (1973) (defining obscenity to require that the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest).

card, check, or “other written instrument” is the amount of property “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.”¹⁵⁶ The language “can be obtained” is inherently unclear¹⁵⁷ and there is no case law on the meaning of this phrase. A fixed amount provides a fairer and more efficient means of calculating the value of an unused payment card or blank check, and dispenses with litigation over the amount of credit or funds that “can be obtained” by a given card or bank account at the time of the property crime under a banking or credit card institution’s policies and practices. The RCC approach also avoids disparate valuation of people’s credit cards and checks based on their available credit or size of their bank account.¹⁵⁸ Determining the value of a payment card or check based on the value of property that *could* be obtained through its use may lead to penalties that are disproportionately severe relative to the actual harm because this language equates potential losses to actual losses. For example, stealing a credit card with a limit of \$10,000 or a book of checks to an account with \$10,000 available would be equivalent to stealing \$10,000 in cash, even if the credit card or checks are never used. In the RCC, if the credit cards or checks are used to obtain property, the value of the property obtained determines the gradation of the relevant RCC offense, such as theft, fraud, etc. However, for stealing, without using, a credit card or blank check, the amount fixed by the statute applies per credit card or check. One benefit of this approach is that thefts and other crimes from wealthy persons (who are likely to have higher credit limits and checking balances) are not treated as more serious than equivalent crimes from poor persons.¹⁵⁹ The RCC approach also generally accords

¹⁵⁶ D.C. Code 22-3201(7) (“‘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.”).

¹⁵⁷ For example, if a defendant steals a credit card with a credit limit of \$10,000, the language could support a valuation of the credit card at \$10,000 (the amount of property that “can be obtained through its use.”). However, it is unclear how the credit card would be valued if, despite the \$10,000 credit limit, the owner had charged \$7,000 to the account, leaving only \$3,000 of credit. If the defendant uses the credit card to buy a \$500 pair of shoes, the proposed language could also support a valuation of the credit card at \$500 (the amount of property that “has been . . . obtained through its use.”). It is also unclear whether the “has been . . . obtained through its use” refers to the actions of the defendant or the owner of the credit card. In the context of a check, it is also unclear how banking institution policies and practices relating to overdraft protection should be considered when evaluating the amount that “can be obtained.”

¹⁵⁸ For example, theft of a purse with two payment cards connected to accounts of \$300 each would, if aggregated, provide a basis for theft of \$600 under current law—graded as fourth degree theft in the RCC or a 180 day misdemeanor under current law. A purse with the same number of cards but in the name of a wealthier person who has credit limits of \$15,000 each would, if aggregated, provide a basis for theft of \$30,000—graded as third degree theft in the RCC or a 10 year felony under current law.

¹⁵⁹ The USAO comment states that its proposed language “better align[s] 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.” The Model Penal Code provision on value does suggest taking the highest of reasonable methods of determining value but, the Model Penal Code—issued in 1962, before

with CCRC public opinion polling of District voters which indicates a marked difference between stealing a credit card with a \$5,000 limit and stealing \$5,000 cash.¹⁶⁰

(2) *USAO, App. C at 286, recommends rewriting the definition of “value” to mean “the greater of” several alternatives that differ from the alternative means of valuation in the RCC definition.¹⁶¹ USAO’s proposed definition would be: “‘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 property or services that has been or can be obtained through its use.” USAO states that this change “better align[s] the definition” with the Model Penal Code, current federal law, and the “fairly recent amendments to the D.C. Omnibus Public Safety Amendment Act of 2009.*

- The RCC does incorporate this recommendation because it would change District law in a way that may authorize disproportionate penalties. The RCC definition of “value” requires that the fair market value of the property be used unless it “cannot be ascertained,” in which case the RCC definition lays out alternative methods of valuation depending on the type of property at issue. Replacing “cannot be ascertained” with “the greater of” would require the prosecution in every instance to determine value using all methods of valuation before comparing the numbers, and may increase an actor’s liability based on factors apparently irrelevant to the harm to the complainant. For instance, theft of a complainant’s recalled

widespread use of payment cards—did not address payment cards or suggest that blank checks should be valued at the amount of the account to which they are tied. See MPC § 223.1. Consolidation of Theft Offenses; Grading; Provisions Applicable to Theft Generally (“The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard, of the property or services which the actor stole or attempted to steal.”).

¹⁶⁰ See, e.g., Advisory Group Memo #27 Appendix A - Survey Responses, Question 4.26 provided the scenario: “Stealing a credit card with an available limit of \$5,000, but never using the stolen card.” Question 4.26 had a mean response of 4.7, compared to a mean response of 6.2 in that survey for Question 4.24 provided the scenario: “Stealing property (other than a car) worth \$5,000.”

¹⁶¹ The RCC definition of “value” is:

- A. The fair market value of the property at the time and place of the offense; or
- B. If the fair market value cannot be ascertained:
 1. For property other than a written instrument, the cost of replacement of the property within a reasonable time after the offense;
 2. For a written instrument constituting evidence of debt, such as a check, draft, or promissory note, the amount due or collectible thereon, that figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied; and
 3. For any other written instrument that creates, releases, discharges, or otherwise affects any valuable legal right, privilege, or obligation, the greatest amount of economic loss which the owner of the instrument might reasonably suffer by virtue of the loss of the written instrument.
- C. Notwithstanding subsections (A) and (B) of this section, the value of a payment card is \$[X] and the value of an unendorsed check is \$[X].

and highly unusual car (or other object), if evaluated under a “replacement cost,” may have a very high valuation because a replacement cannot be found or crafted, even though the complainant’s only interest in the car is for transportation and the car has a very low fair market value because it has a dangerous defect. In addition, as noted above, the proposed language for determining the value of credit cards, checks, and other written instruments- the amount of property “that has been or can be obtained through its use”- does not provide a clear, consistent standard for the value of these written instruments.¹⁶²

(3) *The CCRC recommends revising subparagraph (C) of the definition of “value” to specify that it refers to the value of a payment card “alone” or the value of an unendorsed check “alone.” This clarifies that (C) establishes the value of a payment card or unendorsed check as an item of property, as opposed to its use in a property crime such as payment card fraud (RCC § 22E-2202) or check fraud (RCC § 22E-2203).*

- This change improves the clarity of the revised definition.

¹⁶² This language appears in the current definition of value (D.C. Code § 22-3201(7)) and there is no DCCA case law interpreting it. For example, if a defendant steals a credit card with a credit limit of \$10,000, the language could support a valuation of the credit card at \$10,000 (the amount of property that “can be obtained through its use.”). However, it is unclear how the credit card would be valued if, despite the \$10,000 credit limit, the owner had charged \$7,000 to the account, leaving only \$3,000 of credit. If the defendant uses the credit card to buy a \$500 pair of shoes, the proposed language could also support a valuation of the credit card at \$500 (the amount of property that “has been . . . obtained through its use.”). It is also unclear whether the “has been . . . obtained through its use” refers to the actions of the defendant or the owner of the credit card.

Murder. RCC § 22E-1101.

- (1) *OAG at App. C. 248-249, notes that the Commentary on the penalty enhancement for murder 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.” OAG suggests that this language should be incorporated into the statute, perhaps as a definition of “harm” that would also help clarify other provisions too. OAG says the question is what, in addition to bodily injury, is encompassed in “harm,” but does not recommend specific language.*
- The RCC does not incorporate this recommendation because defining too many terms, particularly frequently used terms, does not improve the clarity of the revised criminal code. The term “harm” as used in this statute accords with the ordinary use of the term, and does not warrant a specified definition.
- (2) *USAO at App. C.287, recommends that felony murder be classified as first degree murder with separate provisions in first degree murder addressing both purposeful felony murder and non-purposeful felony murder. USAO says that “deterrence theories that have been recognized by the D.C. Court of Appeals and other courts [] support categorizing Felony Murder as First Degree Murder.”*
- The RCC does not incorporate USAO’s recommendation because it would authorize disproportionate penalties. Felony murder is a narrow exception to the general rule that murder and manslaughter liability (as opposed to negligent homicide) requires an actor to be subjectively aware that the actor is causing the death of another person. Felony murder criminalizes accidental killings because of the inherent dangerousness of the underlying felonies.
 - Killing another person with premeditation and deliberation, whether or not the actor was engaged in a felony, makes the actor liable for first degree murder under the RCC just as in the current D.C. Code. When a killing is committed with premeditation and deliberation while engaged in a felony, the RCC authorizes separate punishments for the killing (as first degree murder) and the felony at issue, providing a cumulative punishment greater than (for serious felonies, much greater than) that for first degree murder, ensuring each crime is accounted for. Similarly, purposely killing another person without premeditation and deliberation, or doing so knowingly or with extreme indifference to human life makes the actor liable for second degree murder under the RCC, whether or not the actor was engaged in a felony. When a killing is committed purposely, knowingly, or with extreme indifference while engaged in a felony, the RCC authorizes separate punishments for the killing (as second degree murder) and the felony at issue, providing a cumulative punishment greater than (for serious felonies, much greater than) that for second degree murder alone, ensuring each crime is accounted for. Consequently, to the extent that a prospective criminal guides his or her behavior by the availability of increased penalties, the RCC first and second degree framework deters commission of another felony during a homicide, or a

homicide during a felony by proportionately increasing the penalties based on the conduct.

- In addition, the RCC grades a negligent (i.e. accidental, unintended) killing of another person during the course of specified major felonies (e.g. sex assault, robbery, or kidnapping) as equivalent to a second degree murder. Normally, a negligent killing is punished in the D.C. Code¹⁶³ and the RCC as a low-felony offense. And where a person is killed negligently in the course of another felony, the RCC authorizes separate punishments for the killing (as negligent homicide) and the felony at issue, providing a cumulative punishment greater than (for serious felonies, much greater than) that for negligent homicide alone, ensuring each crime is accounted for. But, for a negligent killing during specified major felonies (e.g. sex assault, robbery, etc.), the RCC provides far greater penalties, as if the behavior were purposeful (but not with premeditation or deliberation) or knowing or with extreme indifference to human life. The RCC's major increase in liability for accidental, unintended deaths during specified felonies appropriately recognizes the seriousness of such conduct, even if the death was unintended.
- Under the USAO proposal, any accidental killing that occurs during an enumerated felony would be subject to the same penalty as an intentional murder committed with deliberation and premeditation. This is a disproportionately severe penalty when the actor was merely negligent and had no intent to cause the death of another, or did not act with extreme indifference to human life.. Punishing such killings during a felony equal to second degree murder as in the RCC also may be too severe based on polling of District residents,¹⁶⁴ but the RCC change is a significant decrease from the D.C. Code's treatment of such killings as equal to first degree murder. Beyond retributive measures of proportionality, the CCRC is not aware of any evidence that the penalty difference between second degree murder and first degree murder would deter behavior. To the contrary, general research on deterrence summarized by the Department of Justice's National Institute of Justice indicates there is little effect by increasing imprisonment penalties and, for homicide, there is no apparent deterrence effect of even the death penalty on homicide rates.¹⁶⁵

(3) *USAO at App. C. 287, recommends removing the requirement for felony murder that the defendant act negligently in causing the death while committing an enumerated felony.*

¹⁶³ See D.C. Code § 50–2203.01, Negligent homicide (punishable by up to 5 years imprisonment). This offense further requires that the actor caused the death of another through operation of a vehicle.

¹⁶⁴ See Advisory Group Memo #27 Appendix A - Survey Responses at 1 (showing public evaluations of various killings during felonies as being significantly less severe, by at least one classification, than a manslaughter scenario described as: “An intentional killing in a moment of extreme emotional distress (e.g. after a loved one was hurt).”

¹⁶⁵ See, <https://nij.ojp.gov/topics/articles/five-things-about-deterrence>.

- The RCC does not incorporate this recommendation because it would authorize disproportionate penalties. Felony murder is a narrow exception to the general rule that murder and manslaughter liability (as opposed to negligent homicide) requires an actor to be subjectively aware that the actor is causing the death of another person. Felony murder criminalizes accidental killings because of the inherent dangerousness of the underlying felonies.
 - Under the USAO proposal there would be murder liability on the basis of strict liability—when the defendant was not even negligent in causing the death of another—meaning that murder punishment is imposed for even objectively reasonable mistakes and accidents. For example, if in the course of a robbery, the defendant causes a fatal car accident due to the negligence of another driver and despite following all traffic safety laws and regulations, murder liability would be imposed.
 - The RCC provides second degree murder liability for causing the death of another during an enumerated felony, but imposes a minimal negligence requirement as to the conduct that causes death.
- (4) *USAO at App. C. 288, recommends removing the requirement for felony murder that the lethal act be committed in furtherance of the underlying felony.*
- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. Felony murder is a narrow exception to the general rule that murder and manslaughter liability (as opposed to negligent homicide) requires an actor to be subjectively aware that the actor is causing the death of another person. Felony murder criminalizes accidental killings because of the inherent dangerousness of the underlying felonies.
 - Under the USAO proposal, acts unrelated to the predicate felony but coincidentally occurring at the same time would be subject to murder liability. However, acts that are not taken in furtherance of the felony are not inherently dangerous, and do not merit heightened liability for murder based on a merely negligent culpable mental state.
 - The RCC provides second degree murder liability for merely negligent conduct only when that conduct is an action in furtherance of the underlying felony. Under the RCC an actor may still be held liable for negligently killing someone under RCC § 22E-1103, Negligent Homicide in addition to liability for any felony they are engaged in at the time, and sentenced consecutively for such conduct.
- (5) *USAO at App. C. 289, recommends including fifth degree robbery and felonies involving controlled substances as enumerated felonies for felony murder.*
- The RCC does not incorporate this recommendation because it would authorize disproportionate penalties. Felony murder is a narrow exception to the general rule that murder and manslaughter liability (as opposed to negligent homicide) requires an actor to be subjectively aware that the actor is causing the death of another person. Felony murder criminalizes accidental killings because of the inherent dangerousness of the underlying felonies.

- Under the USAO proposal, robberies that do not involve a weapon or infliction of significant bodily injury and all felony drug trafficking crimes would be eligible for the felony murder exception. The RCC enumerated felonies, similar to those enumerated in the current D.C. Code murder statute, are limited to certain felonies that create an immediate and grave risk to human life.¹⁶⁶ However, as the current D.C. Code does not grade robbery, the RCC's grading of the offense raises the issue of whether some types of robbery are not as inherently dangerous as other types. First through fourth degree RCC robbery involve use of a weapon, or the infliction of significant or serious bodily injury. These forms of robbery are sufficiently dangerous to warrant being enumerated as predicate offenses for felony murder. Fifth degree robbery, however, covers unarmed robberies that only involve threats, physical force, or bodily injury. The type of bodily injury covered by fifth degree robbery is similar to simple assault under current law. Fifth degree robbery, while an offense against persons, does not create a similar inherent risk of death or serious bodily injury to warrant inclusion in the felony murder statute.
 - Felony controlled substance offenses also do not inherently involve immediate and grave risks to human life. Criminalizing as murder accidental deaths that occur during the commission of a drug offense authorizes disproportionately severe penalties.
 - The RCC continues to authorize serious penalties for killings that occur during unenumerated felonies, although the punishment may be less severe. Under the RCC an actor may still be held liable for recklessly killing someone with extreme indifference under RCC § 22E-1101, Second Degree murder in addition to liability for any felony they are engaged in at the time, and sentenced consecutively for such conduct. Also, under the RCC an actor may still be held liable for negligently killing someone under RCC § 22E-1103, Negligent Homicide in addition to liability for any felony they are engaged in at the time, and sentenced consecutively for such conduct.
- (6) *USAO at App. C.290, recommends that a person should be liable for felony murder if the decedent was an accomplice to the underlying felony.*
- The RCC does not incorporate this recommendation because it would authorize disproportionate penalties. Felony murder is a narrow exception to the general rule that murder and manslaughter liability (as opposed to negligent homicide) requires an actor to be subjectively aware that the actor is causing the death of another person. Felony murder criminalizes accidental killings because of the inherent dangerousness of the underlying felonies.
 - Under the USAO proposal an actor who accidentally kills an accomplice while committing an enumerated felony would be eligible for the felony

¹⁶⁶ Notably, the current list of enumerated felonies in the D.C. Code § 22-2101 murder statute does not include a wide array of serious felonies involving the use of force (e.g. third degree sexual abuse, or forced commercial sex).

murder exception. However, the enumerated offenses do not involve the same inherent risk of harm to fellow participants in the underlying offense as they do to the targets of crime. Applying murder liability to the accidental deaths of accomplices would be contrary to the normal culpable mental state requirements for murder liability and authorize disproportionately severe sentences.

- The RCC continues to authorize serious penalties for unintentional killings to any person, although the punishment may be less severe. Under the RCC an actor may still be held liable for recklessly killing someone with extreme indifference under RCC § 22E-1101, Second Degree murder in addition to liability for any felony they are engaged in at the time, and sentenced consecutively for such conduct. Also, under the RCC an actor may still be held liable for negligently killing someone under RCC § 22E-1103, Negligent Homicide in addition to liability for any felony they are engaged in at the time, and sentenced consecutively for such conduct.
- (7) *USAO at App. C.291, recommends that an accomplice to the underlying felony should be liable for felony murder based on the lethal act committed by a co-felon.*
- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties by equivalently punishing conduct of differing seriousness. The RCC murder and other statutes provide felony liability for killing a person, attempting to kill a person, and being an accomplice to (or committing) a felony crime—all of which may apply when a person is an accomplice to a felony in which the co-felon kills someone. However, the RCC does not recommend punishing a co-felon who is not the one who killed the victim and did not assist or encourage (or otherwise act as an accomplice to) the *killing* the same as person who actually committed the lethal act.
 - In the USAO hypotheticals, any person who fires shots during a robbery but misses can still be prosecuted for attempted murder, the underlying robbery, and any applicable weapons offenses. The penalties for these offenses, which can be imposed consecutively, are proportionate as applied to a person who does not actually cause the death of another. In contrast, USAO’s proposal would allow accomplices to be convicted of first degree murder even when they did not commit a lethal act and had no intent to kill. For example, a lookout for a robbery, who did not know or desire that anyone be injured or killed, could be held liable for murder if his co-felon unexpectedly kills another person during the course of the robbery. Murder liability could apply even if the accomplice actively tried to prevent the use of lethal force. Murder liability in these cases is disproportionately severe relative to the defendants’ culpability.
 - The RCC position is consistent with the treatment of murder outside the court’s common law felony-murder doctrine. For example, USAO notes that if in the course of a robbery, two robbers both fire shots and the first robber hits and kills a person, the second robber should be subject to the same liability as the first robber. However, outside of the felony murder

context, it is well established that a person who unsuccessfully attempts to kill another person may only be convicted of attempted murder. If two people, with intent to kill, shoot at a person, and one shooter misses, he is not subject to the same liability as the shooter who actually hits and kills the person. USAO's recommendation would impose murder liability on defendants who did not actually kill anyone. USAO also notes that in some cases when there is more than one shooter, it may not be possible to determine who actually fired the fatal shot. While this is true, it does not justify holding a person liable for murder without proving that the person actually caused the death of another. Outside of the felony murder context, if multiple people fire shots resulting in the death of another, it may be similarly difficult to determine which person fired the fatal shot. In those cases, murder liability still requires proving that a particular person actually fired the fatal shot. It would be inconsistent to apply a higher standard of proof in cases in which the actors had intent to kill, than in the felony murder context, which does not require intent to kill.

- To date, the CCRC has not issued draft recommendations regarding *Pinkerton* liability, but in some cases the current *Pinkerton* liability rule would allow a person to be liable for the lethal act committed by another in furtherance of a conspiracy. The CCRC plans to review and issue a recommendation on *Pinkerton* liability in 2020 and, at that time the CCRC will review this matter further.

(8) USAO at App. C.292, recommends removing the language “with extreme indifference to human life” from the murder and manslaughter statutes.

- The RCC does not incorporate this recommendation because it would authorize disproportionate penalties. Removing the “extreme indifference” language would be inconsistent with current District law regarding the requirements for “depraved heart” murder.¹⁶⁷
- Under the USAO proposal the culpable mental state required for murder would be significantly lower than current law. Removing the “extreme indifference” language would eliminate the requirement that the actor disregarded an extreme risk of death. Depraved heart murder treats accidental killings as tantamount to intentionally taking the life of another. This is only justifiable in rare circumstances in which the actor consciously disregarded an *extreme* risk of death or serious bodily injury. This is reflected in DCCA case law, which consistently recognizes that depraved heart murder requires extraordinarily dangerous conduct.¹⁶⁸

¹⁶⁷ Notably, a sizable minority of American jurisdictions do not recognize depraved heart murder at all, while the Model Penal Code and expert commentators have recommended precisely the language in the RCC. See § 14.4(a)Creation of risk, 2 Subst. Crim. L. § 14.4(a) (3d ed.)

¹⁶⁸ *E.g.*, *Powell v. United States*, 485 A.2d 596 (D.C. 1984) (the defendant led police on a high-speed chase in excess of 90 miles per hour, and turned onto a congested exit ramp causing a fatal collision.). The DCCA noted in *Comber v. United States*, 584 A.2d 26, 39 (D.C. 1990) (*en banc*) that “depraved heart malice exists only where the perpetrator was subjectively aware that his or her conduct created an *extreme* risk of death or serious bodily injury[.]” (emphasis added). As examples of sufficiently dangerous conduct, the DCCA listed “firing a bullet into a room occupied, as the defendant knows, by several people; starting a

Mere recklessness only requires that an actor disregards a substantial risk of death. Although it is not possible to draw a clear distinction between ordinary recklessness and recklessness with “extreme indifference to human life,” some examples may illustrate difference. Causing a fatal crash by driving at 100 miles per hour on narrow residential streets would likely constitute recklessness with extreme indifference to human life. By contrast, causing a fatal crash by driving 10-15 miles per hour over the speed limit on a non-residential street absent other factors would be insufficient to prove “extreme indifference to human life.” Removing the “extreme indifference” language and applying murder liability to recklessly causing death would authorize disproportionately severe penalties.

(9) *USAO at App. C. 292-293, recommends that the RCC codify that “mere words” categorically cannot be adequate provocation that mitigate murder to manslaughter.*

- The RCC does not incorporate this recommendation because it may be confusing and authorize disproportionate penalties. While there used to be a general rule in case law nationally that “words alone” cannot mitigate murder to manslaughter, the CCRC is not aware that rule has ever been codified.¹⁶⁹ And, recently, a number of courts that have examined the matter more closely have distinguished between “informational” and “insulting” words rather than provide a categorical bar.¹⁷⁰ Consistent with this modern trend, the RCC commentary notes that words may serve as a reasonable cause for extreme emotional disturbance, it is not intended that any manner of slights or insults will suffice. The mitigation defense only applies if the emotional disturbance had a “reasonable cause as determined from the viewpoint of a reasonable person in the actor’s situation under the circumstances as the actor believed them to be[.]” Words alone can serve as a mitigating factor only if a jury finds that the words were so heinous that they were a reasonable cause. The CCRC recognizes that these cases, if they arise at all, will be extraordinarily rare. Codifying a categorical “mere words” exception may not accurately reflect District case law, the focus of which has been on insulting or offensive language,¹⁷¹ and as practically implemented may lead to

fire at the front door of an occupied dwelling; shooting into ... a moving automobile, necessarily occupied by human beings ...; playing a game of “Russian roulette” with another person[.]”

¹⁶⁹ The matter is almost never addressed in statutes one way or another, but where it has been addressed the statute either recognizes that words may be mitigating (see, e.g. Minn. Stat. Ann. § 609.20) or precludes only “insulting words” (see, e.g. Alaska Stat. Ann. § 11.41.115).

¹⁷⁰ § 15.2(b)(6)Words, 2 Subst. Crim. L. § 15.2(b)(6) (3d ed.) (“The formerly well-established rule that words alone (or words plus gestures) will never do for reducing an intentional killing to voluntary manslaughter has in many jurisdictions changed into a rule that words alone will sometimes do, at least if the words are informational (conveying information of a fact which constitutes a reasonable provocation when that fact is observed) rather than merely insulting or abusive words.” (internal citations omitted))

¹⁷¹ See, e.g., *High v. United States*, 972 A.2d 829, 836 n.5 (D.C. 2009) (“Furthermore, Gaither’s words to High could not have amounted to adequate provocation because, as we have long held, “[m]ere words standing alone, no matter how insulting, offensive, or abusive, are not adequate provocation.” Nicholson,

confusion over when conduct is “mere words” as compared to words accompanied by some prior conduct or gesture.

(10) *USAO at App. C. 293-294, recommends removing the voluntary intoxication provision from the murder statute, and instead rely on the general voluntary intoxication rule.*

- The RCC does not incorporate this recommendation because it may be confusing. As discussed above, the RCC follows current District law in referencing “extreme indifference to human life” in the revised murder and manslaughter statutes, a higher culpable mental state than mere “recklessness.” The general voluntary intoxication rule under RCC § 22E-209, however, only addresses imputation of awareness of a *substantial* risk, as required for ordinary recklessness. Because “extreme indifference” requires awareness of an *extreme* risk of death or serious bodily injury, the general intoxication rule would not allow a fact finder to impute awareness of the requisite degree of risk. Without the revised murder statute’s voluntary intoxication provision, there may be confusion as to whether the reference to mere reckless culpable mental states in the general part’s intoxication provision applies to murder.

(11) *USAO at App. C. 294, recommends several edits to the mitigation defense provision in the revised murder statute that USAO says are not meant to be substantive.*

- The RCC partially incorporates this recommendation by changing subparagraph (f)(1)(B) to require a belief that deadly force was necessary to prevent *imminent* death or serious bodily injury *to the actor or another person*. These changes clarify the revised statute.
- The RCC does not incorporate the USAO recommended language specifying that the reasonable cause of the extreme emotional disturbance must be “*based on the conduct of another.*” The suggested language may be (mis-)understood to categorically preclude the possibility of mitigation based on hearing information about another person’s conduct, requiring the actor to prove the conduct underlying the information rather than the actor’s reasonable belief in the information.
- This change will improve the clarity of the revised criminal code.

(12) *USAO at App. C. 294, recommends removing any other partial defense to murder as a mitigating defense.*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The current D.C. Code murder statutes do not discuss what may constitute a mitigating factor, and while case law has recognized imperfect self-defense and extreme emotional disturbance as mitigating factors, there is no binding case law precluding any other defense. The USAO recommendation would foreclose any other

supra, 368 A.2d at 565 (words do not constitute adequate provocation because they amount to “a trivial or slight provocation, entirely disproportionate to the violence of the retaliation”); accord *West v. United States*, 499 A.2d 860 (D.C.1985) (provocation not adequate where unarmed victim walked toward armed defendant while they merely exchanged unpleasant words).”).

defense by omitting RCC language in RCC § 22E-1101(f)(1)(C) regarding “Any other legally-recognized partial defense which substantially diminishes either the actor’s culpability or the wrongfulness of the actor’s conduct.” As described in the commentary, an example of conduct that may be considered under the RCC partial defense language would be an actor who kills another person when they have the unreasonable belief that the other person was about to sexually assault them. If lethal force may be justified under certain circumstances, even absent the fear of death or serious bodily harm, then an unreasonable belief that those circumstances existed could constitute a mitigating circumstance under the RCC. Critically, what is at stake here is not of whether there is any criminal liability, but a question of lowering liability from murder to manslaughter. The RCC language provides factfinders an opportunity to decide, based on the facts of the case, whether a legally-recognized partial defense substantially diminishes either the actor’s culpability or the wrongfulness of the actor’s conduct. Omitting any other partial defenses to murder would risk disproportionately severe penalties.

- The commentary will be updated to clarify that this provision should be narrowly interpreted, and only circumstances that significantly reduce an actor’s culpability in a manner equivalent to mitigating circumstances already recognized under current law will suffice.

(13) *USAO, App. C. 295, recommends revising the murder statute so that mitigating circumstances are inapplicable to premeditated murder and felony murder.*

- The RCC partially incorporates this recommendation. The RCC murder statute has been re-drafted so the mitigation defense will not apply to felony murder. However, the RCC does not incorporate the USAO recommendation to codify that no mitigation defense can apply to premeditated murder.
- While the DCCA has not specifically ruled whether mitigating circumstances may or may not lower a first degree murder charge involving premeditation to manslaughter, preserving mitigation for premeditated murder in some circumstances is consistent with DCCA case law. Given the DCCA’s repeated holdings that premeditation and deliberation may be formed in mere moments,¹⁷² it is possible for a person to intentionally cause the death of another with premeditation and deliberation while also under mitigating circumstances. For example, consider a person who hears an intruder in the hall outside his bedroom in the middle of the night. While hiding, the person makes the decision that if the intruder comes into the bedroom, he will kill the intruder. If the intruder enters seconds later, and the person kills the intruder, the person would have satisfied the elements for premeditated murder. However, it would be unjust to categorically preclude a self-defense claim in such

¹⁷² See e.g. *Perry v. United States*, 571 A.2d 1156, 1160 (D.C. 1990) (holding that evidence for premeditation and deliberation was sufficient when defendant wrestled gun away from police officer, and immediately shot the officer out of anger).

circumstances. Similarly, it would also be unjust to categorically preclude an imperfect self-defense claim if the person unreasonably believed that lethal force was necessary.

(14) *USAO at App. C. 296, 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.”*

- No change to the RCC is required by this recommendation. The RCC General Part in Chapter 6 did not previously, and does not now, contain enhancements that are duplicative with the specific enhancements “directly applicable” to first and second degree murder. The RCC only includes three general penalty enhancements, none of which are duplicative of the enhancements in the murder statute: § 22E-606, Repeat Offender Penalty Enhancements; § 22E-607, Hate Crime Penalty Enhancement; and § 22E-608, Pretrial Release Penalty Enhancements.

(15) *USAO, App. C. 273, recommends that throughout the RCC, when the complainant’s status as a protected person increases applicable penalties, instead of requiring recklessness as to the status, strict liability should apply. In addition, USAO recommends that the RCC should include 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.” USAO also recommends that this defense must “be established by a preponderance of the evidence.” As applied to the revised murder statute, this would change the penalty enhancement under subparagraph (d)(3)(A).*

- The RCC does not incorporate this recommendation, because it would authorize disproportionate penalties. Under USAO’s proposal, the defense to the penalty enhancement requires that the actor was negligent as to the complainant’s status as a protected person. This requires that the actor should have been aware of a substantial risk that the complainant *is* a protected person. A person who *reasonably* believed that the complainant was *not* a protected person is not negligent as to the complainant’s status would therefore not satisfy the requirements of the proposed defense.
- The USAO’s proposed defense would apply to actors who believe that the complainant *is* a protected person. Under the RCC, proof of a higher culpable mental state suffices to prove lower culpable mental states. Therefore, a person who desires or is practically certain that the complainant is a protected person would also be negligent as to whether the complainant is a protected person.
- Under USAO’s proposal, the protected person enhancement would apply to *less* culpable actors, but not to *more* culpable actors. An actor who reasonably believes that the complainant is *not* a protected person is less culpable than an actor who believes, or desires, that the complainant *is* a protected person. However, under USAO’s proposal, the enhancement would apply to the former but not the latter.

- (16) *USAO at App. C. 297, recommends that a prior conviction for murder should be included as an aggravating factor in the revised murder statute.*
- The RCC does not incorporate this recommendation because the RCC general recidivist enhancement's crime of violence provision already authorizes increased penalties for a person based on having committed a prior murder.
- (17) *USAO at App. C. 297-298, recommends that killing a person capable of providing information to a law enforcement officer should be included as an aggravating factor in the revised murder statute. USAO argues that the obstruction of justice statute does not necessarily cover this conduct, and that even if it does, the statute of limitations may prevent a conviction for obstruction.*
- The RCC incorporates this recommendation by providing as an enhancement in subparagraph (d)(3)(i): Commits the murder with the purpose of harming the decedent because was or had been a witness in any criminal investigation or judicial proceeding, or the decedent was capable of providing or had provided assistance in any criminal investigation or judicial proceeding." The CCRC has not yet reviewed and revised the obstruction of justice statute, so it is unclear whether the conduct described in subparagraph (d)(3)(i) is criminalized as obstruction of justice. When it does so, it will consider whether to provide a statutory provision or commentary regarding merger of sentences for obstruction of justice and a murder conviction with the enhancement in subparagraph (d)(3)(i), or take other action to ensure proportionate punishments.
- (18) *USAO at App. C. 298, recommends that premeditated murders that occur while the actor committed kidnapping, robbery, arson, rape, or sex offense should be included as an aggravating circumstance.*
- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC authorizes proportionate punishment for criminal behavior, including the most serious forms of that behavior, but does not necessarily authorize such punishment through just one crime when multiple crimes may be charged for the behavior. In the RCC a person who commits a premeditated murder while committing a separate offense may still be convicted of and sentenced consecutively for that separate offense. A separate conviction and penalty for both murder and the other serious felony adequately authorizes a proportionate penalty above the maximum for first degree murder.
- (19) *USAO at App. C. 298-299, recommends that drive by or random shootings should be aggravating circumstances for murder.*
- The RCC incorporates this recommendation. This change improves the proportionality of the revised statute.
- (20) *USAO at App. C. 299, recommends that the enhancement under RCC § 22E-1101 (d)(3), which relates to infliction of extreme physical pain or mental suffering, should not require that the suffering be for a "prolonged period of time immediately prior to the decedent's death."*
- The RCC does not incorporate this recommendation because it makes the statutory text less clear. As the DCCA has noted, all murders "are to some

degree heinous, atrocious, and cruel”¹⁷³ and the difficulty in distinguishing those murders that are especially heinous, atrocious, or cruel can lead to arbitrary and disproportionate results.¹⁷⁴ Omitting the requirement that the pain or suffering be for a prolonged period of time fails to distinguish between ordinary murders and those that warrant a more severe penalty. In most cases, murder requires a degree of violence sufficient to cause significant pain, with the exception of virtually instantaneous killings. The critical question is whether the extreme physical pain or mental suffering of the decedent was prolonged. Additional liability for prior acts of violence against the decedent—for example, an aggravated assault committed hours before the killing—is provided by other RCC criminal statutes, for which an actor may be consecutively sentenced.

(21) *USAO at App. C. 299-300, recommends removing RCC § 22E-1101(e), which provides for a bifurcated trial when an enhancement is charged that is based on prolonged pain or suffering, or mutilation or desecration of the decedent’s body. USAO says that “the bifurcation ignores the practical effects that will result from longer trials and repeatedly calling the same witnesses during both phases.” USAO also says that “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.”*

- The RCC does not incorporate this recommendation because it may result in disproportionate penalties. Regarding the first USAO argument, while it is true that a separate proceeding will require more time from court staff, attorneys, and witnesses, this cost is warranted to prevent the risk of unfair prejudice in determining whether the defendant is guilty of the offense. Second, while some evidence may be relevant to both stages of the bifurcated proceeding, some evidence will only be relevant to determining if the murder involved prolonged pain or suffering, or mutilation or desecration of the decedent’s body. This evidence could be unfairly prejudicial in determining whether the defendant actually committed the murder.
- Conviction for aggravated murder makes a person liable for imprisonment throughout the remainder of their lives and is the most severe penalty authorized under District law. Bifurcation of those aggravated murder proceedings that may involve evidence that prejudices the factfinder’s decision about murder adds additional cost but is warranted for this most severe punishment. The commentary to the American Law Institute’s (ALI) recently issued recommendations has noted that while the Supreme Court to date has only required bifurcated trial proceedings in death

¹⁷³ *Long v. United States*, 83 A.3d 369, 381 (D.C. 2013), as amended (Jan. 23, 2014); see also *State v. Salazar*, 844 P.2d 566, 585–86 (Ariz. 1992) (“If there is some ‘real science’ to separating ‘especially’ heinous, cruel, or depraved killers from ‘ordinary’ heinous, cruel, or depraved killers, it escapes me. It also has escaped the court.”).

¹⁷⁴ See *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (noting that the words “outrageously or wantonly vile, horrible and inhuman” in the Georgia criminal code do not create “any inherent restraint on the arbitrary and capricious infliction of the death sentence.”).

penalty cases, “state legislatures should consider the adoption of comparable procedural protections before LWOP [life without parole] penalties may be imposed.”¹⁷⁵ The ALI sentencing commentary further notes that: “Bifurcated deliberations avoid over-long instructions at either stage, head off the possibility that ‘sentencing instructions’ may convey to the trial jury that the defendant’s guilt has been assumed in advance, and avoid placing the defendant in the uncomfortable position of contesting guilt at trial while, in the alternative, arguing that he committed the crime in a manner that does not justify an enhanced penalty.”¹⁷⁶

(22) *The CCRC recommends amending RCC § 22E-1101(e) to specify that the same fact finder shall serve at both stages of the bifurcated proceeding.*

- This change resolves a procedural ambiguity as to whether a separate jury must be selected for the second stage of the bifurcated proceedings. This change clarifies the revised statute.

(23) *USAO at App. C. 300, recommends adding a “while armed” penalty enhancement.*

- The RCC does not incorporate this recommendation because it would result in disproportionate penalties. A murder committed by means of a dangerous weapon is punished more severely than another murder in the RCC because it will still be subject to liability under separate weapons offenses, with penalties that may be consecutive to the murder sentence. However, providing a more substantial enhancement for committing murder with a dangerous weapon would be disproportionate for several reasons. First, it is not clear that the seriousness of committing murder with a dangerous weapon merits enhancement as compared to murder committed by other means or with other enhancements. Unlike lesser offenses which, when committed with a dangerous weapon, carry a risk of killing a person that merits higher punishment, the punishment for murder already accounts for a completed killing. Also, as compared to deaths that involve torture or a minor complainant, it is not clear that use of a dangerous weapon (that may well speed the death) is of comparable seriousness. Second, as approximately 75% of murders are committed with a dangerous weapon,¹⁷⁷ providing a while-armed enhancement would effectively raise the statutory maximum for a large majority of murders. Third, from court records it appears that under current law (providing a while-armed enhancement for murder) few if any murders were actually enhanced above the statutory maximum they otherwise would have had absent the while-armed enhancement.¹⁷⁸ Fourth, the D.C. Voluntary

¹⁷⁵ American Law Institute Sentencing Recommendations at 162.

¹⁷⁶ American Law Institute Sentencing Recommendations at 501.

¹⁷⁷ From 2009 to 2018, 42 of 45 (87.5%) felony murder convictions, 135 of 151 (89.4%) of first degree murder convictions, and 202 of 301 (67%) of second degree murder convictions had a while armed enhancement. See Appendix D to Advisory Group Memorandum # 28: Statistics on Adult Criminal Charges and Convictions.

¹⁷⁸ Data provided in by the D.C. Sentencing Commission is collected in Appendix D to Advisory Group Memorandum #10 and provides a breakout of charges by the specific type of enhancement applied.

Sentencing Guidelines recommend for current law no distinction between degrees of murder while-armed and those degrees unarmed.

(24) *PDS, at App. C. 269, recommends amending the commentary discussing the rule of imputation of awareness of risk required for depraved heart murder.*

- The RCC incorporates this recommendation by updating the commentary to clarify that in some cases, voluntary intoxication may weigh against finding that a person acted with extreme indifference to human life.

(25) *USAO at App. C. 420-421, “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.*

- The RCC presently sets only the relative penalties for Class 1 felonies and does not establish the absolute penalties, be it a determinate term of years or an indeterminate term such as “life without parole.” As the District

According to this D.C. Sentencing Commission data, from 2010 to 2015 there were a total of 125 first degree “Murder I Armed” convictions that did not have any additional penalty enhancements. Of these 125 convictions, 11 received a life sentence, 9 received indeterminate sentences (under old, pre-2000 laws), and 105 received prison sentences that never exceeded the 60 year maximum authorized for unenhanced first degree murder. Thus, in more than 90% of first degree murder while armed convictions, the sentence was still within the maximum authorized for *unarmed* first degree murder, and the only exceptions were the 11 life sentences for Murder I - Armed. However, whether these 11 life sentences were actually unenhanced is not entirely clear. The Sentencing Commission data divides first degree murder into two categories, labeled “22DC2101-X” and “22DC2101-Y,” though it is not clear what these court labels designate and the DC Courts do not have a “data dictionary” that explains their coding system. Notably, all 11 life sentences for first degree murder were under the 22DC2101-Y label. A different dataset obtained by the CCRC uses different coding labels for types of first degree murder that are differentiated by whether the charges were “felony murder” or “other than felony murder,” suggesting that the Sentencing Commission “-X” and “-Y” variants of “Murder I Armed” are differentiated by whether a felony was committed in the case. For example, if the 22DC2101-Y label designates felony murder cases, it is possible that even though there is no “enhancement code” the “-Y” coding variant indicates an aggravator under D.C. Code § 22-2104.01(b)(1) for committing the murder in the course of kidnapping or abduction. Or, if the 22DC2101-Y label designates felony murder cases, the defendant could have been convicted of first degree murder and the separate felony and the sentences could run consecutively. Consequently, without further data and analysis of these 11 Murder I-Armed convictions, it is unclear whether the while-armed aggravator was the sole reason for the punishment going above the 60 year authorized maximum for *unenhanced, unarmed* first degree murder.

The D.C. Sentencing Commission data shows that for the same time period there was a total of 178 second degree murder while armed convictions that had no other penalty enhancements. Of these 178 convictions, only 1 count received a life sentence, and no other convictions received a sentence of more than 40 years, the maximum authorized for *unarmed* second degree murder. The one count receiving a life sentence in the data had an unusual code of “1820” which suggests the sentence may have been under an older (pre-2000) District law, but the meaning is unclear. Consequently, without further data and analysis of this 1 Murder II-Armed conviction, it is unclear whether the while-armed aggravator was the sole reason for the punishment going above the 40 year authorized maximum for *unenhanced, unarmed* first degree murder.

The CCRC plans to conduct further research with its dataset on the enhancements and facts at play in the approximately 31 life sentences (by charge, not by case) imposed for murder offenses in Superior Court 2009-2018. For statistics on use of the while-armed enhancement in District murder convictions according to the CCRC dataset, see also Appendix D to Advisory Group Memorandum # 28: Statistics on Adult Criminal Charges and Convictions.

abolished parole in 2000, “life” sentences issued since then are functionally the equivalent of “life without parole” sentences.

- The RCC does not incorporate the recommendation to penalize enhanced second degree murder the same as enhanced first degree murder because it may authorize disproportionate penalties.¹⁷⁹ Under the RCC, enhanced second degree murder is penalized as a Class 3 felony. All but two of the penalty enhancements available for second degree murder involve facts that, if proven, would likely satisfy the premeditation and deliberation requirements for first degree murder.¹⁸⁰ The two enhancements that most reasonably may apply to second degree murder (but not constitute first degree murder) are subparagraph (d)(3)(A) (Commits the murder “reckless as to the fact that that the decedent is a protected person”) and subparagraph (d)(3)(F) (“Knowingly mutilates or desecrates the decedent’s body”). While such crimes are the most serious in terms of consequences, the lower culpable mental states involved in second degree murder do not merit a punishment equivalent to premeditated and deliberate first degree murders of a protected person or a person whose body is then mutilated or desecrated. As a Class 2/3 felony, a sentence for enhanced second degree murder still authorizes incarceration for most or all a person’s adult life.

(26) *CCRC recommends revising the phrasing of the penalty enhancement provision in paragraph (d)(3) to state, “in addition to any penalty enhancements under this title applicable per Chapter 8 of this Title . . .” instead of “in addition to any penalty enhancements applicable per Chapter 8 of this Title[.]” Broadening the reference from Chapter 8 to include any general penalty enhancements facilitates*

(27) *The CCRC recommends revising the phrasing of the penalty enhancement provision in paragraph (f)(5) to state, “In addition to the general penalty enhancements under this title, the penalty classification for this offense is increased by one class when...” instead of “The penalty classification for first degree murder and second degree murder may be increased in severity by one penalty class, in addition to any penalty enhancements under Chapter 8 of the Title[.]” Broadening the reference to include any general penalty enhancement, instead just enhancements under Chapter 8, facilitates the addition of other general enhancements in the future. Specifying that the classification “is increased,” instead of “may be increased” clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase “one or more of the following is proven” is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.*

¹⁷⁹ The USAO recommendation to punish various sex crimes equivalent to enhanced first degree murder and/or enhanced second degree murder are addressed in the corresponding Appendix D1 entries for sex crimes.

¹⁸⁰ For example, sub-subsection ii (“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;”) and vii (“In fact, commits the murder after substantial planning.”).

Appendix D. Disposition of Advisory Group Comments & Other Changes From Draft Documents (D1)

- This revision improves the clarity of the revised statute.

Manslaughter. RCC § 22E-1102.

(1) *USAO at App. C. 295, recommends retaining an extreme negligence form of involuntary manslaughter.*

- The RCC does not incorporate this recommendation because it may result in disproportionate penalties. In the RCC, negligently causing the death of another remains criminalized as negligent homicide, per RCC § 22E-1103, but is no longer labeled manslaughter or punished the same as manslaughter. This change improves the proportionality of the revised homicide statutes by more finely grading homicide. Actors who are genuinely unaware of the risk they create, even extreme risks, are negligent and less culpable than those who are consciously aware of the risk they create as required for manslaughter.¹⁸¹ Requiring awareness of risk, i.e. recklessness, for involuntary manslaughter is consistent with the modern approach under the MPC¹⁸², and has been adopted by a majority of reformed jurisdictions¹⁸³, and the proposed Federal Criminal Code.¹⁸⁴ Support among District voters for grading the penalty for a negligent killing lower than a reckless killing is apparent in the CCRC public opinion surveys.¹⁸⁵

(2) *USAO at App. C. 296, 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.”*

- No change to the RCC is required by this recommendation. The RCC General Part in Chapter 6 did not previously, and does not now, contain enhancements that are duplicative with the specific enhancements

¹⁸¹ LaFave, Wayne. Substantive Criminal Law § 15.4(a). Criminal Negligence. Stating that for the “quite serious crime of involuntary manslaughter, a felony in most jurisdictions, actual awareness of risk should be required, excepting perhaps, for reasons of policy, in the case where the defendant's only reason for not being aware of the risk is his state of voluntary intoxication.” LaFave further notes that “[t]he modern view, evidenced by the position taken in most of the recent comprehensive criminal codes, is to require for involuntary manslaughter a consciousness of risk—i.e., “recklessness,” as does the Model Penal Code.”

¹⁸² Model Penal Code § 210.3.

¹⁸³ Ala. Code § 13A-6-4; Ark. Code Ann. § 5-10-104; Colo. Rev. Stat. Ann. § 18-3-104; Conn. Gen. Stat. Ann. § 53a-55; Del. Code Ann. tit. 11, § 632; Haw. Rev. Stat. Ann. § 707-702; 720 Ill. Comp. Stat. Ann. 5/9-3; Kan. Stat. Ann. § 21-5405; Ky. Rev. Stat. Ann. § 507.040; Me. Rev. Stat. tit. 17-A, § 203; Mo. Ann. Stat. § 565.024; N.H. Rev. Stat. Ann. § 630:2; N.J. Stat. Ann. § 2C:11-4; N.Y. Penal Law § 125.15; N.D. Cent. Code Ann. § 12.1-16-02; Or. Rev. Stat. Ann. § 163.118; S.D. Codified Laws § 22-16-20; Tex. Penal Code Ann. § 19.04; Utah Code Ann. § 76-5-205; Wash. Rev. Code Ann. § 9A.32.060.

¹⁸⁴ Proposed Federal Criminal Code § 1602.

¹⁸⁵ See Advisory Group Memo #27 Appendix A - Survey Responses at 1 (showing public evaluations of various killings during felonies as being significantly less severe, by at least one classification, than a manslaughter scenario described as: “An intentional killing in a moment of extreme emotional distress (e.g. after a loved one was hurt).” Question 3.26 provided the scenario: “A law enforcement officer cleans their gun, wrongly believing the gun to be unloaded. The gun accidentally discharges, killing someone standing nearby.”). Question 3.26 had a mean response of 8, two classes below the 10.0 milestone corresponding to manslaughter, and the same as the 8.0 corresponding to aggravated assault, currently a 10 year offense in the D.C. Code.

“directly applicable” to first and second degree murder. The RCC only includes three general penalty enhancements, none of which are duplicative of the enhancements in the murder statute: § 22E-606, Repeat Offender Penalty Enhancements; § 22E-607, Hate Crime Penalty Enhancement; and § 22E-608, Pretrial Release Penalty Enhancements.

(3) *USAO, App. C. 273, recommends that throughout the RCC, when the complainant’s status as a protected person increases applicable penalties, instead of requiring recklessness as to the status, strict liability should apply. In addition, USAO recommends that the RCC should include 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.” USAO also recommends that this defense must “be established by a preponderance of the evidence.” As applied to the revised manslaughter statute, this recommendation would change the penalty enhancement under subparagraph (d)(3)(A).*

- The RCC does not incorporate this recommendation for the reasons described in response to the identical recommendation regarding the RCC murder statute.

(4) *USAO, at App. C. 421-422, recommends classifying voluntary manslaughter as a class 4 felony instead of a class 5 felony, and involuntary manslaughter as a Class 5 offense instead of a class 7 offense.*

- The RCC does not incorporate this recommendation because it would result in disproportionate penalties. While the RCC at present does not address absolute imprisonment penalties associated with classes, the RCC recommendation of Class 5 for voluntary manslaughter would correspond to according to 240 months or 216 months in Models 1 and 2 in the First Draft of Report #41. The RCC recommendation of Class 6 for involuntary manslaughter would correspond to according to 180 months or 144 months in Models 1 and 2 in the First Draft of Report #41. The RCC’s penalty recommendations for manslaughter reflect a significant decrease from the current D.C. Code statutory penalties of 30 years imprisonment for manslaughter of any sort, which are outdated and are far more severe than is proportionate under modern D.C. judicial practice.

- i. For all voluntary manslaughter sentences in the Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions, the median sentence (50% of sentences were greater) for voluntary manslaughter was 120 months, including enhancements, and for involuntary manslaughter was 60 months, including enhancements. The 75th percentile (25% of sentences were greater) for voluntary manslaughter was 156 months, including enhancements, and for involuntary manslaughter was 72 months, including enhancements. Even the most severe (97.5%) Superior court sentences for voluntary manslaughter (207 months, including enhancements) and involuntary manslaughter (105.6 months, including enhancements) are a fraction of the enhanced burglary penalties authorized by current statute (360 months for

both) and within the Models 1 and 2 in the First Draft of Report #41.

- ii. Polling of District voters also suggests that classifying involuntary manslaughter as a Class 7 offense appropriately accounts for the harm and culpability. See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.¹⁸⁶

(5) *The CCRC recommends revising the phrasing of the penalty enhancement provision in paragraph (d)(3) to state, “In addition to the general penalty enhancements under this title, the penalty classification for this offense is increased by one class when...” instead of “The penalty classification for first degree murder and second degree murder may be increased in severity by one penalty class, in addition to any penalty enhancements under Chapter 8 of the Title[.]” Broadening the reference to include any general penalty enhancement, instead just enhancements under Chapter 8, facilitates the addition of other general enhancements in the future. Specifying that the classification “is increased,” instead of “may be increased” clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase “one or more of the following is proven” is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.*

- This revision improves the clarity of the revised statute.

¹⁸⁶ Question 3.26 provided the scenario: “Unintentionally killing another driver while speeding and looking at a phone. The driver was aware that driving in such a manner could kill someone.” Question 3.26 had a mean response of 8.5, less than one class above the 8.0 milestone corresponding to aggravated assault, currently a 10 year offense in the D.C. Code. The mean 8.5 response is 1.5 less than the milestone 10 offense, which corresponds to voluntary manslaughter. This gap is generally consistent with the RCC’s recommendation of a two penalty class gap between voluntary and involuntary manslaughter.

In interpreting the public opinion results, note that there was only one question that specifically related to involuntary manslaughter. Moreover, due to survey design limitations, the survey question did not specify a culpable mental state, other than clarifying that the actor was aware of the risk. It is possible that results would vary if other hypotheticals were presented, and if survey respondents were provided with more nuanced descriptions of the requisite culpable mental state.

RCC § 22E-1103. Negligent Homicide.

(1) *USAO at App. C. 295, recommends retaining a civil negligence standard for the negligent homicide offense.*

- The RCC does not incorporate this recommendation because it may result in disproportionate penalties and would result in inconsistency in the culpable mental states applicable to homicide offenses. A civil negligence standard only requires a deviation from the ordinary standard of care, whereas the criminal negligence standard under the RCC requires that the actor should have been aware of a substantial risk of death, and that the failure to perceive the risk was clearly blameworthy. Using a civil negligence standard to apply felony homicide liability is disproportionately severe,¹⁸⁷ and is inconsistent with national legal trends.¹⁸⁸ No other offense in the RCC or current D.C. Code Title 22 (as far as the CCRC is aware) applies criminal liability, let alone felony liability, on the basis of civil negligence. Moreover, as neither civil nor criminal negligence require any subjective awareness of risk, lowering the culpable mental state is unlikely to produce any additional deterrent effect.

¹⁸⁷ Commentary to the Model Penal Code acknowledges that even under its heightened criminal negligence standard, criminal liability is controversial. “No one has doubted that purpose, knowledge, and recklessness are properly the basis for criminal liability, but some critics have opposed any penal consequences for negligent behavior.” Commentary to MPC § 2.02. Although the MPC disagrees that negligence is categorically insufficient from criminal liability, the drafters note that even the heightened form of negligence codified in the MPC “should properly not generally be deemed sufficient in the definition of specific crimes[.]” The MPC does not codify a homicide offense predicated on tort negligence.

¹⁸⁸ Only six states provide homicide liability on the basis of civil negligence. Cal. Penal Code § 193; Conn. Gen. Stat. Ann. § 14-222a; Haw. Rev. Stat. § 701-107; Mass. Gen. Laws Ann. ch. 90; § 24G, Nev. Rev. Stat. Ann. § 193.150; Okla. Stat. Ann. tit. 47, § 11-903. The other forty-four jurisdictions do not have an analogous negligent homicide offense; require gross or criminal negligence; or require civil negligence plus an additional aggravating factor, such as intoxication, or violation of a state or local traffic law.

In its comment, USAO notes that Maryland recently adopted a Negligent Homicide offense, and states that it is “consistent with D.C.’s current law that criminalizes both gross negligence and civil negligence.” However, this interpretation of the statute is not supported by the text of the statute or relevant case law. Maryland’s Negligent Homicide statute requires that the person “cause the death of another as the result of the person’s driving, operating, or controlling a vehicle or vessel in a criminally negligent manner.” Md. Code Ann., Crim. Law § 2-210. The statute specifies that a person acts in a “criminally negligent manner” when “(1) the person should be aware, but fails to perceive, that the person’s conduct creates a substantial and unjustifiable risk that such a result will occur; and (2) the failure to perceive constitutes a gross deviation from the standard of care that would be exercised by a reasonable person.” *Id.* The Maryland Court of Special Appeals noted that the Maryland General Assembly provided guidance in interpreting this statute by stating that “the term ‘gross deviation from the standard of care’ was to ‘be interpreted synonymously with the term ‘gross deviation from the standard of care’ under § 2.02(2)(d) of the Model Penal Code.” *Beattie v. State*, 88 A.3d 906, 915 (Md. Ct. Spec. App. 2014). Commentary to MPC § 2.02 specifically states that “the requirements established [for criminal negligence] are considerably more rigorous than simple negligence as usually treated in the law of torts.” MPC Commentary at 243, n. 31. Maryland’s Negligent Homicide offense’s *mens rea* requirement is virtually identical to that under the RCC’s negligent homicide offense.

- USAO’s comment is ambiguous as to whether the RCC’s negligent homicide offense should require causing death of another by operating a motor vehicle. While a civil negligence standard is insufficiently culpable to warrant criminal liability under either scenario, a civil negligence standard would be especially problematic if the offense were broadened to include deaths caused by any means.
- (2) *USAO at App. C. 296, 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.”*
- No change to the RCC is required by this recommendation. The RCC General Part in Chapter 6 did not previously, and does not now, contain enhancements that are duplicative with the specific enhancements “directly applicable” to first and second degree murder. The RCC only includes three general penalty enhancements, none of which are duplicative of the enhancements in the murder statute: § 22E-606, Repeat Offender Penalty Enhancements; § 22E-607, Hate Crime Penalty Enhancement; and § 22E-608, Pretrial Release Penalty Enhancements.

Robbery. RCC § 22E-1201.

- (1) *USAO, at App. C. 300-301, opposes removing the “stealthy seizure” form of robbery from the revised robbery statute. USAO says that this change creates ambiguity as to when a taking from a person constitutes robbery or mere theft.*
- The RCC partially incorporates this recommendation by adding as a distinct means of committing robbery “removing property held in the hand or arms of the complainant.” This change clarifies that seizing an item from a person’s grasp, even when non-painful and non-harmful (and so not covered by the revised statute’s sub-paragraph (e)(4)(A) concerning “bodily injury”) is sufficient for robbery liability. Cases such as suddenly snatching a phone from a person’s grasp may involve such small and quick movements that it may be unclear whether the force used by the actor overpowered the complainant (and, consequently, whether the conduct is captured by the revised statute’s sub-paragraph (e)(4)(C) concerning “using physical force that overpowers”). This change clarifies that ambiguity.
 - However, the RCC does not recommend retaining the District’s current statutory provision treating all “sudden or stealthy seizure or snatching” as robbery. Retaining the current statute’s language would result in unnecessarily overlapping statutes and disproportionate penalties by categorically treating all pickpocketing and non-violent thefts from persons as the same as violent takings. For example, under the current statute it is robbery to quietly take property lying on a chair nearby the owner while the owner is in a conversation with a friend and does not see the taking. Treating this non-violent conduct as a felony offense, regardless of the value of the property, would be disproportionately severe. The RCC separately criminalizes takings from a person as fourth degree theft.
- (2) *USAO, at App. C. 301-302, recommends codifying a separate carjacking statute, instead of including carjacking within the revised robbery statute.*
- The RCC does not incorporate this recommendation because it would create unnecessary overlap between offenses. Carjacking is a form of robbery in which the property taken is a motor vehicle. Just as neither the RCC nor the current D.C. Code codify a separate auto-theft offense, there is no need for a separate carjacking offense. Carjacking may involve taking property that is more valuable than the property seized in an ordinary robbery, but this distinction is reflected in the grading distinctions in the revised robbery statute.
 - To the extent that carjacking may involve harm in addition to taking a motor vehicle by means of force or threats, separate RCC criminal offenses account for these additional harms. For example, if a person commits carjacking by driving away while a passenger is still in the car, the person could be convicted of both robbery and kidnapping, and the sentences could be imposed consecutively. The RCC classifies robbery in which a motor vehicle is taken as fourth degree robbery. This penalty

gradation properly accounts for the harm imposed by taking a motor vehicle by use of force or threats. Carjacking by displaying or using a dangerous weapon is subject to more severe penalties under the RCC. Committing robbery in which the property taken is a motor vehicle, by means of displaying or using a dangerous weapon is categorized as third degree robbery.

- Polling of District voters also suggests that the harm caused by carjacking is accounted for in the RCC’s robbery statute. See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.¹⁸⁹
- The RCC’s fourth degree robbery offense includes robbery of a motor vehicle, as well as robberies in which the defendant recklessly causes significant bodily injury. Significant bodily injury is defined as “a bodily injury that, to prevent long-term physical damage or to abate severe pain, requires hospitalization or immediate medical treatment beyond what a layperson can personally administer.”¹⁹⁰ Significant bodily injuries include broken bones, lacerations requiring stitches, second degree burns, and traumatic brain injuries. The penalty for committing a robbery while causing this degree of injury is sufficient to account for the harm involved in committing a robbery in which a motor vehicle is taken. Under the D.C. Code, there are some minor differences between the robbery and carjacking statutes, in addition to the requirement under carjacking that the property involved be a motor vehicle. For example, the D.C. Court of Appeals has noted two differences between the robbery and carjacking statutes: 1) the robbery offense required “specific intent to steal,” whereas the carjacking statute only requires that the actor “recklessly” took the motor vehicle; and 2) unlike the robbery statute, the carjacking statute does not require “asportation.” i.e. that the property be carried away.¹⁹¹ Given these differences, it may have been necessary under the D.C. Code to separately codify each offense.¹⁹² However, the RCC does not maintain these distinctions, and the USAO’s comments do not suggest that these distinctions should remain in effect. Accordingly, there is no sufficient rationale for separately codifying a carjacking offense.

¹⁸⁹ Question 1.14 provided the scenario: “Pulling the only person in a car out, causing them minor injury, then stealing it.” Question 1.14 had a mean response of 6.2, less than one class above the 6.0 milestone corresponding to felony assault, currently a 3 year offense in the D.C. Code.

¹⁹⁰ RCC § 22-701.

¹⁹¹ *Pixley v. United States*, 692 A.2d 438, 440 (D.C. 1997).

¹⁹² It does not appear from the available legislative history, however, that the when the separate carjacking statute was legislatively enacted there was consideration as to whether a person could be convicted of both robbery and carjacking for the same event. This oversight means that, under the DCCA’s “elements test” (which generally allows multiple convictions for offenses that each differ by one element from each other, absent a legislative intent to the contrary), a person now can be convicted and sentenced consecutively for robbery and carjacking. Such stacking of convictions and penalties appears to authorize disproportionate penalties.

- (3) *USAO, at App. C. 302, recommends amending the robbery statute to include taking property by “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 says that this language would clarify that robbery includes non-verbal threats.*
- The RCC partially incorporates this recommendation by adding a threat of a “sexual contact” to the list of specified threats. This change eliminates a possible gap in liability.
 - The RCC does not adopt USAO’s proposed language concerning use of conduct that places a person in fear because drafting statutes in such a manner is inconsistent with the RCC general approach of including within threats gestures and other conduct. This RCC approach is consistent with the plain language meaning of “threaten” as including menacing a person with a weapon.¹⁹³ To separately address conduct that places a person in “reasonable fear” may suggest that threats ordinarily do *not* include conduct that place a person in reasonable fear, or that a significant difference is intended between a threat that is verbal or non-verbal.¹⁹⁴ The RCC consistently uses threats to include non-verbal conduct, however, the robbery commentary will be updated to further clarify that threats, as required for the robbery statute, do not require verbal communication.
- (4) *USAO, App. C. 302, recommends amending the “protected person provisions consistent with recommendations in the General Comments.*
- The RCC does not incorporate this recommendation for the reasons described in response to the identical recommendation regarding the RCC murder statute.
- (5) *USAO, at App. C. 302, recommends amending the offense to provide for higher penalty grades when the actor acted “while armed,” instead of requiring that the actor “used or displayed” a dangerous weapon or imitation weapon.*
- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC eliminates a general “while armed” penalty enhancement for crimes of violence in favor of incorporating gradations for the use or display of a weapon into violent offenses and retaining an array of separate offenses, such as: carrying a dangerous weapon (RCC § 22E-4102); possession of a dangerous weapon with intent to commit crime (RCC § 22E-4103); and possessing a dangerous weapon during a crime (RCC § 22E-4104). Commentary for the offense gradation specifies that the phrase “by displaying or using” a weapon “should be broadly construed to include making a weapon known

¹⁹³ See Merriam-Webster online dictionary definition of “threaten” (providing as one of the definitions “to cause to feel insecure or anxious” and listing as the first example of a use of the word, “The mugger threatened him with a gun.”) (last visited 12-29-19).

¹⁹⁴ For example, it is unclear what work the word “reasonable” is doing in the USAO’s proffered language, and whether or how such a reasonableness requirement differs from a verbal threat.

by sight, sound, or touch.”¹⁹⁵ When an actor does not satisfy this requirement for displaying or using a weapon, the complainant does not experience increased fear of serious harm and the impact of the encounter is likely to be significantly less traumatic. Although there may be an increased risk of harm when an actor simply possesses or carries a dangerous weapon, this is accounted for by the various separate RCC Chapter 41 weapons offenses for which the actor would be liable and may be sentenced consecutively. The USAO recommendation would treat as equivalent the display or use of a dangerous weapon during an encounter with less severe conduct.

- Polling of District voters also suggests that the harm caused by actual use or display of a dangerous weapon differs from mere possession or carrying a dangerous weapon. See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.¹⁹⁶

(6) USAO, at App. C. 303, recommends including the words “imitation dangerous weapon” in first, second, and third degree robbery.

- The RCC incorporates this recommendation by including the words “imitation dangerous weapon” in first, second, and third degree robbery. Inclusion of both dangerous weapons and imitation dangerous weapons achieves separate policy goals. Dangerous weapons produce a heightened risk of serious injury or death while imitation weapons may elicit substantially greater fear in the complainant but do not involve a similar risk of violence. However, the grading of the RCC first, second, and third degree robbery accounts for not only the display or use of a dangerous weapon, but the infliction of varying degrees of bodily injury by means of that weapon. While it would be a rare fact pattern where the use or display of an imitation dangerous weapon causes bodily injury or worse, there is no significant difference in seriousness in such scenarios and they should be graded the same. This change clarifies the revised statute and may improve the proportionality of penalties.

(7) USAO, at App. C. 303 recommends in the alternative that fourth degree robbery should replace the word “display” with “displays or uses.”

- The RCC incorporates this recommendation by adding the words “or uses” to subparagraph (d)(2)(A)(ii). While there are few fact patterns where “use” of a dangerous weapon or imitation dangerous weapon would not

¹⁹⁵ Commentary to the revised robbery statute references commentary to RCC § 22E-1203. Menacing.

¹⁹⁶ Question 1.18 provides the scenario “Robbing someone’s wallet by punching them, which caused minor injury.” The mean response to this scenario was 6. Question 1.16 provides the scenario “Robbing someone’s wallet by threatening to kill them. The robber secretly carried, but never displayed, a gun.” The mean response to this scenario was 6.2, only slightly higher than the mean response for unarmed robbery. Question 1.17 provides the scenario, “Robbing someone’s wallet by displaying a gun and threatening to kill them.” The mean response to this scenario was a 7. The responses to these three scenarios suggest that the public believes that while actually displaying or using a weapon while committing robbery justifies an increase in penalty severity by one class, there is relatively little distinction between an unarmed robbery and robbery while possessing, but not displaying or using, a weapon.

involve a “display” of such a weapon, there is no significant difference in seriousness in such scenarios and they should be graded the same. This change clarifies the revised statute and may improve the proportionality of penalties..

(8) *USAO, at App. C. 303, recommends amending subparagraph (e)(4)(B) to add threats of “sexual contact” as a form of robbery.*

- The RCC incorporates this recommendation by adding a threat of a “sexual contact” to the list of specified threats. This change will improve the clarity and proportionality of the revised criminal code.

(9) *USAO, at App. C. 303-304, recommends in subparagraph (e)(4)(C) replacing the words “overpower” with the words “is sufficient to overpower.”*

- The RCC does not incorporate this recommendation because it would make the statute less clear and does not improve the consistency of the revised statutes. The current definition of “force” in the sexual abuse context may have been intended to avoid language that suggests there must be proof that the complainant offered resistance to the actor (a common requirement in older sex assault statutes). However, importing such language into the revised statute is unnecessarily complicated and inherently ambiguous, and such language is eliminated in the RCC revised sexual assault statutes. It is unclear if the degree of force that “is sufficient to overcome” a person is intended to be different in degree from force that “actually overcomes” a complainant, or whether this is primarily intended as an evidentiary provision that, for example, would allow a witness description of a robbery to suffice for prosecution even when the complainant themselves is unwilling to testify. Either way, requiring speculation as to what degree of force would be sufficient to overcome a person would introduce an ambiguous and subjective element into the revised statute—particularly as this “overpowers” element only comes into play in lower gradations that don’t involve bodily injuries, threats, or use or display of dangerous weapons.

(10) *PDS, at App. C. 414, recommends that first degree robbery should be classified as a Class 6 felony instead of a Class 5 felony, and moving each subsequent grade of robbery down by one class.*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. Under PDS’s proposal, degrees of robbery generally would be included in the same penalty class as corresponding degrees assault, even though robberies involve both assaultive conduct and theft-type conduct. The hybrid nature of robbery as an offense against persons and a property crime merits more serious punishment than the corresponding assaultive harm alone. Due to the current robbery statute’s lack of gradations, it is not possible to evaluate how current District robbery involving assaultive conduct compares to the sentencing for various gradations of assault. However, support among District voters for grading the penalty for a robbery involving assaultive

conduct more seriously than such assaultive conduct alone is apparent in the CCRC public opinion surveys.¹⁹⁷

- (11) *The CRCC recommends adding the word “or” at the end of sub-subparagraph (d)(2)(A)(ii). This change is clarificatory and does not substantively alter the offense. This change clarifies that the elements under subparagraph (d)(2)(A) are alternates, and only one must be proven. This change improves the clarity of the revised statute.*

¹⁹⁷ See Advisory Group Memo #27 Appendix A - Survey Responses. Question 1.18 provided the scenario: “Robbing someone’s wallet by punching them, which caused minor injury.”). Question 1.18 had a mean response of 6, two classes above the 4 milestone corresponding to simple assault involving a minor injury, and the same as the 6 milestone corresponding to significant bodily injury assault, currently a 3 year offense in the D.C. Code.

RCC § 22E-1202. Assault.

(1) *USAO, App. C at 305, recommends in first degree assault, second degree assault, and third degree assault replacing “by displaying or using an object that, in fact, is a dangerous weapon” with “while knowingly being armed with or having readily available what, in fact, is a dangerous weapon or imitation dangerous weapon.” USAO, App. C at 272, states that the RCC language is “too limited” and it is “more appropriate” to include the language from the current “while armed” enhancement statute in D.C. Code § 22-4502(a) (“armed with or ha[s] readily available.”). USAO states that “[i]n 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 increased risk of danger by introducing a weapon to an offense,” even if the defendant does not use or display it. Specifically, for firearms, a firearm “could inadvertently discharge, and a complainant could suffer additional injury as a result” and “the presence of a firearm also increases the chances of the intentional use of the weapon at some point during the offense.” USAO states that “it is appropriate to require that the defendant ‘knowingly’ be armed with or have readily available the weapon.” Finally, USAO states that is “appropriate to include both dangerous weapons and imitation dangerous weapons” because if “a firearm is not recovered, it is impossible to tell if it is a real firearm or an imitation firearm.”*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC eliminates a general “while armed” penalty enhancement for crimes of violence in favor of incorporating gradations for the use or display of a weapon into violent offenses and retaining an array of separate offenses, such as: carrying a dangerous weapon (RCC § 22E-4102); possession of a dangerous weapon with intent to commit crime (RCC § 22E-4103); and possessing a dangerous weapon during a crime (RCC § 22E-4104). Commentary for the offense gradation specifies that the phrase “by displaying or using” a weapon “should be broadly construed to include making a weapon known by sight, sound, or touch.”¹⁹⁸ When an actor does not satisfy this requirement for displaying or using a weapon, the complainant does not experience increased fear of serious harm and the impact of the encounter is likely to be significantly less traumatic. Although there may be an increased risk of harm when an actor simply possesses or carries a dangerous weapon, this is accounted for by the various separate RCC Chapter 41 weapons offenses for which the actor would be liable and may be sentenced consecutively. The USAO recommendation would treat as equivalent the display or use of a dangerous weapon during an encounter with less severe conduct.
- Polling of District voters also suggests that the harm caused by actual use or display of a dangerous weapon differs from mere possession or carrying a dangerous weapon. See the responses to survey questions in Advisory

¹⁹⁸ Commentary to the revised assault statute references commentary to RCC § 22E-1203. Menacing.

Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.¹⁹⁹

- (2) *USAO, App. C at 305, recommends in first degree assault, second degree assault, third degree assault, and fifth degree assault replacing the “protected person” gradations with a negligence standard, for the reasons stated in its General Comments (App. C at 273-274).*
 - The CCRC does not incorporate this recommendation for the reasons stated in the response to the same comment for the RCC murder statute (RCC § 22E-1101).
- (3) *The CCRC recommends replacing “an object that, in fact, is” with “what, in fact, is” in the weapons gradations and in the prohibition on negligent discharge of a firearm. With this change, the weapons gradations will require the use or display of “what, in fact, is a dangerous weapon or imitation dangerous weapon” and the prohibition on the negligent discharge of a firearm will require discharging “what, in fact, is a firearm.” The reference to “an object” is unnecessary and is not used in the weapons gradations of other RCC offenses.*
 - This change improves the clarity and consistency of the revised statute.
- (4) *The CCRC recommends replacing the reference to a firearm “as defined in D.C. Code § 22-4501(2A)” in sixth degree assault. With this change, this provision in sixth degree assault would require negligently causing bodily injury to the complainant by discharging a “firearm” and the RCC definition of “firearm” in RCC § 22E-701 would apply. “Firearm” is a defined term in the RCC and is used in multiple revised offenses.*
 - This change improves the clarity and consistency of the revised statute.
- (5) *The CCRC recommends including “an imitation dangerous weapon” in paragraphs (a)(3), (b)(2), and (c)(2) so that they prohibit causing the specified type of bodily injury “by displaying or using an object that, in fact, is a dangerous weapon or imitation dangerous weapon.” If a defendant uses an “imitation dangerous weapon” to directly cause one of the specified types of bodily injury, e.g., repeatedly hitting a complainant with an imitation firearm, that conduct was already included in the weapons gradations of the RCC assault statute to the extent that the imitation dangerous weapon satisfies subsection (F) of the RCC definition of “dangerous weapon” (“Any object, other than a body part or stationary object, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person.”). USAO, App. C. 303, recommended including the words “imitation dangerous weapon” in first, second, and third degree robbery, in part because “if a gun is not recovered, it is*

¹⁹⁹ Question 1.18 provides the scenario “Robbing someone’s wallet by punching them, which caused minor injury.” The mean response to this scenario was 6. Question 1.16 provides the scenario “Robbing someone’s wallet by threatening to kill them. The robber secretly carried, but never displayed, a gun.” The mean response to this scenario was 6.2, only slightly higher than the mean response for unarmed robbery. Question 1.17 provides the scenario, “Robbing someone’s wallet by displaying a gun and threatening to kill them.” The mean response to this scenario was a 7. The responses to these three scenarios suggest that the public believes that while actually displaying or using a weapon while committing robbery justifies an increase in penalty severity by one class, there is relatively little distinction between an unarmed robbery and robbery while possessing, but not displaying or using, a weapon.

impossible to ascertain if the firearm used is real or an imitation, and they often look identical.” The RCC incorporated this recommendation into the RCC robbery statute, and the same concerns apply to assault. To the extent that the defendant uses an imitation dangerous weapon to directly cause a specified type of bodily injury, and the imitation dangerous weapon does not satisfy the RCC definition of “dangerous weapon,” e.g., hitting the complainant with an imitation firearm one time and causing only “bodily injury,” it is consistent and proportionate to include that conduct in the weapons gradation to account for the use of an imitation weapon. If the defendant uses the imitation dangerous weapon to indirectly cause the specified type of bodily injury, e.g., brandishing an imitation firearm and so causing the complainant to fall down stairs, it is consistent and proportionate to include that conduct in the weapons gradations of assault. Including imitation dangerous weapons ensures that, if the other requirements, particularly the causation requirements, of the RCC assault statute are met, whether an object is an imitation dangerous weapon should not determine liability.

- This change improves the clarity and consistency of the revised statute.
- (6) *USAO, App. C at 304-305, recommends that the assault statute include liability for the use of “force or violence” against the complainant “with the intent to cause bodily injury to the complainant,” even if no bodily injury results.²⁰⁰ USAO states that for these attempted-battery assaults, 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).” USAO states that 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.” USAO states that this change “may shield” from assault liability defendants “who, using force or violence, intend to cause physical injury to another but do not achieve that result” and defendants “who actually cause physical injury to the complainant, but which the government is unable to prove at trial,” including when the complainant is uncooperative. When the government cannot prove bodily injury, USAO states that the defendant “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).”*
- The RCC does not incorporate this recommendation because it would introduce ambiguity into the offense and may authorize disproportionate penalties. The USAO recommendation does not include a definition of the phrase “force or violence” or specify how this phrase differs from the clearly defined definition of attempted assault liability under RCC § 22E-301. Defining the scope of attempted-battery assaults and the meaning of “force or violence” under current District law is a matter in active

²⁰⁰ Specifically, USAO recommends including in third degree of the RCC assault statute “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,” and including in sixth degree “With the intent to cause bodily injury to the complainant, uses force or violence against the complainant.” USAO, App. C at 304.

litigation due to the D.C. Code’s failure to clearly define the elements of assault and the lack of prior case law on point. A panel of the DCCA recently ruled (in an opinion since vacated pending an *en banc* ruling) that unwanted touchings do not necessarily constitute “force or violence” necessary for assault liability.²⁰¹ The USAO recommendation would increase the penalty for conduct that does not result in bodily injury—defined in the RCC to include the infliction of “physical pain, physical injury, illness, or any impairment of physical condition”—and is inconsistent with the other gradations of the RCC assault statute that require a specified type of bodily injury, disfigurement, or maiming. The RCC offensive physical contact offense (RCC § 22E-1205) or attempted assault provide liability for the use of force or violence when bodily injury does not result or cannot be proven, but do so with penalties proportionate to the harm suffered.

(7) USAO, *App. C at 305*, recommends re-instating the “assault with intent to commit” offenses (AWI offenses), or, in the alternative, updating D.C. Code § 16-2307 to replace “assault with intent to commit any such offense” with “an attempt to commit any such offense.” USAO states that under current D.C. Code § 16-2307, there is “a rebuttable presumption for charging a juvenile defendant as an adult pursuant to Title 16” when the defendant is charged with “‘murder, 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 property joinable with such an offense.’”²⁰² USAO notes that eliminating the AWI offenses “limit[s] USAO’s ability to exercise its discretion in charging such individuals pursuant to Title 16.” USAO further states that it “submitted a comment on this issue in its May 20, 2019 comments (*App. C at 236-237*), which is separately addressed in this Appendix in the entries for RCC § 22E-301 (criminal attempt provision).

- The RCC does not incorporate the recommendation to re-instate “assault with intent to” offenses because doing so would reintroduce ambiguity and unnecessarily overlapping offenses, and may authorize disproportionate penalties. In the RCC, liability for the conduct criminalized by the current AWI offenses²⁰³ is provided through application of the general attempt statute in RCC § 22E-301 to the completed offenses in a more consistent manner.²⁰⁴
- The RCC does not incorporate the recommendation to update D.C. Code § 16-2307 to replace “assault with intent to commit any such offense” with “an attempt to commit any such offense” at this time. After the Advisory Group votes to approve final recommendations, time permitting the CCRC

²⁰¹ *Perez Hernandez v. United States*, 207 A.3d 594, 604 (D.C.), vacated, 207 A.3d 605 (D.C. 2019).

²⁰² USAO, *App. C at 305* (quoting D.C. Code § 16-2308(e-2)(1) – (2)).

²⁰³ D.C. Code §§ 22-401 (assault with intent to kill, assault with intent to commit first degree sexual abuse, assault with intent to commit second degree sexual abuse, assault with intent to commit child sexual abuse, assault with intent to commit robbery); 22-402 (assault with intent to commit mayhem); 22-403 (assault with intent to commit any other felony).

²⁰⁴ The commentary to the RCC assault statute (RCC § 22E-1202) discusses this revision in detail.

will include recommendations to the Council and Mayor for conforming amendments such as this one.

(8) *USAO, App. C a 305-306, recommends codifying separately from other assaults and offensive physical contact statutes assaults and offensive physical contact on a law enforcement officer. USAO states that there should be a specific RCC offense for “assaulting a police officer, regardless of whether injury results” as there is under the current assault on a police officer statute. USAO notes that, “it appears that that “Resisting Arrest” is a possible or planned RCC statute in Chapter 34 that has not yet been drafted” but says “USAO believes that a person’s physical conduct might not qualify as ‘resisting arrest’ and yet should still be criminalized.” USAO gives as a hypothetical “a person [that] pushes or shoves an officer,” stating under the RCC, the person would not be guilty of assault, but merely “generic second-degree offensive physical contact.” USAO states that the RCC should separately criminalize assault and offensive contact with law enforcement officers “in recognition of officer’s special roles and the potential for violence if a person does make offensive physical contact with the officer.”*

- The RCC partially incorporates this recommendation by revising the offensive physical contact offense to include a “protected person” gradation for each type of prohibited conduct—contact with bodily fluid or excrement and general offensive physical contact. The RCC definition of “protected person” includes a law enforcement officer, in the course of his or her official duties.²⁰⁵ This change improves the consistency and proportionality of the revised statutes.
- The RCC assault statute already provides liability for physical actions toward law enforcement officers that do not result in bodily injury (defined in the RCC to include the infliction of “physical pain, physical injury, illness, or any impairment of physical condition”) whenever such action satisfies the requirements for attempt liability under RCC § 22E-301.²⁰⁶ The scope of attempted assault liability is the same for law enforcement officers as for other persons, however, even while the penalties differ. In addition, the CCRC does plan to issue recommendations regarding revision of the District’s “resisting arrest” statute, § 22–405.01. Together with the revised offensive physical contact offense, there is no apparent decrease in the scope of covered conduct toward law enforcement officers between the current D.C. Code and the RCC.²⁰⁷ However, unlike the current D.C. Code the RCC reduces overlap between relevant offenses and improves the proportionality of penalties.

²⁰⁵ RCC § 22E-701.

²⁰⁶ For this reason, the USAO statement that, “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” appears incomplete or incorrect. 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).

²⁰⁷ Defining the scope of attempted-battery assaults and the meaning of “force or violence” under current District law is a matter in active litigation due to the D.C. Code’s failure to clearly define the elements of

(9) *USAO, App. C at 306-307, recommends adding “regardless of whether the arrest, stop, or detention was lawful” to paragraph (g)(2)²⁰⁸ of the limitation on justification and excuse defenses to assault on a law enforcement officer. Currently, the subsection reads “the use of force occurred during an arrest, stop, or detention for a legitimate law enforcement purpose.” USAO states that the word “legitimate” is undefined in the RCC, and “could lead to unnecessary litigation over whether the police officer’s actions were for a ‘legitimate’ purpose.” In addition, USAO states that “legitimate” could “connote that the officer’s purpose was also unlawful,” which is contrary to current law²⁰⁹ and that the RCC “should make clear that whether an officer’s actions were legitimate is not related to whether the officer’s actions were lawful.”*

- The RCC incorporates this recommendation by revising paragraph (g)(2) to include “regardless of whether the arrest, stop, or detention is lawful.” This change improves the clarity of the revised statute and may reduce a possible gap in liability.

(10) *OAG, App. C at 249, comments that it assumes that “appeared reasonably necessary” in paragraph (g)(3)²¹⁰ (“The law enforcement officer used only the amount of physical force that appeared reasonably necessary”) refers to “how it appeared to the law enforcement officer.” OAG comments that “[i]f the Commission wanted something else, the language should be amended and further discussion would be warranted.”*

- The RCC commentary previously noted that subsection (g) of the assault statute “codifies the requirements in DCCA case law” that “the law enforcement officer’s use of force appeared reasonably necessary,” and cited to *Nelson v. United States*, 580 A.2d 114, 117 (D.C.1990) (*on rehearing*).²¹¹ The citation to *Nelson* has been replaced with a citation to *Speed v. United States*, where the DCCA approved a jury instruction for assault on a police officer that stated “[i]n making and maintaining the arrest, the measure of reasonable force is that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary.”²¹² This changes clarifies the revised commentary.

(11) *The CCRC recommends, through use of the phrase “in fact,” specifying that strict liability applies to the requirements in paragraphs (g)(2) and (g)(3) of*

assault and the lack of prior case law on point. A panel of the DCCA recently ruled (in an opinion since vacated pending an *en banc* ruling) that unwanted touchings do not necessarily constitute “force or violence” necessary for assault liability. *Perez Hernandez v. United States*, 207 A.3d 594, 604 (D.C.), vacated, 207 A.3d 605 (D.C. 2019).

²⁰⁸ The previous version of the RCC assault statute had non-substantive numbering errors in the subsections. The relevant subsection was previously labeled as (g)(B), but has now been corrected to (g)(2).

²⁰⁹ USAO cites to *Speed v. United States*, 562 A.2d 124, 129 (D.C. 1989).

²¹⁰ The previous version of the RCC assault statute had non-substantive numbering errors in the subsections. The relevant subsection was previously labeled as (g)(C), but has now been corrected to (g)(3).

²¹¹ RCC Commentary Subtitle II. Offenses Against Persons, pages 89-90 & n. 144.

²¹² The citation now reads “*Speed v. United States*, 562 A.2d 124, 127, 128 (D.C. 1989).

the limitation on justification and excuse defenses to assault on a law enforcement officer. With this change, subparagraph (g)(2) would specify “In fact, the use of force occurs during an arrest, stop, or detention for a legitimate police purpose, regardless of whether the arrest, stop, or detention is lawful” and, per the rule of construction in 22E-207, “in fact” would also apply to the requirements in paragraph (g)(3) (“The law enforcement officer uses only the amount of physical force that appears reasonably necessary.”). The previous version of the limitation did not specify whether a culpable mental state or strict liability applied to these requirements in paragraph (g)(2) and (g)(3).

- This change improves the clarity of the revised statute. The commentary to the RCC sexual abuse by exploitation statute has been updated to reflect that this a clarificatory change to current District law.

(12) *The CCRC recommends deleting the jury demandability provisions in subsection (i). The RCC now addresses jury demandability for all RCC offenses in a general provision (RCC § 22E-XX).*

- This revision improves the clarity, consistency, and proportionality of the revised statute.

(13) *OAG, App. C at 408, recommends that all Class A and B misdemeanors be jury demandable, but offenses with a Class C, D, and E penalty, including attempts to commit a Class B misdemeanor, not be jury-demandable. With respect to the RCC assault offenses, this would make attempts to commit sixth degree assault (a Class B misdemeanor) non-jury demandable.*

- The RCC partially incorporates this recommendation to the extent it is consistent with the RCC general approach to jury demandability. As of the Second Draft of Report #41 the RCC specifies that in any case in which a person is not constitutionally entitled to a trial by jury, the trial shall be by a single judge, except for the following main offenses: a Class B offense or inchoate (attempt, conspiracy, etc.) forms of a Class B offense; an offense that requires sex-offender registration; or specified offenses in which the complainant is a law enforcement officer. Under this framework, sixth degree assault (a Class B misdemeanor) and attempted sixth degree assault are jury demandable. See the Second Draft of Report #41, for more details. This change improves the consistency of the revised statute.

(14) *USAO, App. C at 415-419, appears to recommend against creation of a right to a jury trial for sixth degree assault (including attempts). USAO states that requiring jury trials in cases that are non-jury demandable under current law will create a tremendous strain on limited judicial resources.*

The RCC does not incorporate this recommendation because it would be inconsistent with the RCC general approach to jury demandability. As of the Second Draft of Report #41 the RCC specifies that in any case in which a person is not constitutionally entitled to a trial by jury, the trial shall be by a single judge, except for the following main offenses: a Class B offense or inchoate (attempt, conspiracy, etc.) forms of a Class B offense; an offense that requires sex-offender registration; or specified offenses in which the complainant is a law enforcement officer. Under this framework, sixth degree assault (a Class B misdemeanor) and attempted sixth degree assault are jury demandable. See

the Second Draft of Report #41, for more details. This change improves the consistency of the revised statute.

RCC § 22E-1203. Menacing.

(1) *USAO, App. C at 307, recommends subsuming the menacing statute into the assault statute. USAO does not raise concerns about the drafting of the revised menacing statute’s element, but states it is “concerned that this will result in ADW-intent-to-frighten cases being explicitly treated as lesser cases, and likely subject to lesser penalties...[which] does not represent the dangers created by this offense.”*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties by punishing conduct of significantly different seriousness the same.
- In criminal law, District courts have recognized “intent-to-frighten assault,”²¹³ “attempted battery assault,”²¹⁴ and “offensive physical contact assault,” which includes “non-violent sexual touching assault.”²¹⁵ District courts have explained that intent-to-frighten assault requires a “menacing” or “threatening” act.²¹⁶ The RCC relabels the infliction of apprehension “menacing,”²¹⁷ the infliction of physical harm or injury “assault,”²¹⁸ the infliction of offensive physical contact “offensive physical contact,”²¹⁹ and non-violent sexual touching “sexual assault”²²⁰ and/or “non-consensual sexual conduct.”²²¹ The revised menacing statute accounts for the seriousness of displaying or using a weapon or imitation weapon through the penalty gradation structure, which punishes “gun point cases” as first degree menacing. Subsuming these cases—which do not involve contact, bodily injury, or attempted bodily injury—into the RCC’s equivalent of a battery statute would lead to disproportionate penalties.
- In the First Draft of Report #41 (October 3, 2019), the CCRC recommended that the RCC classify first degree menacing—which does not require any bodily injury or an attempt to cause bodily injury—as a Class 9 felony, equivalent to an assault that actually results in significant bodily injury.²²² The RCC grading of assault, detailed in the First Draft of Report #41, provides more serious penalties for assaults with a dangerous

²¹³ *McGee v. United States*, 533 A.2d 1268, 1270 (D.C. 1988).

²¹⁴ *Ray v. United States*, 575 A.2d 1196 (D.C. 1990).

²¹⁵ *In the Matter of A.B.*, 556 A.2d 645, 646–47 (D.C. 1989).

²¹⁶ *Williamson v. United States*, 445 A.2d 975, 978 (D.C. 1982); *Robinson v. United States*, 506 A.2d 572, 574 (D.C. 1986).

²¹⁷ RCC § 22E-1203.

²¹⁸ RCC § 22E-1202.

²¹⁹ RCC § 22E-1205.

²²⁰ RCC § 22E-1301.

²²¹ RCC § 22E-1307.

²²² “Significant bodily injury” means a bodily injury that, to prevent long-term physical damage or to abate severe pain, requires hospitalization or immediate medical treatment beyond what a layperson can personally administer. 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; a burn of at least second degree severity; a temporary loss of consciousness; a traumatic brain injury; and a contusion or other bodily injury to the neck or head caused by strangulation or suffocation. RCC § 22E-701.

weapon that result in any bodily injury (3rd Degree Assault, a Class 8 felony), significant bodily injury (2nd Degree Assault, a Class 7 felony), and serious bodily injury (1st Degree Assault, a Class 6 felony). In contrast, the USAO recommendation would punish conduct that results in bodily injury (of varying degrees) the same as conduct that does not cause any bodily injury and falls short of an attempt to inflict bodily injury.

(2) *USAO, App. C at 307-308 and 415-419, appears to recommend against creation of a right to a jury trial for second degree menacing. USAO states, in relevant part, that it is “unclear how there are any particular, unique constitutional interests created by this offense.” USAO further states that requiring jury trials in cases that are non-jury demandable under current law will create a tremendous strain on limited judicial resources.*

- The RCC does not incorporate this recommendation because it would be inconsistent with the RCC general approach to jury demandability. As of the Second Draft of Report #41, the CCRC generally recommends that the RCC classify all Class A and Class B misdemeanors, and inchoate versions of those offenses, as jury demandable offenses, improving the consistency of the revised statutes. This would include the RCC first and second degree menacing offenses, and inchoate versions of those offenses. The Second Draft of Report #41 provides a general justification of this change.
- In addition to the general RCC approach to jury demandability, the RCC menacing offense particularly merits jury demandability because it, in part, criminalizes a form of speech. Unlike the current “intent-to-frighten” assault statute, the RCC menacing offense includes not only bodily movements but verbal speech. Subject to limited exceptions, such as a “true threats” exception,²²³ the exercise of free speech is protected by the First Amendment to the United States Constitution. The Council has long recognized a heightened need to provide jury trials to defendants accused of crimes that may involve the exercise of civil liberties.²²⁴ The DCCA

²²³ See *Virginia v. Black*, 538 U.S. 343, 359–360 (2003).

²²⁴ See Report on Bill 16-247, the “Omnibus Public Safety Amendment Act of 2006,” Council of the District of Columbia Committee on the Judiciary (April 28, 2006) at Page 7.

The Council has grappled with so-called ‘misdemeanor streamlining’ for over a decade. On the one hand, judicial expediency urges that the number of jury-demandable misdemeanor crimes be minimized. On the other hand, the right to a jury trial seems fundamental.

Generally, the committee print provides for jury demandable offenses where there is a possible conflict between law and civil liberties. For instances, the status offense of gang membership (no criminal activity required other than mere membership) is such that the extra layer protection for the liberty of the accused individual, - that is, allowing for a jury trial - is reasonable. Similarly, the penalty for unlawful entry currently is jury demandable. Because this charge is often brought against demonstrators, the protection of trial by jury seems prudent. The newly created prostitution free zones *will permit law enforcement against otherwise permitted activity* - freedom of association, for instance -

recently noted, “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.”²²⁵

(3) *USAO, App. C at 308, recommends adding a penalty enhancement for first degree menacing of a minor, senior citizen, transportation worker, District official or employee, or citizen patrol member. USAO cites its general comments for all offenses on such penalty enhancements. This apparently refers to USAO recommendations in App. C at 273 that there be a new affirmative defense applying a negligence standard as to the defendant’s age.*

- The RCC partially incorporates this recommendation by applying a penalty enhancement for recklessly menacing a protected person.²²⁶ This change improves the proportionality and consistency of the revised statutes.
- The RCC does not adopt a “negligence” standard as to the victim’s status as a protected person for the reasons stated in the response to the same comment in the RCC murder statute.²²⁷

(4) *OAG, App. C at 249, recommends either striking the exclusion from liability for protected speech or providing a specific example of a menacing fact pattern that involves protected speech.*

- The RCC incorporates this recommendation by striking the exclusion from liability language as potentially confusing. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion. This change clarifies but does not substantively change the revised offense.

(5) *OAG, App. C at 249, recommends amending the commentary (p. 94) that explains a communication must be “received and understood” by the intended listener. OAG notes an apparent conflict between this comment and the commentary (p. 95) explaining that it is “not necessary to prove that the communication was perceived as a serious expression of an intent to do harm.”*

- The RCC partially incorporates this recommendation by clarifying the commentary. The menacing offense requires that the listener receive and understand, at the most basic level, the *meaning* of the defendant’s

and thus the bill permits trial by jury. Another concern is whether the elements of the crime are somewhat subjective. In such cases the defendant should be able to present his or her case to representatives of the community (i.e., a jury) to answer the question whether there is guilt beyond a reasonable doubt.

(Emphasis added.)

²²⁵ *Bado v. United States*, 186 A.3d 1243, 1264 (D.C. 2018) (Washington, J., concurring).

²²⁶ “Protected person” is defined in RCC § 22E-701.

²²⁷ RCC § 22E-1101.

speech.²²⁸ However, the offense does not require that the listener be certain about the *intent* behind the defendant’s speech. So long as (1) the defendant intended that the victim perceive the threat as serious²²⁹ and (2) a reasonable person in the victim’s circumstances would perceive the threat as serious,²³⁰ it is of no consequence that the listener does not actually believe that the defendant means what was said.²³¹ The commentary is updated to include this explanation. This change clarifies the revised commentary.

(6) *USAO, App. C at 426, recommends that first degree menacing be reclassified as a Class 7 or Class 8 felony. USAO notes that survey respondents ranked ‘threatening to kill someone face-to-face, which [sic.] displaying a gun,’ at a mean score of 7.6 [out of 12].*²³²

- The RCC partially incorporates this recommendation by making first degree menacing a Class 8 felony when committed against a protected person.

²²⁸ Similarly, in the revised criminal threats offense, the verb “communicates” is intended to be broadly construed, encompassing all speech and other messages that are received and understood by another person. RCC § 22E-1205. In *Evans v. United States*, 779 A.2d 891, 894-95 (D.C. 2001), the DCCA recognized that for there to be a communication of a threat the recipient must be able to access or comprehend it, at the most basic level. For example, there is no communication of a threat if the content of the threat is in a language that the recipient does not comprehend.

²²⁹ For example, a person who screams a threatening remark out of exasperation without intent to frighten the listener does not commit a menacing offense.

²³⁰ See *Lewis v. United States*, 95 A.3d 1289, 1290 (D.C. 2014) (reversing a conviction where the appellant was expressing frustration over his arrest by yelling derogatory names at the officers and yelling that the officer was “lucky” that appellant had not had a gun on him because he would have “blown [the officer’s] partner’s god-damned head off.”)

²³¹ Consider, for example, Coworker A approaches Coworker B threatening to “beat him up” in the office. B believes that A would never risk losing A’s job by following through on this threat. A, nevertheless, may have committed menacing against B.

²³² Advisory Group Memo #27, at 2.

RCC § 22E-1204. Criminal Threats.

(1) *USAO, App. C at 308 and 415-419, appears to recommend against creation of a right to a jury trial for all degrees of threats, including attempts. USAO also states, in relevant part, “there are no particular constitutional interests created [sic.] by the Threats statute.” USAO further states that in current practice, the government almost always proceeds under an attempted threat theory in misdemeanor cases, resulting in non-jury trials.*

- The RCC partially incorporated this recommendation in the Second Draft of Report #41, concerning jury demandability. In the First Draft of Report #41 (October 3, 2019), the CCRC recommended that the RCC classify first degree threats as a Class B misdemeanor and second degree threats as a Class C misdemeanor. In the Second Draft of Report #41, the CCRC recommended that the RCC classify completed and inchoate forms of Class B misdemeanors as jury demandable and classify Class C misdemeanors as non-jury demandable, improving the consistency of the revised statutes.
- Under current District law violation of D.C. Code § 22-407 is punishable by six months and a violation of D.C. Code § 22-1810 is punishable by 20 years, rendering both jury demandable.²³³ Only an attempted violation of D.C. Code § 22-407 or D.C. Code § 22-1810—currently punishable by up to 180 days—is non-jury demandable. In contrast with the current threats statutes, the sole manner in which the RCC changes jury demandability is by making the completed form of the revised second degree threats statute non-jury demandable.
- In addition to the general RCC approach to jury demandability, the RCC criminal threats offense particularly merits jury demandability because it criminalizes a form of speech. Subject to limited exceptions, including a “true threats” exception,²³⁴ the exercise of free speech is protected by the First Amendment to the United States Constitution. The Council has long recognized a heightened need to provide jury trials to defendants accused of crimes that may involve the exercise of civil liberties.²³⁵ The DCCA

²³³ See D.C. Code § 16-705.

²³⁴ See *Virginia v. Black*, 538 U.S. 343, 359–360 (2003).

²³⁵ See Report on Bill 16-247, the “Omnibus Public Safety Amendment Act of 2006,” Council of the District of Columbia Committee on the Judiciary (April 28, 2006) at Page 7.

The Council has grappled with so-called ‘misdemeanor streamlining’ for over a decade. On the one hand, judicial expediency urges that the number of jury-demandable misdemeanor crimes be minimized. On the other hand, the right to a jury trial seems fundamental.

Generally, the committee print provides for jury demandable offenses where there is a possible conflict between law and civil liberties. For instances, the status offense of gang membership (no criminal activity required other than mere membership) is such that the extra layer protection for the liberty of the accused individual, - that is, allowing for a jury trial - is reasonable. Similarly, the penalty for unlawful entry currently is jury

recently noted, “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.”²³⁶

- (2) *USAO, App. C at 309, recommends adding a penalty enhancement for threats against a minor, senior citizen, transportation worker, District official or employee, or citizen patrol member.*
 - The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. Notably, the threats offenses under current District law²³⁷ are not subject to a protected person-type enhancement based on the victim’s status as over 65 years of age or under 18 years of age, or as a citizen patrol member. Current D.C. Code § 22-3752 provides an enhancement for “threats to do bodily harm” to transportation workers, and there is a separate offense for certain threats to District officials in D.C. Code § 22-851. The RCC brings consistency to the wide array of predicate offenses for various enhancements based on the victim’s “protected person” status but does not expand the use of such enhancements for misdemeanors other than simple assault.
- (3) *The CCRC recommends increasing the value threshold for the financial injury penalty enhancement from \$250 to \$500 consistent with the thresholds for the revised property offenses.²³⁸ This change is made for the reasons described in the identical CCRC recommendation regarding the RCC fraud statute.²³⁹*
 - This change improves the consistency of the revised offenses.
- (4) *The CCRC recommends revising the commentary to reflect an additional change to current District law. Specifically, the revised statute does not include a provision similar to the D.C. Code § 22-407’s statement that, “Whoever is convicted...may be required to give bond to keep the peace for a period not exceeding 1 year.”*
 - This change clarifies the revised commentary.
- (5) *The CCRC recommends revising the commentary to note the DCCA’s recent opinion in Roberts v. United States,²⁴⁰ which was issued after the most recent draft language was released.*

demandable. Because this charge is often brought against demonstrators, the protection of trial by jury seems prudent. The newly created prostitution free zones *will permit law enforcement against otherwise permitted activity* - freedom of association, for instance - and thus the bill permits trial by jury. Another concern is whether the elements of the crime are somewhat subjective. In such cases the defendant should be able to present his or her case to representatives of the community (i.e., a jury) to answer the question whether there is guilt beyond a reasonable doubt.

(Emphasis added.)

²³⁶ *Bado v. United States*, 186 A.3d 1243, 1264 (D.C. 2018) (Washington, J., *concurring*).

²³⁷ D.C. Code §§ 22-407 and 22-1810.

²³⁸ *See, e.g.*, RCC §§ 22E-2101 (Theft); 22E-2202 (Fraud); 22E-2205 (Identity Theft).

²³⁹ RCC § 22E-2201.

²⁴⁰ 216 A.3d 870, 886 (D.C. 2019).

- This change clarifies the revised commentary.
- (6) *The CCRC recommends striking the exclusion from liability for protected speech as potentially confusing.*
- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

RCC § 22E-1205. Offensive Physical Contact.

(1) *USAO, App. C at 309-310, recommends, in the event that “bodily injury” is not eliminated as a requirement from assault, making what is now third degree offensive physical contact “an explicit lesser included offense of sixth degree assault.” Specifically, USAO recommends amending what is now third degree offensive physical contact to include as paragraph (c)(4) “Or commits what would be sixth degree assault but for the absence of bodily injury.” USAO states that “the line between a sixth-degree assault and [what is now third degree] offensive physical contact will sometimes be hard to delineate” and “will often turn on whether the victim experienced ‘physical pain’” as assessed by a factfinder. USAO states that this revision would eliminate the need for USAO to charge both third degree offensive physical contact and sixth degree assault “in every run-of-the-mill assault case.”*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC assault statute and RCC offensive physical contact statute require different culpable mental states in addition to different types of harm. RCC sixth degree assault requires recklessly causing “bodily injury,” defined in RCC § 22E-701 as “physical pain, physical injury, illness, or any impairment of physical condition.” What is now third degree of the RCC offensive physical contact offense requires higher culpable mental states—knowingly causing physical contact with the complainant with intent that the physical contact be offensive to the complainant.²⁴¹ Including in what is now third degree offensive physical contact a reckless touching without bodily injury would criminalize any physical contact that is done “recklessly,” no matter how trivial, such as bumping into someone on Metro.

(2) *USAO, App. C at 310, recommends including a protected person enhancement for both degrees of the RCC offensive physical contact offense. USAO states that conduct that constitutes first degree offensive physical contact “could be a serious offense in certain circumstances” because bodily fluid “can contain transmittable disease, and can lead to serious consequences for a victim” who becomes infected. Second, having a protected person enhancement “reflects the added seriousness of committing these crimes against vulnerable community members.” USAO proposes using the language suggested in its General comments, App. C at 273, which applies strict liability to the fact that the complainant is a “protected person” with 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.”*

- The RCC partially incorporates this recommendation by expanding the offensive physical contact offense to three gradations, as opposed to two, and codifying a protected person gradation in what is now first degree and

²⁴¹ The RCC offensive physical contact offense also requires that “in fact, a reasonable person in the situation of the complainant would regard” the contact as offensive.

second degree of the offense. The protected person gradation applies to each type of prohibited conduct in the revised statute—contact with bodily fluid or excrement and general offensive physical contact. Specifically, first degree offensive physical contact is now reserved for causing a protected person to come into physical contact with bodily fluid or excrement or causing this physical contact with the purpose of harming the complainant because of the complainant’s status as a law enforcement officer, public safety employee, or District official. Second degree offensive physical contact now prohibits either causing any complainant to come into physical contact with bodily fluid or excrement, or committing third degree offensive physical contact when the complainant is a protected person or with the purpose of harming the complainant because of the complainant’s status as a law enforcement officer, public safety employee, or District official. Third degree offensive physical contact generally prohibits offensive physical contact against any complainant. This change improves the consistency and proportionality of the revised statute.

- The RCC does not incorporate the recommendation to replace the “protected person” gradations with a negligence standard, for the reasons stated in the response to the same comment for the RCC murder statute (RCC § 22E-1101).
- (3) *The CCRC recommends deleting the jury demandability provision (previously in subsection (d)). The RCC now addresses jury demandability for all RCC offenses in a general provision (RCC § 22E-XX).*
- This revision improves the clarity, consistency, and proportionality of the revised statute.
- (4) *The CCRC recommends classifying second degree offensive physical contact as a Class C misdemeanor, instead of a Class D misdemeanor, and classifying third degree offensive physical contact as a Class D misdemeanor. As is discussed elsewhere in this appendix, offensive physical contact now has three gradations. As a result of this revision, what was previously second degree offensive physical contact (general offensive physical contact with any person) is now third degree. Second degree offensive physical contact now requires making any person come into contact with bodily fluid or excrement, or causing general offensive physical contact with a protected person or other specified complainant. Increasing the severity of second degree offensive physical contact by one class to a Class C misdemeanor is proportionate with the more serious conduct contained in second degree, and making third degree offensive physical contact a Class D misdemeanor is proportionate with the comparatively less serious conduct contained in third degree.*
- This change improves the consistency and proportionality of the revised statute.
- (5) *OAG, App. C at 408, recommends that all Class A and B misdemeanors be jury demandable, but offenses with a Class C, D, and E penalty, including attempts to commit a Class B misdemeanor, not be jury-demandable. This would make attempts to commit first degree offensive physical contact non-jury demandable.*

- The RCC partially incorporates this recommendation to the extent it is consistent with the RCC general approach to jury demandability. As of the Second Draft of Report #41 the RCC specifies that in any case in which a person is not constitutionally entitled to a trial by jury, the trial shall be by a single judge, except for the following main offenses: a Class B offense or inchoate (attempt, conspiracy, etc.) forms of a Class B offense; an offense that requires sex-offender registration; or specified offenses in which the complainant is a law enforcement officer. First degree offensive physical contact is a Class B misdemeanor and attempted first degree offensive physical contact would be an inchoate form of a Class B misdemeanor See the Second Draft of Report #41, for more details. This change improves the consistency of the revised statute.
- (6) *USAO, App. C at 415-419, appears to recommend against creation of a right to a jury trial for all degrees of offensive physical contact (including attempts).*²⁴² *USAO states that requiring jury trials in cases that are non-jury demandable under current law will create a tremendous strain on limited judicial resources.*
- The RCC not partially incorporates this recommendation by specifying in the RCC that in any case in which a person is not constitutionally entitled to a trial by jury, the trial shall be by a single judge, except for the following main offenses: a Class B offense or inchoate (attempt, conspiracy, etc.) forms of a Class B offense; an offense that requires sex-offender registration; or specified offenses in which the complainant is a law enforcement officer (including offense physical contact). Under this framework, any gradation of offensive physical contact in which the complainant is a law enforcement officer is jury demandable, and for any complainant, first degree offensive physical contact (Class B misdemeanor) and attempted first degree offensive physical contact would be jury demandable. See the Second Draft of Report #41, for more details. This change improves the consistency of the revised statute.

²⁴² When USAO submitted this comment, the RCC offensive physical contact statute had only two gradations. As is discussed elsewhere in this Appendix, the RCC offensive physical contact statute now has three gradations, but first degree is still classified as a Class B misdemeanor with a maximum term of imprisonment of 6 months.

RCC § 22E-1301. Sexual Assault.

(1) *USAO, App. C at 316-317, recommends adding “engages in” to paragraphs (a)(1), (b)(1), (c)(1), and (d)(1) so that the paragraphs prohibit “engages in or causes the complainant to engage in or submit to” the sexual act or sexual contact instead of “causes the complainant to engage in or submit to” the sexual act or sexual contact. USAO states that “it makes more sense to focus on the actions of the defendant than on the actions of the complainant” and that the recommended language “tracks the current law.”*

- The RCC incorporates this recommendation by adding to paragraphs (a)(1) and (b)(1) that the actor “engages in a sexual act with the complainant” and adding to paragraphs (c)(1) and (d)(1) that the actor “engages in a sexual contact with the complainant.” This change improves the clarity and consistency of the revised statute. The commentary to the RCC sexual assault statute has been updated to reflect this is a possible change in law.

(2) *USAO, App. C at 317, recommends in first degree and third degree sexual assault replacing “overcomes, restrains, or causes bodily injury” with “is sufficient to overcome, restrain, or cause bodily injury.” USAO states that the proposed language is “consistent with current law” where “force” is defined, in relevant part as, “the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person” and is “consistent with the current jury instructions.”*

- The RCC does not incorporate USAO’s recommendation because it would retain the ambiguity that exists in the definition of “force” for the current sexual abuse statutes. The current D.C. Code definition of “force” requires “the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person.”²⁴³ It is unclear whether “as is sufficient” means the force must actually overcome, restrain, or injure the complainant, or whether the force must be sufficient to overcome, restrain, or injure a “reasonable” or “average” person, regardless of the effect on the complainant. However, independent of the current D.C. Code definition of “force,” the current first degree sexual abuse statute requires that the defendant’s use of force actually cause the complainant to engage in a sexual act or sexual contact.²⁴⁴ Given this causation requirement, the clarity and consistency of the revised sexual assault statute improves if first degree and third degree require that the force actually overcome, restrain, or cause bodily injury to the complainant. The use of force that

²⁴³ D.C. Code § 22-3001(5) (defining “force” as “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.”).

²⁴⁴ D.C. Code §§ 22-3002(a)(1) (first degree sexual abuse statute stating “if that person engages in or causes another person to engage in or submit to a sexual act in the following manner: (1) By using force against that other person.”); 22-3004(1) (third degree sexual abuse statute stating “if that person engages in or causes sexual contact with or by another person in the following manner: (1) By using force against that other person.”).

does not physically overcome, restrain, or cause bodily injury to the complainant, may be covered by second degree or fourth degree sexual assault if it satisfies the RCC definition of “coercive threat” and causes the complainant to engage in or submit to a sexual act or sexual contact. The commentary to the RCC sexual assault statute has been updated to reflect that the RCC sexual assault statute deletes “as is sufficient” from the current definition of “force” and that it is a clarificatory change.

(3) *OAG, App. C at 250, recommends revising first degree sexual assault²⁴⁵ to replace “by using physical force that overcomes . . . the complainant” with “by using physical force that overcomes resistance.” At the July 31, 2019 Advisory Group meeting, OAG stated that its concern was not substantive, but rather grammatical, and that it is unclear in the current drafting what or who must be overcome by the force.²⁴⁶ OAG stated at the meeting that reordering the relevant language in first degree and third degree sexual assault would address its concern.*

- The RCC incorporates this recommendation by re-ordering subparagraphs (a)(2)(A) and (c)(2)(B) to require “By using physical force that causes bodily injury to, overcomes, or restrains the complainant.” This change improves the clarity of the revised statute.

(4) *The CCRC recommends replacing “the complainant” with “any person” in first degree and third degree sexual assault (subparagraphs (a)(2)(A) and (c)(2)(A)) so that they prohibit “By using physical force that causes bodily injury to, overcomes, or restrains any person.” This change makes the scope of these provisions match the scope of subparagraphs (a)(2)(B) and (c)(2)(B), which prohibit threats against “any person.” The current D.C. Code first degree and third degree sexual abuse statutes require either the use of “force” against the complainant²⁴⁷ or certain threats against “any person.”²⁴⁸ However, the current D.C. Code definition of “force” includes “the use of a threat of harm sufficient to coerce or compel submission by the victim,”²⁴⁹ which would include causing bodily injury to, overcoming, or restraining any person. Replacing “the complainant” with “any person” in (subparagraphs (a)(2)(A) and (c)(2)(A)) of the RCC sexual assault statute makes it clear that physical harms to any individual that the actor knows cause the complainant to engage in or submit to the sexual act or sexual contact are sufficient for first degree and third degree sexual assault. All other threats not pertaining to physical harm are potentially sufficient for second degree and fourth degree sexual assault if they meet the RCC definition of “coercive threat.”*

- This change improves the clarity, consistency, and proportionality of the revised statute. The commentary to the RCC sexual assault statute has been updated to reflect this is a possible change in law.

²⁴⁵ OAG’s comment is specific to first degree sexual assault, but also applies to third degree.

²⁴⁶ See Minutes of the July 31, 2019 Advisory Group meeting.

²⁴⁷ D.C. Code §§ 22-3002(a)(1); 22-3004(1).

²⁴⁸ D.C. Code §§ 22-3002(a)(2); 22-3004(2).

²⁴⁹ D.C. Code § 22-3001(5).

(5) *The CCRC recommends deleting from first degree and third degree sexual assault what was previously subparagraphs (a)(2)(B) and (c)(2)(B), which prohibited “using a weapon against the complainant.” The definition of “force” in the current D.C. Code sexual abuse statutes prohibits “the use or threatened use of a weapon,”²⁵⁰ but “weapon” is not defined statutorily and there is no DCCA case law interpreting it. It is unclear how a “weapon” in the current D.C. Code definition of “force” differs from a “deadly or dangerous weapon” in the current sexual abuse aggravators.²⁵¹ To the extent that a “weapon” is an item that does or may cause a comparatively less serious bodily injury than a deadly or dangerous weapon, first degree and third degree of the RCC sexual assault statute prohibit the use or threatened use of such an item in subparagraphs (a)(2)(B) and (c)(2)(B) (the use of force that causes bodily injury to, overcomes, or restrains the complainant) and subparagraphs (a)(2)(C) and (c)(2)(C) (prohibiting threats of “bodily injury.”).*

- This revision improves the clarity of the revised statute. The commentary to the RCC sexual assault statute has been updated to reflect this is a possible change in law.

(6) *OAG, App. C at 251, recommends defining “weapon” for first degree and third degree sexual assault, which previously specifically prohibited using a “weapon” against the complainant. OAG recommends defining “weapon” as “an object that is designed to be used, actually used, or threatened to be used, in a manner that is likely to produce bodily injury.” OAG notes that while “dangerous weapon” is defined in the RCC, “weapon” is not.*

- The RCC does not incorporate this recommendation because, as is discussed above, using a “weapon” is no longer a discrete basis of liability for first degree or third degree sexual assault.

(7) *USAO, App. C at 317, recommends in first degree and third degree sexual assault replacing “using a weapon” with “displaying or using what, in fact, is a dangerous weapon or imitation dangerous weapon.” USAO states that “dangerous weapon” is a clearer term than “weapon,” which is undefined in the RCC. USAO recommends including an “imitation dangerous weapon” in these gradations because it may be difficult to prove whether a dangerous weapon is real or imitation and “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.” USAO further states that “in fact” should apply to this element, consistent with the weapons gradations in other RCC offenses, such as robbery. Finally, USAO recommends including “displaying or using” because displaying a dangerous weapon “could compel a complainant to submit to a sexual act or contact, and should be criminalized as sexual assault.” USAO notes that*

²⁵⁰ D.C. Code § 22-3001(5) (defining “force” as “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.”).

²⁵¹ D.C. Code § 22-3001(6) (“The defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon.”).

“displaying or using” is consistent with the weapons gradations in other RCC offense, such as robbery.

- The RCC does not incorporate this recommendation because, as is discussed above, first degree and third degree of the revised sexual assault statute no longer include the use of a “weapon” against the complainant as a discrete basis of liability. The proposed language as it pertains to a “real” dangerous weapon would be sufficient for liability under first degree and third degree sexual assault as either the use of force that causes bodily injury to, overcomes, or restrains the complainant (subparagraphs (a)(2)(B) and (c)(2)(B)) or the use of specified threats, including threats of “bodily injury” (subparagraphs (a)(2)(C) and (c)(2)(C)). The proposed language as it pertains to “an imitation dangerous weapon,” may also be sufficient for liability in these subparagraphs if actually used or threatened in a manner that causes the complainant to engage in or submit to conduct, and, if not, may be sufficient for the use of a “coercive threat” in second degree and fourth degree sexual assault.
- (8) *The CCRC recommends deleting “unwanted” from “unwanted sexual act” in subparagraphs (a)(2)(B) and (c)(2)(B) of first degree and third degree sexual assault (“By threatening, explicitly or implicitly, to kill, kidnap, or cause bodily injury to any person, or to commit an unwanted sexual act against any person). “Unwanted” is conveyed in the concept of a threat and it is superfluous.*
- This change improves the clarity of the revised statute.
- (9) *OAG, App. C at 251, recommends revising subparagraph (c)(2)(B) in third degree sexual assault²⁵² to prohibit “the use of, or threatened use of, a weapon against a third party, as opposed to “using a weapon against the complainant.” OAG states that the revision is necessary to account for situations where the complainant is “coerced” into a sexual act or sexual contact because of the use of, or threatened use of, a weapon against a third party.*
- The RCC does not incorporate OAG’s recommendation because the RCC sexual assault statute no longer has a provision that is specific to the use of a weapon. However, first degree and third degree sexual assault encompass the use or threatened use of a weapon against a third party in subparagraphs (a)(2)(A) and (c)(2)(A) (the use of force against any person) and subparagraphs (a)(2)(B) and (c)(2)(B) (specified threats against any person).
- (10) *USAO, App. C at 319, recommends replacing threats of “significant bodily injury” with threats of “bodily injury” in first degree and third degree sexual assault (now subparagraphs (a)(2)(B) and (c)(2)(B)). USAO gives as a hypothetical a defendant that threatens to “punch a complainant repeatedly in the face, and the complainant submitted to a sexual act on that basis” and states this should be first degree sexual assault. USAO states that the current D.C. Code definition of “bodily injury” for the sexual abuse statutes is “more limited in certain respects” than the RCC definition of “bodily injury,” but notes that the*

²⁵² OAG’s comment is specific to third degree sexual assault, but also applies to first degree.

current D.C. Code definition of “bodily injury” also includes “injury involving significant pain” and in that respect is “far more expansive than the RCC’s proposed definition of ‘significant bodily injury.’”

- The RCC incorporates this recommendation by replacing threatening to cause “significant bodily injury” with threatening to cause “bodily injury” in subparagraphs (a)(2)(B) and (c)(2)(B). This change improves the clarity and consistency of the revised statute and removes a possible gap in liability. The commentary to the RCC assault statute has been updated to reflect this is a change in law.

(11) USAO, App. C at 318, recommends in first degree and third degree sexual assault replacing “threatening” with “threatening or placing in reasonable fear.” USAO states that this “tracks current law,” which is “an appropriate statement of the law.” USAO states that a threat requires a communication, citing the RCC criminal threats statute (RCC § 22E-1204), and states that 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.”

- The RCC does not incorporate USAO’s recommendation because it would introduce ambiguity into the statute. The current D.C. Code general sexual abuse statutes prohibit “threatening or placing that other person in reasonable fear.”²⁵³ The DCCA has not generally discussed the meaning of “placing in reasonable fear” in the current D.C. Code sexual abuse statutes, but has interpreted it to reach implied threats based upon conduct.²⁵⁴ As is discussed below, first degree and third degree of the RCC sexual assault statute now specifically include implied threats (subparagraphs (a)(2)(B) and (c)(2)(B)), and second degree and fourth degree now specially include implied coercive threats (subparagraphs (b)(2)(A) and (d)(2)(A)). It is unclear what conduct “placing in reasonable fear” prohibits beyond an implied threat. Limiting the sexual assault statute to express or implied threats improves the clarity of the revised statute.

(12) The CCRC recommends specifying that first degree and third degree of the RCC sexual assault statute include both express and implied threats, and that second degree and fourth degree include both express and implied coercive threats. With this change, what is now subparagraphs (a)(2)(B) and (c)(2)(B) specify “By threatening, explicitly or implicitly,” and subparagraphs (b)(2)(A) and (d)(2)(A) specify “By a coercive threat, express or implied.” The current D.C. Code general sexual abuse statutes prohibit “threatening or placing that other person in reasonable fear.”²⁵⁵ The DCCA has not generally discussed the meaning of

²⁵³ D.C. Code §§ 22-3002(a)(2), 22-3003(1), 22-3004(2), 22-3005(2).

²⁵⁴ See, e.g., *Way v. United States*, 982 A.2d 1135, 1137 (D.C. 2009) (finding the evidence sufficient for second degree sexual abuse that the complainant “engaged in sexual acts with appellant only because she had a reasonable fear of being arrested” and that “the jury could reasonably conclude that appellant intentionally obtained sex from [the complainant] by intimidating her with the unspoken threat of arrest.”).

²⁵⁵ D.C. Code §§ 22-3002(a)(2), 22-3003(1), 22-3004(2), 22-3005(2).

“placing in reasonable fear” in the current sexual abuse statutes, but has interpreted it to reach implied threats based upon conduct.²⁵⁶ The RCC previously stated in the commentary to the RCC sexual assault statute that the offense extended to both express and implied threats, but it is clearer to codify this in the statute.

- This change improves the clarity of the revised statute. Other (non-sex offense) statutes in the RCC have also been updated to refer to both “express or implied” threats to ensure consistency. The commentary to the RCC sexual assault statute has been updated to reflect that the offense includes both express and implied threats and classifies it as a clarificatory change in law.

(13) USAO, App. C at 318, recommends in first degree and third degree sexual assault replacing “sexual act” with “sexual act or sexual contact” so that the gradations include threats to commit a sexual contact against any person. USAO states that a “threat to commit any unwanted sexual contact can be a very serious threat, and should be a basis for liability.”²⁵⁷

- The RCC does not incorporate USAO’s recommendation because it may authorize disproportionate penalties for similar conduct. Expanding first degree and third degree of the RCC sexual assault statute to include threats of a “sexual contact” would create overlap with second degree and fourth degree and risk disproportionate penalties for similar conduct. First degree and third degree of the RCC sexual assault statute prohibit threats to kill, kidnap, or cause bodily injury to any person, as well as threats to cause a “sexual act,” as defined in RCC § 22E-701, against any person. Second degree and fourth degree of the RCC sexual assault statute prohibit using a “coercive threat” against the complainant. A “coercive threat” is a defined term in RCC § 22E-701 that includes a threat of a “sexual contact.”²⁵⁸

(14) USAO, App. C at 319-320, recommends adding to the involuntary intoxication provisions in first degree and third degree of the RCC sexual assault statute that the drug or other intoxicant renders the complainant “substantially incapable, mentally or physically, of declining participation” in the sexual act or sexual

²⁵⁶ See, e.g., *Way v. United States*, 982 A.2d 1135, 1137 (D.C. 2009) (finding the evidence sufficient for second degree sexual abuse that the complainant “engaged in sexual acts with appellant only because she had a reasonable fear of being arrested” and that “the jury could reasonably conclude that appellant intentionally obtained sex from [the complainant] by intimidating her with the unspoken threat of arrest.”).

²⁵⁷ When USAO submitted this comment, first degree and third degree of the RCC sexual assault statute prohibited threats of an “unwanted” sexual act. As is discussed elsewhere in this Appendix, the CCRC recommends deleting “unwanted” so that first degree and third degree sexual assault prohibit threats to commit a “sexual act.”

²⁵⁸ The RCC definition of “coercive threat” is defined as “a threat, express or implicit, that, unless the complainant complies, any person will . . . : (A) Engage in conduct that, in fact, constitutes: (1) An offense against persons as defined in subtitle III of RCC Title 22E.” In addition to this specific provision in the definition of “coercive threat,” subsection (G) of the definition includes threats 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 as the complainant to comply.”

*contact.*²⁵⁹ *USAO states that current law for second degree and fourth degree sexual abuse includes liability if the defendant knows or has reason to know that the other person is “incapable of declining participation” in the sexual act or sexual contact. USAO states that “[i]t is appropriate to attach liability in this situation and it is consistent with current law.”*

- The RCC does not incorporate USAO’s recommendation because it would introduce ambiguity into the revised statute. The revised intoxication provision includes complainants that are “asleep, unconscious, substantially paralyzed, or passing in and out of consciousness,” as well as complainants that are “substantially incapable of communicating unwillingness to engage in” the sexual act or sexual contact. These provisions more clearly refer to common situations and encompass a complainant that is substantially incapable, mentally or physically, of declining participation in the sexual act or sexual contact.

(15) USAO, App. C at 319, recommends revising first degree and third degree of the RCC sexual assault to include as a paragraph (E) “after rendering the complainant unconscious.” USAO states that this conduct “may not currently fall within the RCC’s proposed definition of sexual assault.” USAO gives as a hypothetical a defendant that “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.” USAO states that this language is in current law and “should be an option for liability.”

- The RCC does not incorporate USAO’s recommendation because the RCC sexual assault statute already includes liability for a defendant that engages in a sexual act or sexual contact “after” rendering the complainant unconscious. First degree and third degree of the RCC sexual assault statute include engaging in or causing a complainant to engage in or submit to a sexual act “by using physical force that causes bodily injury to the complainant” (subparagraphs (a)(2)(A) and (c)(2)(A)). The RCC definition of “bodily injury” in RCC § 22E-701 would extend to unconsciousness (“physical pain, physical injury, illness, or any impairment of physical condition.”). If the actor renders the complainant unconscious and then later decides to sexually assault the complainant, without the causal connection that first degree and third degree require, there is liability in second degree and fourth degree sexual assault for engaging in a sexual act or sexual contact with an “unconscious” complainant (sub-subparagraphs (b)(2)(B)(i) and (d)(2)(B)(i)). The commentary to the RCC sexual assault statute has been updated to reflect that the RCC sexual assault statute deletes “after rendering [the complainant] unconscious” as a discrete basis of liability as a possible change in law.

²⁵⁹ When USAO submitted this comment, the involuntary intoxication provision in first degree and third degree of the RCC sexual assault statute specified “mentally or physically” for several of the required effects of the intoxicant. As is discussed elsewhere in this Appendix, the CCRC recommends deleting “mentally or physically” from these provisions.

(16) USAO, *App. C at 319-320*, recommends adding to second degree and fourth degree sexual assault that the complainant is “incapable, mentally or physically, of declining participation” in the sexual act or sexual contact.²⁶⁰ USAO states that current law for second degree and fourth degree sexual abuse includes liability if the defendant knows or has reason to know that the other person is “incapable of declining participation” in the sexual act or sexual contact. USAO states that “[i]t is appropriate to attach liability in this situation and it is consistent with current law.”

- The RCC does not incorporate USAO’s recommendation because it would reduce the clarity of the revised statute. The current D.C. Code second degree and fourth degree sexual abuse statutes include as a basis for liability that the complainant is “incapable of declining participation in”²⁶¹ the sexual act or sexual contact. This language is not statutorily defined and there is no DCCA case law interpreting it. Second and fourth degree of the RCC sexual assault statute include complainants that are incapable of declining participation in the sexual act or sexual contact due to conditions such as sleep, paralysis, etc. (sub-subparagraphs (b)(2)(B)(i) and (d)(2)(B)(i)), and that are incapable of communicating unwillingness to engage in the sexual act or sexual contact (sub-subparagraphs (b)(2)(B)(iii) and (d)(2)(B)(iii)). These provisions more clearly refer to the most common situations and encompass a complainant that is incapable, mentally or physically, of declining participation in the sexual act or sexual contact. The RCC sexual assault statute clarifies the physical and mental requirements for being incapable of declining participation in the sexual act or sexual contact.

(17) *The CCRC recommends deleting “mentally or physically” from the required effects of the intoxicant in first degree and third degree of the revised sexual assault statute (sub-subparagraphs (a)(2)(C)(ii)(II), (a)(2)(C)(ii)(III), (c)(2)(C)(ii)(II), and (c)(2)(C)(ii)(III)). With this revision, the revised intoxication provision would require, in relevant part, that the intoxicant, in fact, renders the complainant “substantially incapable of appraising the nature of” the sexual act or sexual contact or “substantially incapable of communicating unwillingness to engage in” the sexual act or sexual contact. The previous version of the RCC sexual assault statute added “mentally or physically” to these provisions to mirror the requirements for an incapacitated complainant in second degree and fourth degree of the revised sexual assault statute. However, as is discussed elsewhere in this Appendix, the CCRC now recommends deleting “mentally or physically” from second degree and fourth degree. In the revised intoxication provision, deleting “mentally or physically” keeps the focus on whether the intoxicant rendered the complainant substantially incapable of appraising the*

²⁶⁰ When USAO submitted this comment, second degree and fourth degree of the RCC sexual assault statute specified “mentally or physically” for several of the specified types of incapacitation. As is discussed elsewhere in this Appendix, the CCRC recommends deleting “mentally or physically” from these provisions.

²⁶¹ D.C. Code §§ 22-3003(2)(B); 22-3005(2)(B).

nature of or communicating unwillingness to engage in the sexual act or sexual contact, which may be due to combination of mental or physical effects of the intoxicant rather than one or the other.

- This change improves the clarity and consistency of the revised statute.

(18) *The CCRC recommends deleting “[m]entally or physically” from “incapable of appraising the nature of” the sexual act or sexual contact from sub-subparagraphs (b)(2)(B)(ii) and (d)(2)(B)(ii) of second degree and fourth degree sexual assault. With this revision, these sub-subparagraphs are limited to certain complainants that are “incapable of appraising the nature of” the sexual act or sexual contact. The current D.C. Code second degree and fourth degree sexual abuse statutes include complainants that are “incapable of appraising the nature of the conduct.”²⁶² This language is not statutorily defined, and there is no DCCA case law on point.²⁶³ The previous version of the RCC sexual assault statute added “mentally or physically” to “incapable of appraising the nature of” in an attempt to clarify the scope. However, this language shifts the focus away from whether a given complainant is incapable of appraising the nature of the sexual or sexual contact, to whether the complainant has a mental or physical condition or disability.²⁶⁴*

- This change improves the clarity and consistency of the revised statute.

(19) *The CCRC recommends including in second degree and fourth degree of the revised sexual assault statute incapacitation that prevents the complainant from “understanding the right to give or withhold consent” to the sexual act or sexual contact. With this revision, sub-subparagraphs (b)(2)(B)(ii) and (d)(2)(B)(ii) would require, in relevant part, that the complainant be “incapable of appraising the nature of the [sexual act or sexual contact] or of understanding the right to give or withhold consent to the [sexual act or sexual contact].” The current D.C. Code second degree and fourth degree sexual abuse statutes include complainants that are “incapable of appraising the nature of the conduct,”²⁶⁵ as well as “incapable of declining participation in that [sexual act or sexual contact].”²⁶⁶ The language is not statutorily defined and there is no DCCA case law that interprets the meaning of “the nature of the conduct” or “declining participation.” The proposed language clarifies that understanding the right to give or withhold consent is a crucial part of sexual conduct and a complainant’s*

²⁶² D.C. Code §§ 22-3003(2)(A); 22-3005(2)(A).

²⁶³ In *In re M.S.*, the DCCA stated in dicta that “incapable of appraising the nature of the conduct” for “an adult victim, the charge might involve proof of the victim’s intoxication or general mental incapacity.” In *In re M.S.*, 171 A.3d 155, 164 (D.C. 2017) (citing the underlying facts of *Thomas v. United States*, 59 A.3d 1252, 1255 (D.C. 2013)).

²⁶⁴ For example, “physically incapable of appraising the nature of” appears to include within second degree and fourth degree of the RCC sexual assault statute physical characteristics, such as blindness, deafness, or muteness that do not affect a complainant’s ability to understand the nature of sexual activity or give meaningful consent. Retaining this language may categorically prohibit defendants from engaging in consensual sexual activity with blind, deaf, or mute individuals.

²⁶⁵ D.C. Code §§ 22-3003(2)(A); 22-3005(2)(A).

²⁶⁶ D.C. Code §§ 22-3003(2)(B); 22-3005(2)(B).

inability to understand this right can be a basis for liability in second degree and fourth degree of the RCC sexual assault statute.

- This change improves the clarity, consistency, and proportionality of the revised statute. The commentary to the RCC sexual assault statute has been updated to reflect that including “understanding the right to give or withhold consent” is a clarificatory change to current District law.

(20) *The CCRC recommends in second degree and fourth degree sexual assault specifying as a basis for liability that a complainant’s inability to appraise the nature of the sexual act or sexual contact or give or withhold consent be due to “an intellectual, developmental, or mental disability or mental illness,” which excludes age as the sole cause of a complainant’s inability. With this revision, sub-subparagraphs (b)(2)(B)(ii) and (d)(2)(B)(ii) would require, in relevant part, that the complainant be “[i]ncapable of appraising the nature of the [sexual act or sexual contact] or of understanding the right to give or withhold consent to the [sexual act or sexual contact] . . . due to an intellectual, developmental, or mental disability or mental illness.” The current D.C. Code second degree and fourth degree sexual abuse statutes include complainants that are “incapable of appraising the nature of” the sexual conduct.²⁶⁷ The language is not statutorily defined, but the DCCA has held that the current D.C. Code fourth degree sexual abuse statute categorically merges into the current D.C. Code second degree child sexual abuse statute,²⁶⁸ in part because “once the government proves in a sexual assault case that the defendant was four or more years older than the [complainant under the age of 16 years], there is a conclusive presumption that the defendant knew or should have known that the [complainant under the age of 16 years] was incapable of appraising the nature of the sexual conduct.”²⁶⁹ However, such a conclusive presumption categorically convicts defendants of sexual assault that are themselves under the age of 16 years even if they, due to their young age, are also incapable of appraising the nature of the sexual activity. This is inconsistent with the protected status of persons under the age of 16 years in the current sexual abuse statutes. In contrast, in the RCC, a defendant cannot be found guilty of second degree or fourth degree sexual assault based solely on the complainant’s age. If the complainant is under 16 years of age and the defendant is at least four years older, there is no longer a conclusive presumption that the complainant is incapable of appraising the nature of the sexual activity. In the case of any complainant under the age of 18 years, the complainant’s young age is no longer the sole basis for determining whether that complainant is incapable of appraising the nature of the sexual activity.²⁷⁰ A defendant of any*

²⁶⁷ D.C. Code §§ 22-3003(2)(A); 22-3005(2)(A).

²⁶⁸ *In re M.S.*, 171 A.3d 155, 165-166 (D.C. 2017) (“[W]e hold that it is impossible to commit second-degree child sexual *166 abuse without also committing fourth-degree sexual abuse. Therefore, appellant’s fourth-degree sexual abuse adjudications merge into his second-degree child sexual abuse adjudications.”).

²⁶⁹ *In re M.S.*, 171 A.3d 155, 165-166 (D.C. 2017).

²⁷⁰ A complainant’s young age may be highly relevant in assessing whether the complainant has an intellectual, developmental, or mental disability or mental illness that makes the complainant incapable of appraising the nature of the sexual act or sexual contact or of understanding the right to give or withhold consent to the sexual act or sexual contact. In addition, although this entry focuses on the young age of a

age that engages in sexual activity with a complainant under the age of 18 years may still have liability under other provisions of the RCC sexual assault statute, and the young age of the complainant remains a basis for liability under the RCC nonconsensual sexual conduct statute (RCC § 22E-1307). Age also remains the basis of liability for the RCC sexual abuse of a minor statute (RCC § 22E-1302), which would entirely overlap with the second and fourth degree sexual assault statutes without this change. Notably, the American Law Institute’s most recent draft revised sexual assault statute exclude age as a basis of liability for sexual assault of a vulnerable person.²⁷¹

- This change improves the clarity, consistency, and proportionality of the revised sexual assault and sexual abuse of a minor statutes, and reduces unnecessary overlap. The commentary to the RCC sexual assault statute has been updated to reflect this discussion of adding “an intellectual, developmental, or mental disability or mental illness” as a specific basis of liability and classifies it as a change to current District law.

(21) The CCRC recommends in second degree and fourth degree sexual assault specifying as a basis for liability that a complainant’s inability to appraise the nature of the sexual act or sexual contact or give or withhold consent be due to “a drug, intoxicant, or other substance.” With this revision, sub-subparagraphs (b)(2)(B)(ii) and (d)(2)(B)(ii) would require, in relevant part, that the complainant be “[i]ncapable of appraising the nature of the [sexual act or sexual contact] or of understanding the right to give or withhold consent to the [sexual act or sexual contact] . . . due to a drug, intoxicant, or other substance.” The current D.C. Code second degree and fourth degree sexual abuse statutes include complainants that are “incapable of appraising the nature of” the sexual conduct.²⁷² This language is not statutorily defined, and there is no DCCA case law on point. However, the DCCA has stated in dicta that “incapable of appraising the nature of the conduct” for “an adult

complainant, the age of an older complainant may not be the sole basis of determining whether that complainant is incapable of appraising the nature of the sexual conduct or of understanding the right to give or withhold consent to the sexual conduct. It may, however, be relevant in determining whether an older complainant has an intellectual, developmental, or mental disability or mental illness and otherwise meets the requirements of this provision.

²⁷¹ American Law Institute, Council Draft No. 10 (December 13, 2019), § 213.3(2):

Sexual Assault of an Impaired Person. An actor is guilty of Sexual Assault of an Impaired Person when the actor causes another person to submit to or perform an act of sexual penetration or oral sex and:

- (a) the act is without effective consent because at the time of the act the other person:
 - (i) has an intellectual developmental, or mental disability or mental illness that makes the person substantially incapable of appraising the nature of the sexual activity involved, or of understanding the right to give or withhold consent in sexual encounters, and the actor has no similarly serious disability; . . .

²⁷² D.C. Code §§ 22-3003(2)(A); 22-3005(2)(A).

*victim . . . might involve proof of the victim’s intoxication or general mental incapacity.”*²⁷³

- This change improves the clarity, consistency, and proportionality of the revised sexual assault statute. The commentary to the RCC sexual assault statute has been updated to reflect this discussion of adding “a drug, intoxicant, or other substance” as a specific basis of liability and classifies it as a clarificatory change to current District law.

(22) *The CCRC recommends including in second degree and fourth degree of the revised sexual assault statute certain types of incapacitation if “the actor has no similar serious disability or illness.” With this revision, sub-subparagraphs (b)(2)(B)(ii) and (d)(2)(B)(ii) would require that the complainant be “[i]ncapable of appraising the nature of the [sexual act or sexual contact] or of understanding the right to give or withhold consent to the [sexual act or sexual contact]. . . due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness.” The current D.C. Code second degree and fourth degree sexual abuse statutes include complainants that are “incapable of appraising the nature of” the sexual conduct,²⁷⁴ “incapable of declining participation in” the sexual act or sexual contact,²⁷⁵ and “incapable of communicating unwillingness to engage in” the sexual act or sexual contact.²⁷⁶ The language is not statutorily defined, and there is no DCCA case law interpreting these provisions when the defendant has a similar disability or illness as the complainant. The proposed language excludes from liability defendants that have a “similarly serious” disability or illness as the complainant for second degree or fourth degree sexual assault. There may still be liability under other provisions of the RCC sexual assault statute or the RCC nonconsensual sexual conduct statute (RCC § 22E-1307). This approach is consistent with the American Law Institute’s most recent draft revised sexual assault of a vulnerable person statute.²⁷⁷*

- This change improves the consistency of the revised statute. The commentary to the RCC sexual assault statute has been updated to reflect

²⁷³ In *In re M.S.*, 171 A.3d 155, 164 (D.C. 2017) (citing the underlying facts of *Thomas v. United States*, 59 A.3d 1252, 1255 (D.C. 2013).

²⁷⁴ D.C. Code §§ 22-3003(2)(A); 22-3005(2)(A).

²⁷⁵ D.C. Code §§ 22-3003(2)(B); 22-3005(2)(B).

²⁷⁶ D.C. Code §§ 22-3003(2)(C); 22-3005(2)(C).

²⁷⁷ American Law Institute, Council Draft No. 10 (December 13, 2019), § 213.3(2):

Sexual Assault of an Impaired Person. An actor is guilty of Sexual Assault of an Impaired Person when the actor causes another person to submit to or perform an act of sexual penetration or oral sex and:

(b) the act is without effective consent because at the time of the act the other person:

(j) has an intellectual developmental, or mental disability or mental illness that makes the person substantially incapable of appraising the nature of the sexual activity involved, or of understanding the right to give or withhold consent in sexual encounters, and the actor has no similarly serious disability; . . .

that requiring that the defendant not have a mental disability as the complainant is a possible change to current District law.

(23) *The CCRC recommends in second degree and fourth degree sexual assault deleting “mentally or physically” from sub-subparagraphs (b)(2)(B)(iii) and (d)(2)(B)(iii). With this change, these sub-subparagraphs would specify that the complainant must be “[i]ncapable of communicating unwillingness to engage in” the sexual act or sexual contact. The current D.C. Code second degree and fourth degree sexual abuse statutes include complainants that are “incapable of communicating unwillingness to engage in” the sexual act or sexual contact.²⁷⁸ This language is not statutorily defined, and there is no DCCA case law on point. The previous version of the RCC sexual assault statute added “mentally or physically” to “incapable of communicating unwillingness to engage in” in an attempt to clarify the scope. However, this language shifts the focus away from whether a given complainant is incapable of communicating unwillingness to engage in the sexual or sexual contact, to whether the complainant’s inability is due to a mental or physical condition or disability.*

- This change improves the clarity and consistency of the revised statute.

(24) *USAO, App. C at 320, recommends removing what was previously sub-subparagraphs (e)(1)(B)(i) and (e)(1)(B)(ii) of the effective consent defense that place requirements on the ages of the parties and the relationship between them: “(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.” USAO states that “this exception should not exist here” because 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.” In the alternative, App. C at 322, USAO recommends removing the age gap requirements in these subsections.*

- The RCC does not incorporate USAO’s recommendation because it would lead to inconsistency with the RCC sexual abuse of a minor statute. These sub-subparagraphs limit situations in which young complainants can give effective consent under the RCC sexual assault statute and codify the DCCA holding in *Davis v. United States*.²⁷⁹ These situations mirror the

²⁷⁸ D.C. Code §§ 22-3003(2)(C); 22-3005(2)(C).

²⁷⁹ The DCCA held that in a prosecution under the current D.C. Code general sexual abuse statutes, if the complainant is a “child” under the age of 16 years “an adult defendant who is at least four years older than the complainant may not assert a “consent” defense. In such a case, the child’s consent is not valid.” *Davis v. United States*, 873 A.2d 1101, 1106 (D.C. 2005). “Child” is defined in D.C. Code § 22-3001 as “a person who has not yet attained the age of 16 years.” D.C. Code Ann. § 22-3001(3). “Adult” is not statutorily defined in the current D.C. Code sex offenses, and the DCCA does not provide a definition in *Davis*. The DCCA further noted that the four-year age gap requirement in the current D.C. Code child sexual abuse statutes “appears [to] modify the traditional rule [that a child is legally incapable of

requirements for liability in the RCC sexual abuse of a minor statute so that if there would be liability under the RCC sexual abuse of a minor statute, the minor cannot give effective consent to that conduct under the RCC sexual assault statute. Although sexual conduct with minors is criminalized under the sexual abuse of a minor statute, it could also be charged under the general sexual assault statute. For example, a 20 year old defendant that uses a firearm to cause a 15 year old complainant to engage in a sexual act could be charged under either first degree sexual assault or second degree sexual abuse of a minor. The RCC does not incorporate USAO's recommendation to strike the age gap requirements in subparagraphs (e)(1)(B)(i) and (e)(1)(B)(ii) because, with the exception of the 4 year age gap in subsection (e)(1)(B)(ii), these subparagraphs follow current law.²⁸⁰

(25) *The CCRC recommends in subsection (e) applying strict liability (with the language "in fact") to the element that the actor has the complainant's effective consent. With this change, subsection (e) requires either that "the actor has, in fact, the complainant's effective consent to the actor's conduct or the actor reasonably believes that the complainant gives effective consent to the actor's conduct." The previous version of the effective consent defense did not specify whether a culpable mental state or strict liability applied to the fact that the actor had the complainant's effective consent.*

- This change improves the clarity of the revised statute.

(26) *The CCRC recommends in subsection (e) applying strict liability (with the language "in fact") to the requirements of the affirmative defense in paragraph (e)(2) (the actor's conduct does not inflict significant bodily injury or serious bodily injury, or involve the use of a dangerous weapon), (e)(3) (age requirements for the actor and the complainant), and (e)(4) (age requirements for the actor and the complainant). The previous version of the effective consent defense did not specify whether a culpable mental state or strict liability applied to these facts.*

- This change improves the clarity of the revised statute.

(27) *The CCRC recommends deleting the burden of proof requirements for the affirmative defense (previously paragraph (e)(2)). The RCC has a general*

consenting to sexual conduct with an adult] so as to allow *bona fide* consent of a child victim to be a potential defense where the defendant is less than four years older than the child." *Id.* at 1105 n.8.

²⁸⁰ The current D.C. Code child sexual abuse statutes and the RCC sexual abuse of a minor statute prohibit sexual conduct when the complainant is under the age of 16 years and the actor is at least four years older. D.C. Code §§ 22-3008, 22-3009, 22-3001(3) (defining "child" as "a person who has not yet attained the age of 16 years."); RCC § 22E-1302(a), (b), (d), (e) (prohibiting a sexual act of sexual contact when the complainant is under 16 years of age and the actor is at least four years older). Subparagraph (e)(1)(B)(i) retains these age and age gap requirements.

The current D.C. Code sexual abuse of a minor statutes prohibit sexual conduct when the complainant is under the age of 18 years and the actor is at least 18 years of age and in a "significant relationship" with the complainant. D.C. Code §§ 22-3009.01, 22-3009.02, 22-3001(5A) (defining "minor" as "a person who has not yet attained the age of 18 years."). Third degree and sixth degree of the RCC sexual abuse of a minor statute retain these requirements, but, as is discussed in the commentary to the offense, require a four year age gap to match the age gap in the child sexual abuse statutes.

provision that addresses the burden of proof for all affirmative defenses in the RCC (RCC § 22E-XX).

- This change improves the clarity and consistency of the revised statute.

(28) *The CCRC recommends revising the phrasing of the penalty enhancement provision in paragraph (f)(5) to state, “In addition to the general penalty enhancements under this title, the penalty classification for this offense is increased by one class when...” instead of “In addition to any general penalty enhancements in RCC §§ 22E-605 – 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 the following is proven.” Broadening the reference to RCC §§ 22E-605 - 608 to include any general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification “is increased,” instead of “may be increased” clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase “one or more of the following is proven” is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.*

- This revision improves the clarity of the revised statute.

(29) *OAG, App. C at 251, recommends replacing “sexual conduct” with “sexual act or sexual contact” in what is now subparagraph (f)(5(A)) of the sexual assault penalty enhancement for causing the “sexual conduct” with the use or display of a dangerous weapon or imitation dangerous weapon). OAG notes that “sexual conduct” is not a defined term in the RCC.*

- The RCC incorporates OAG’s recommendation in subparagraph (f)(5)(A), as well as the penalty enhancement in subparagraph (f)(5)(C) (causing serious bodily injury during the sexual act or sexual contact). This change improves the clarity of the revised statute. The commentary to the RCC sexual assault statute has been updated to reflect this is a clarificatory change in law.

(30) *The CCRC recommends replacing “an object that, in fact” was with “what is, in fact” is in the weapons penalty enhancement. With this change, the weapons penalty enhancement will require the use or display of “what is, in fact, a dangerous weapon or imitation dangerous weapon.” The reference to “an object” is unnecessary and is not used in the weapons gradations of other RCC offenses.*

- This change improves the clarity and consistency of the revised statute.

(31) *USAO, App. C at 321-322, recommends replacing the penalty enhancement in subparagraph (f)(5)(A) with “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 states that it is “more appropriate to include language from the current ‘while armed’ enhancement” and that the RCC’s language, which requires displaying or using a dangerous weapon or imitation dangerous weapon, is “too limited” because “[e]ven 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.” USAO states that a firearm could inadvertently discharge or intentionally discharge, resulting in injury.

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC does not enhance the penalty for sexual assault when the defendant merely possess or carries a dangerous weapon or imitation dangerous weapon, without using or displaying it to cause the sexual act or sexual contact. Possessing or carrying a dangerous weapon or imitation dangerous weapon is subject to punishment under an array of separate RCC weapons offenses, such as: carrying a dangerous weapon (RCC § 22E-4102); possession of a dangerous weapon with intent to commit crime (RCC § 22E-4103); and possessing a dangerous weapon during a crime (RCC § 22E-4104). Commentary for the sexual assault penalty enhancement specifies that the phrase “by displaying or using” a weapon “should be broadly construed to include making a weapon known by sight, sound, or touch.”²⁸¹ Although there may be an increased risk of harm when an actor simply possesses or carries a dangerous weapon, this is accounted for by the various separate RCC Chapter 41 weapons offenses for which the actor would be liable and may be sentenced consecutively. The USAO recommendation would treat as equivalent the display or use of a dangerous weapon during an encounter with less severe conduct.
- Polling of District voters also suggests that the harm caused by actual use or display of a dangerous weapon differs from mere possession or carrying a dangerous weapon. See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.²⁸²

(32) *USAO, App. C at 321, recommends deleting “that were present at the time of the offense” from the accomplice penalty enhancement (now in subparagraph (f)(5)(B) (“The actor knowingly acted with 1 or more accomplices that were present at the time of the offense.”)). First, USAO states that it is unclear whether “present 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,” such as kidnapping and assaulting a complainant. Second, USAO states that “present” is unclear because it could require a physical presence, or be read to include remote presence, such as a telephone.*

²⁸¹ Commentary to the revised sexual assault statute references commentary to RCC § 22E-1203 (Menacing).

²⁸² Question 1.18 provides the scenario “Robbing someone’s wallet by punching them, which caused minor injury.” The mean response to this scenario was 6. Question 1.16 provides the scenario “Robbing someone’s wallet by threatening to kill them. The robber secretly carried, but never displayed, a gun.” The mean response to this scenario was 6.2, only slightly higher than the mean response for unarmed robbery. Question 1.17 provides the scenario, “Robbing someone’s wallet by displaying a gun and threatening to kill them.” The mean response to this scenario was a 7. The responses to these three scenarios suggest that the public believes that while actually displaying or using a weapon while committing robbery justifies an increase in penalty severity by one class, there is relatively little distinction between an unarmed robbery and robbery while possessing, but not displaying or using, a weapon.

Finally, USAO states that the revised penalty enhancement is contrary to current law, which does not have a requirement that the accomplice be present at the time of the offense.

- The RCC partially incorporates this recommendation by revising the penalty enhancement to require that the accomplices “were physically present at the time of the sexual act or sexual contact.” The current D.C. Code penalty enhancement merely requires that the defendant “was aided or abetted by 1 or more accomplices”²⁸³ and there is no DCCA case law interpreting this language. Accomplices that are physically present at the time of the sexual act or sexual contact potentially increase the danger and effects of the offense in a way that other, physically absent accomplices do not. This change improves the clarity and proportionality of the revised statute. The commentary to the RCC sexual assault statute has been updated to reflect this is a possible change in law.

(33) *USAO, App. C at 321-322, recommends removing “during the sexual conduct” from the serious bodily injury penalty enhancement (now subparagraph (f)(5)(C) (“The actor recklessly caused serious bodily injury to the complainant during the sexual conduct.”)). USAO states that the current D.C. Code penalty enhancement requires that the complainant “sustained serious bodily injury as a result of the offense” and that the RCC “inappropriately limits this enhancement.” USAO gives as a hypothetical a defendant that “viciously stabbed a complainant, and then forced the complainant to engage in a sexual act after a brief period of time.” USAO states that under the RCC penalty enhancement, the defendant would not have caused serious bodily injury during the sexual act and the penalty enhancement would not apply. In addition, USAO states that “‘during the offense’ is vague under current law” because it could apply “solely to the sexual act or sexual contact, or . . . to the totality of the actions leading to the forced sexual act or sexual contact,” such as kidnapping and assaulting a complainant. USAO states it is unnecessary to state “during the offense” because “[i]t is clear that this enhancement can only apply when it relates to a sexual offense.” USAO does not recommend a substitute for the removed “during the sexual conduct” language.*

- The RCC partially incorporates USAO’s recommendation by amending the penalty enhancement to state: “The actor recklessly causes serious bodily injury to the complainant immediately before, during, or immediately after the sexual act or sexual contact.” This language includes within the penalty enhancement USAO’s hypothetical of a defendant that “viciously stabbed a complainant, and then forced the complainant to engage in a sexual act after a brief period of time.” The commentary to the RCC sexual assault statute has been updated to reflect that this is a possible change in law. This change clarifies and may improve the proportionality of the revised statutes.

(34) *USAO, App. C at 322, recommends in the penalty enhancement in subparagraph (f)(5)(D)(i) removing the requirement that the actor be at least four*

²⁸³ D.C. Code § 22-3020(a)(4).

years older than a complainant under the age of 12 years. USAO states that this change is “consistent with current law” and relies on the rationale in its General Comments to RCC Chapter 13 (App. C at 313-316). There, USAO states that that an age gap should not be added because the RCC sexual assault statute “only deals with sexual acts/contacts involving force or violence.” As such, USAO states the age gap “is not a relevant consideration” because 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.” USAO compares the age gap in the penalty enhancement to the four year age gap required in the RCC sexual abuse of a minor statute and current law for complainants under 16 years of age, noting that in these offenses, the age gap requirement “serve[s] a very different purpose,” “exclud[ing] 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 RCC does not incorporate USAO’s recommendation because the four year age gap improves the proportionality of the revised statute. The four year age gap requirement reserves the penalty enhancement for predatory behavior targeting very young complainants. An actor that commits sexual assault against a complainant under the age of 12 years when there is less than a four year age gap still has liability for sexual assault, and another sexual assault penalty enhancement may apply to the actor’s conduct.

(35) The CCRC recommends deleting the second “in fact” from sub-subparagraph (f)(5)(D)(i) so that the provision requires “The complainant is, in fact, under 12 years of age and the actor is at least 4 years older than the complainant.” Given the revised rule of construction in RCC § 22E-207, strict liability applies to every element following “in fact” until a new culpable mental state is specified.

- This change improves the clarity of the revised statute.

(36) USAO, App. C at 322, recommends removing the penalty enhancement in sub-subparagraph (f)(5)(D)(ii) (“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.”). USAO states that this is “consistent with current law” and that it relies on the rationale in its General Comments to RCC Chapter 13 (App. C at 313-316). However, there is no specific discussion of deleting this enhancement.

- The RCC does not incorporate this recommendation because it is inconsistent with the requirements for liability in the RCC sexual abuse of a minor statute. The current D.C. Code sexual abuse penalty enhancements do not have an enhancement for a complainant that is under the age of 16 years when the actor is at least four years older,²⁸⁴ but do when “the victim was under the age of 12 years”²⁸⁵ and when “the victim was under the age of 18 years at the time of the offense and the actor had a

²⁸⁴ D.C. Code § 22-3020.

²⁸⁵ D.C. Code § 22-3020(a)(1).

significant relationship to the victim.”²⁸⁶ The RCC added this penalty enhancement to parallel the requirements for liability in second degree and fifth degree of the RCC sexual abuse of a minor statute (RCC § 22-3020) and the current child sexual abuse statutes,²⁸⁷ which prohibit a sexual act or sexual contact with a complainant under the age of 16 years when the actor is at least four years older. The penalty enhancement improves the proportionality of the revised statute and its consistency with the RCC sexual abuse of a minor statute.

(37) USAO, *App. C* at 322, recommends in sub-subparagraph (f)(5)(D)(iii) of the penalty enhancements replacing the “recklessly” culpable mental state with strict liability (“in fact”) for the fact that the complainant is under 18 years of age and the fact that the actor is in a position of trust with or authority over the complainant. USAO states that this change is “consistent with current law” and relies on the rationale in its General Comments to RCC Chapter 13 (*App. C* at 313-316). There, USAO states that “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.” USAO states that “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,”²⁸⁸ as well as “extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act.”²⁸⁹ USAO states that this latter type of evidence “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.” USAO states that it “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.” However, 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.” In the alternative, USAO recommends keeping strict liability for “offenses involving

²⁸⁶ D.C. Code § 22-3020(a)(2).

²⁸⁷ D.C. Code §§ 22-3008, 22-3009, 22-3001(3) (defining “child” as “a person who has not yet attained the age of 16 years.”).

²⁸⁸ USAO further states that 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.”

²⁸⁹ USAO states that this evidence “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.”

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.” There is no discussion specific to the element that the actor was in a position of trust with or authority the complainant.

- The RCC does not incorporate USAO’s recommendation because the “recklessly” culpable mental state improves the proportionality of the revised statute. The RCC sexual assault offense requires the use of force, threats, involuntary intoxication, a coercive threat, or involves a complainant with a specified type of mental or physical incapacitation. Unlike the RCC sexual abuse of a minor statute (RCC § 22E-1302), the offense does not base liability on the ages of the parties or the relationship between them. The “recklessly” culpable mental state in the sexual assault penalty enhancement reserves the enhancement for a defendant that has subjective awareness of the complainant’s age and the fact that the actor is in a position of trust with or authority over the complainant, yet still chooses to use force, threats, engage with an incapacitated complainant, etc. The penalty enhancement does not “create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,”²⁹⁰ which the RCC does not substantively change in any manner, or “extremely prejudicial, and otherwise inadmissible, evidence not specially covered by the Rape Shield Act.”²⁹¹ Requiring recklessness as to the age of the minor is not

²⁹⁰ USAO lists several examples of “evidence that is known to the defendant” that it states would be admissible under the RCC sexual assault penalty enhancements to prove that the defendant was not reckless as to the age of the complainant, but would not be allowed by the current rape shield statute: “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.” USAO, App. C at 314. However, under the current D.C. Code and RCC rape shield statutes, it appears that this evidence would largely be excluded. To the extent that this evidence is opinion or reputation evidence of the complainant’s “past sexual behavior,” it is excluded under the current and RCC rape shield statutes. See D.C. Code § 22-3021(a); RCC § 22E-1311(a). To the extent that this evidence is evidence of the complainant’s “past sexual behavior” and is not reputation or opinion evidence, it is not admissible unless certain procedural requirements are met and it fits it within specific narrow categories. These narrow categories are: 1) evidence that is “constitutionally required to be admitted” (D.C. Code 22-3022(a)(1); RCC § 22E-1311(b)(1)(A)); 2) evidence of past sexual behavior with persons other than the actor, offered by the actor, on the issue of whether or not the actor is the source of semen or bodily injury (D.C. Code § 22-3022(a)(2)(A); RCC § 22E-1311(b)(2)(B)(i)); or 3) evidence of past sexual behavior with the actor where the consent of the complainant is at issue and is offered by the actor on the issue of consent (D.C. Code § 22-3022(a)(3)); RCC § 22E-1311(b)(1)(B)(ii) (requiring the RCC defined term “effective consent.”). Whether the actor was reckless as to the complainant’s age may not categorically fit into these specific categories. The current rape shield statutes and the RCC define “past sexual behavior” as “sexual behavior other than the sexual behavior with respect to which” certain sex offenses is alleged. D.C. Code § 22-3021(b); RCC § 22E-1311.

²⁹¹ USAO lists several examples of “extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act” that it states would be admissible under the RCC sexual assault penalty enhancements: “the victim’s reputation, physical characteristics such as weight and size of

inconsistent with robust rape shield laws as, for example, the current D.C. Code sex trafficking of children statute²⁹² already combines a recklessness requirement for the age of the complainant with a Rape Shield law.²⁹³ In addition, the American Law Institute’s most recent draft revised sexual abuse of a minor statute requires recklessness as to the age of the complainant, including a complainant under the age of 12 years, and also has a Rape Shield provision.²⁹⁴

(38) *USAO, App. C at 322, recommends in the penalty enhancement in sub-subparagraph (f)(5)(D)(iii) removing the requirement that the actor be at least four years older than the complainant so that the penalty enhancement would apply if the complainant was under 18 years of age and the actor was in a “position of trust with or authority over” the complainant. USAO states that this is “consistent with current law” and relies on the rationale in its General Comments to RCC Chapter 13 (App. C at 313-316). There, USAO states that “the important consideration is the power dynamic between the defendant and the complainant, not the age differential” and that the “focus is on the relationship between the parties, and the defendant violating the trust that was put into him or her.”*

- The RCC does not incorporate USAO’s recommendation because the four year age gap improves the proportionality of the revised statute. The four year age gap requirement reserves the penalty enhancement for predatory behavior targeting young complainants. An actor that is at least 18 years of age and in a position of trust with or authority over a complainant that is under 18 years when there is less than a four year age gap still has liability for sexual assault, and another sexual assault penalty enhancement may apply to the actor’s conduct.

(39) *USAO, App. C at 322, recommends deleting the penalty enhancement: “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.” USAO states that this is “consistent with current law” and that it relies on the rationale in its General Comments to RCC Chapter 13 (App. C at 313-316). However, there is no specific discussion of deleting this enhancement.*

- The RCC accepts this recommendation by deleting this penalty enhancement. The CCRC independently makes this recommendation, discussed below. This change improves the consistency of the revised statute with the RCC sexual abuse of a minor statute.

(40) *The CCRC recommends deleting the sexual assault penalty enhancement in what was previously subparagraph (g)(4)(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*

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.”

²⁹² D.C. Code § 22-1834.

²⁹³ D.C. Code § 22-1839.

²⁹⁴ American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.8; 213.11.

years of age or older and at least 4 years older than the complainant.” This penalty enhancement codified a revised version of the general penalty enhancement for crimes against minors in D.C. Code § 22-3611.²⁹⁵ However, it is inconsistent with RCC sexual abuse of a minor statute (RCC § 22E-1302), which only imposes liability for sexual conduct with a complainant under 18 years if the defendant was at least 18 years of age, at least four years older, and in a position of trust with or authority over the complainant.

- This change improves the consistency of the RCC sexual assault and sexual abuse of a minor statutes and improves the proportionality of the penalties. The commentary to the RCC sexual assault statute has been updated to reflect this is a change in law.

(41) *The CCRC recommends in the penalty enhancement in sub-subparagraph (f)(5)(D)(iv) requiring that the actor is under 65 years of age. With this change, the penalty enhancement requires that the complainant is 65 years of age or older, and, in fact, the actor is under 65 years of age and at least 10 years younger than the complainant. This change was proposed for the RCC definition of “protected person” in the First Draft of Report #36, Cumulative Update to Chapters 3, 7 and the Special Part of the Revised Criminal Code (Report),²⁹⁶ but the revised statutory text for the definition omitted the requirement. The CCRC recommends making this change in the definition of “protected person,” discussed elsewhere in this appendix, and in this sexual assault penalty enhancement. This change preserves the penalty enhancement for predatory behavior targeting older complainants.*

- This change improves the clarity, consistency, and proportionality of the revised statute.

(42) *USAO, App. C 322, recommends in the penalty enhancement in sub-subparagraph (f)(5)(D)(iv) removing the requirement that the complainant be at least 10 years younger than a complainant that is 65 years of age or older so that the penalty enhancement would apply if the complainant were 65 years of age or older. USAO states that this is “consistent with current law” and relies on the rationale in its General Comments to RCC Chapter 13 (App. C at 313-316). There, USAO states that an age gap should not be added because the RCC sexual assault statute “only deals with sexual acts/contacts involving force or violence.” As such, USAO states the age gap “is not a relevant consideration” because 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.” USAO compares the age gap in the penalty enhancement to the*

²⁹⁵ D.C. Code § 22-3611(a) (“Any adult, being at least 2 years older than a minor, who commits a crime of violence against that minor may be punished by a fine of up to 1 ½ times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to 1 ½ times the maximum term of imprisonment otherwise authorized for the offense, or both.”). The RCC increased the required age gap to 4 years and expanded the crimes to which the enhancement applies, *see* RCC Commentary to the definition of “protected person” in RCC § 22E-701.

²⁹⁶ First Draft of Report #36, *Cumulative Update to Chapters 3, 7 and the Special Part of the Revised Criminal Code (Report)*, Appendix D - Disposition of Advisory Group Comments & Other Changes to Draft Documents (4-1519).

four year age gap required in the RCC sexual abuse of a minor statute and current law for complainants under 16 years of age, noting that in these offenses, the age gap requirement “serve[s] a very different purpose,” “exclud[ing] 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 RCC does not incorporate USAO’s recommendation because the 10 year age gap improves the proportionality of the revised statute. The 10 year age gap requirement reserves the penalty enhancement for predatory behavior targeting older complainants. An actor that is less than 10 years younger than an elderly complainant still has liability for sexual assault, and another sexual assault penalty enhancement may apply to the actor’s conduct.

(43) USAO, App. C at 322, recommends in the penalty enhancement for complainants that are 65 years of age or older in sub-subparagraph (f)(5)(D)(iv) replacing the “recklessly” culpable mental state for the age of the complainant with strict liability (“in fact”) for the fact that the complainant is 65 years of age or older. USAO states that this change is “consistent with current law” and relies on the rationale in its General Comments to RCC Chapter 13 (App. C at 313-316). There, USAO states that “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.” USAO states that “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,”²⁹⁷ as well as “extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act.”²⁹⁸ USAO states that this latter type of evidence “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.”

- The RCC does not incorporate USAO’s recommendation because the “recklessly” culpable mental state improves the proportionality of the revised statute. The RCC sexual assault offense requires the use of force, threats, involuntary intoxication, a coercive threat, or involves a complainant with a specified type of mental or physical incapacitation. Unlike the RCC sexual abuse of a minor statute (RCC § 22E-1302), the

²⁹⁷ USAO further states that 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.”

²⁹⁸ USAO states that this evidence “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.”

offense does not base liability on the ages of the parties or the relationship between them. The “recklessly” culpable mental state in the sexual assault penalty enhancement reserves the enhancement for a defendant that has subjective awareness of the complainant’s age and the fact that the actor is in a position of trust with or authority over the complainant, yet still chooses to use force, threats, engage with an incapacitated complainant, etc. The penalty enhancement does not “create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,”²⁹⁹ which the RCC does not substantively change in any manner, or “extremely prejudicial, and otherwise inadmissible, evidence not specially covered by the Rape Shield Act.”³⁰⁰ Requiring recklessness as to the age of the minor is not inconsistent with robust rape shield laws as, for example, the current D.C. Code sex trafficking of children statute³⁰¹ already combines a recklessness requirement for the age of the complainant with a Rape Shield law.³⁰² In addition, the American Law Institute’s most recent draft revised sexual abuse of a minor statute requires recklessness as to the age of the complainant, including a complainant under the age of 12 years, and also has a Rape Shield provision.³⁰³

²⁹⁹ USAO lists several examples of “evidence that is known to the defendant” that it states would be admissible under the RCC sexual assault penalty enhancements to prove that the defendant was not reckless as to the age of the complainant, but would not be allowed by the current rape shield statute: “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.” USAO, App. C at 314. However, under the current D.C. Code and RCC rape shield statutes, it appears that this evidence would largely be excluded. To the extent that this evidence is opinion or reputation evidence of the complainant’s “past sexual behavior,” it is excluded under the current and RCC rape shield statutes. *See* D.C. Code § 22-3021(a); RCC § 22E-1311(a). To the extent that this evidence is evidence of the complainant’s “past sexual behavior” and is not reputation or opinion evidence, it is not admissible unless certain procedural requirements are met and it fits it within specific narrow categories. These narrow categories are: 1) evidence that is “constitutionally required to be admitted” (D.C. Code 22-3022(a)(1); RCC § 22E-1311(b)(1)(A)); 2) evidence of past sexual behavior with persons other than the actor, offered by the actor, on the issue of whether or not the actor is the source of semen or bodily injury (D.C. Code § 22-3022(a)(2)(A); RCC § 22E-1311(b)(2)(B)(i)); or 3) evidence of past sexual behavior with the actor where the consent of the complainant is at issue and is offered by the actor on the issue of consent (D.C. Code § 22-3022(a)(3)); RCC § 22E-1311(b)(1)(B)(ii) (requiring the RCC defined term “effective consent.”). Whether the actor was reckless as to the complainant’s age may not categorically fit into these specific categories. The current rape shield statutes and the RCC define “past sexual behavior” as “sexual behavior other than the sexual behavior with respect to which” certain sex offenses is alleged. D.C. Code § 22-3021(b); RCC § 22E-1311.

³⁰⁰ USAO lists several examples of “extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act” that it states would be admissible under the RCC sexual assault penalty enhancements: “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.”

³⁰¹ D.C. Code § 22-1834.

³⁰² D.C. Code § 22-1839.

³⁰³ American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.8; 213.11.

(44) USAO, *App. C* at 322, recommends in the penalty enhancement for a vulnerable adult (subparagraph (g)(4)(E)) replacing the “recklessly” culpable mental state for the fact that the complainant is a vulnerable adult with strict liability (“in fact.”). USAO states that this is “consistent with current law” and relies on the rationale in its General Comments (*App. C* at 313-316). However, there is no discussion specifically about the sexual assault penalty enhancement for a vulnerable adult.

- The RCC does not incorporate USAO’s recommendation because the “recklessly” culpable mental state improves the proportionality of the revised statute. The sexual assault offense requires the use of force, threats, involuntary intoxication, a coercive threat, or involves an incapacitated complainant. The “recklessly” culpable mental state in the sexual assault penalty enhancement reserves the enhancement for a defendant that has subjective awareness of the complainant’s status as a “vulnerable adult,” yet still chooses to use force, threats, engage with an incapacitated complainant, etc. There is no current sexual abuse aggravator for a “vulnerable adult” so it is not possible to compare the RCC penalty enhancement to current law.

(45) USAO, *App. C* at 275-276, recommends codifying a sex offense repeat offender penalty enhancement to the RCC’s repeat offender penalty enhancement statute (RCC § 22E-606). Specifically, USAO recommends adding a sex offense recidivist penalty enhancement 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 equivalent offense]; 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 equivalent offense], involving 2 or more victims.” USAO is “concerned” that the misdemeanor recidivist penalty enhancement and the non-crime of violence felony penalty enhancement in RCC § 22E-606 require two or more prior convictions. USAO is also “concerned” that this enhancement “only applies to the number of prior convictions, rather than to the total number of victims.” USAO states that the proposed provision 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.” USAO states that “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 crime of violence felony recidivist enhancement.

- The RCC does not incorporate this recommendation because it would change current law in a way that leads to inconsistencies with other RCC offenses of similar seriousness and may authorize disproportionate penalties. The USAO recommendations significantly expand the scope of the current D.C. Code sexual abuse aggravators, which do not contain an aggravator for only one prior conviction and require crimes be committed “against” 2 or more victims.³⁰⁴ The RCC general provision provides a

³⁰⁴ The current D.C. Code sexual abuse aggravators include an aggravator if the “defendant is or has been found guilty of committing sex offenses against 2 or more victims” D.C. Code § 22-3020(a)(5). The

uniform penalty enhancement for an actor who has a prior crime of violence, felony, or misdemeanor crime of violence conviction. It is inconsistent with other revised and D.C. Code offenses to provide a recidivist penalty based on the number of victims in an instant case—multiple counts may be brought in such cases, resulting in multiple punishments that can be run consecutively. Notably, while the statistical evidence available to the CCRC is limited as to the operation of specific enhancements,³⁰⁵ Superior Court statistics for 2009-2015 indicate only five instances during those six years where an aggravating factor for a sex offense resulted in a sentence higher than the otherwise-authorized statutory maximum—and in all five instances the aggravator concerned the relationship of the actor to the complainant, not priors or multiple victims.³⁰⁶

(46) *USAO at App. C. 420-421, “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.*

- The RCC does not incorporate the recommendation because it may authorize disproportionate penalties by punishing offenses of differing seriousness the same.³⁰⁷ The USAO recommendation would authorize punishments more severe than first degree murder (acting with premeditation and deliberation) for enhanced first degree sexual assault, first degree sexual abuse of a minor (presumably including enhanced first degree sexual abuse of a minor), and enhanced second degree sexual abuse of a minor. In contrast, under the First Draft of Report #41 (October 15, 2019) and the Second Draft of Report #41, first degree sexual assault is a Class 4 felony and enhanced first degree sexual assault is a Class 3 felony. These rankings are proportional in relation to the rankings of the most serious RCC homicide offenses—enhanced first degree murder as a Class 1 felony, first degree murder as a Class 2 felony, enhanced second degree murder as a Class 3 felony, and second degree murder as a Class 4 felony.

plain language of the enhancement is unclear and there is no case law clarifying the issue. One possible interpretation of the current aggravator is that priors will only be counted if they are against different complainants. Another interpretation, not precluded by the plain language, is that for a prior to count, it must involve two or more victims—although this interpretation would exclude many prior sex offenses.

³⁰⁵ The CCRC analysis of court statistics provided in Advisory Group Memo #28 do not differentiate between non-while armed enhancements.

³⁰⁶ See Advisory Group Memo #10 Appendix C - Sentencing Commission Statistics on District Penalty Enhancements (6-7-17). According to the analysis provided by the Sentencing Commission, four life sentences were given for First Degree Child Sexual Abuse, D.C. Code § 22-3008, and one sentence of 408 months was given for First Degree Sexual Abuse, D.C. Code § 22-3002, based on the aggravator in D.C. Code §22-3020(a)(2) enhancement (“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).

³⁰⁷ The USAO recommendation for homicide crimes is addressed in the corresponding Appendix D1 entries for homicide crimes.

- While the RCC at present does not address absolute imprisonment penalties associated with classes, the RCC recommendation of Class 3 for enhanced first degree sex assault and enhanced first degree sexual abuse of a minor would correspond to 480 months or 384 months in Models 1 and 2 in the First Draft of Report #41. The RCC recommendation of Class 4 for first degree sex assault, first degree sex abuse of a minor, and enhanced second degree sex abuse of a minor would correspond to according to 360 months or 288 months in Models 1 and 2 in the First Draft of Report #41. The RCC’s penalty recommendations reflect a significant decrease from the current D.C. Code statutory penalties of up to life imprisonment for enhanced forms of first degree sexual abuse and first degree child sexual abuse, which appear to be more severe than is proportionate under modern D.C. judicial practice. Note that, as the District abolished parole in 2000, “life” sentences issued since then are functionally the equivalent of “life without parole” sentences.
 - i. For all first degree sexual abuse and first degree child sexual abuse offense sentences reviewed in the Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions (covering a 10 year span), even the most severe (97.5%) Superior court sentences for first degree sexual abuse (444 months, including enhancements) and first degree child sexual abuse (234.6 months, including enhancements) are well below the life without parole penalties authorized by current statute and within the Model 1 and/or 2 in the First Draft of Report #41.
- Support among District voters for grading the penalty for sexual assault lower than first or second degree homicide is apparent in the CCRC public opinion surveys.³⁰⁸
- The RCC presently sets only the relative penalties for Class 1 felonies and does not establish the absolute penalties, be it a determinate term of years or an indeterminate term such as “life without parole.” However, the CCRC data in sentences in the Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions indicates that in the relevant 10 year time range, there were 6 first degree child sexual abuse convictions, one second degree child sexual abuse conviction, one misdemeanor sexual abuse, and no first degree sexual abuse convictions that received a life sentence. However, as the record for misdemeanor sexual abuse evinces, it is possible that some of the life

³⁰⁸ See Advisory Group Memo #27 Appendix A - Survey Responses at 1 (showing public evaluation of sexual assault involving serious bodily injury as being significantly less severe, by at least one classification, than a manslaughter scenario described as: “An intentional killing in a moment of extreme emotional distress (e.g. after a loved one was hurt).” Question 2.16 provided the scenario: “Forcing submission to sexual penetration by inflicting serious injury..”). Question 2.16 had a mean response of 8.7, over class below the 10.0 milestone corresponding to manslaughter, and nearer the 8.0 corresponding to aggravated assault, currently a 10 year offense in the D.C. Code.

sentences in this court data was a clerical error. The CCRC plans to conduct further research with its dataset on the enhancements and facts at play in the 7 life sentences (by charge, not by case) imposed for child sex offenses in Superior Court 2009-2018. Notably, data provided in by the D.C. Sentencing Commission was collected in Appendix D to Advisory Group Memorandum #10 and provides a breakout of charges by the specific type of enhancement applied. According to this D.C. Sentencing Commission data (which evaluates dispositions at different points in a case and includes resentencing), from 2010 to 2015 there were a total of 4 life sentences given for first degree child sexual abuse under the enhancement for the victim being a minor with whom the actor had a significant relationship (per D.C. Code § 22-3020(a)(2)). Correspondence with USAO identified at least two sex offense cases sentenced 2009-2018, one in 2011 and another in 2015, that resulted in one or more life sentences. Subsequent agency research of public records indicates that one of these two cases involved a person convicted of numerous counts of child sex offenses which included 6 life sentences for first degree child sexual abuse and one for second degree child sexual abuse. In the second case identified by USAO in the ten-year timespan, the person was convicted of guilty on 23 counts of sexual abuse, assault, robbery, kidnapping and other charges. As the data evaluated by the CCRC, the Sentencing Commission, and the public records is taken at different points in time, a direct comparison of these life sentences is not possible. However, based on these several sources, it appears that there have been life sentences imposed by Superior Court judges in the past ten years for first and second degree child sexual abuse, but to the best of our knowledge these sentences were in cases involving so many convictions and serious charges that had the person convicted received a low number of years for each conviction the aggregate punishment would be equivalent to life imprisonment. A maximum sentence in accord with the RCC recommendations for sex offenses would have no practical effect on the imprisonment these offenders received and they would still be imprisoned for the rest of their lives.

RCC § 22E-1302. Sexual Abuse of a Minor.

(1) *USAO at App. C. 420-421, “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.*

- The RCC does not incorporate the recommendation because it may authorize disproportionate penalties by punishing offenses of differing seriousness the same.³⁰⁹ The USAO recommendation would authorize punishments more severe than first degree murder (acting with premeditation and deliberation) for enhanced first degree sexual assault, first degree sexual abuse of a minor (presumably including enhanced first degree sexual abuse of a minor), and enhanced second degree sexual abuse of a minor. In contrast, under the First Draft of Report #41 (October 15, 2019) and the Second Draft of Report #41, first degree sexual assault is a Class 4 felony and enhanced first degree sexual assault is a Class 3 felony. These rankings are proportional in relation to the rankings of the most serious RCC homicide offenses—enhanced first degree murder as a Class 1 felony, first degree murder as a Class 2 felony, enhanced second degree murder as a Class 3 felony, and second degree murder as a Class 4 felony.
- Further details and rationale regarding this recommendation are listed in the Appendix D1 entry above regarding the identical USAO recommendation for enhanced first degree sex assault.

(2) *The CCRC recommends classifying enhanced first degree sexual abuse of a minor as a Class 3 felony, enhanced second degree sexual abuse of a minor as a Class 4 felony, enhanced third degree sexual abuse of a minor as a Class 5 felony, enhanced fourth degree sexual abuse of a minor as a Class 5 felony, enhanced fifth degree sexual abuse of a minor as a Class 6 felony, and enhanced sixth degree sexual abuse of a minor as a Class 7 felony. Enhanced first degree sexual abuse of a minor and enhanced second degree sexual abuse of a minor have the same penalty classifications as enhanced first degree sexual assault and enhanced second degree sexual assault, which is consistent with the classification of the unenhanced gradations of these offenses. The enhanced gradations for third degree, fourth degree, fifth degree, and sixth degree sexual abuse of a minor are one penalty class higher than the equivalent unenhanced gradations in sexual abuse of a minor.*

- This change improves the consistency and proportionality of the revised statute.

(3) *USAO, App. C at 324, recommends adding “engages in” to paragraphs (a)(1), (b)(1), (c)(1), (d)(1), (e)(1), and (f)(1) so that the paragraphs prohibit “engages in or causes the complainant to engage in or submit to” the sexual act or sexual contact, as opposed to “causes the complainant to engage in or submit to” the*

³⁰⁹ The USAO recommendation for homicide crimes is addressed in the corresponding Appendix D1 entries for homicide crimes.

sexual act or sexual contact.” USAO states that this is consistent with the current first degree child sexual abuse statute that prohibits “engages in a sexual act with that child or causes that child to engage in a sexual act” (D.C. Code § 22-3008). USAO states “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.” USAO gives as a hypothetical if “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.” USAO states that liability should “still attach in this situation, as the adult defendant acted culpably by engaging in sexual conduct with the complainant.”

- The RCC incorporates this recommendation by adding to paragraphs (a)(1), (b)(1), and (c)(1) that the actor “engages in a sexual act with the complainant” and adding to paragraphs (d)(1), (e)(1), and (f)(1) that the actor “engages in a sexual contact with the complainant.” The commentary to the RCC sexual abuse of a minor statute has been updated to include this change in the discussion of the “causes the complainant to engage in or submit to” language. This change improves the clarity and consistency of the revised statute.
- (4) *The CCRC recommends including in the reasonable mistake of age defense a “written” statement that the complainant made to the actor about the complainant’s age in addition to oral statements. As previously drafted, the reasonable mistake of age defense was limited to certain “oral” statements, which could lead to inconsistent liability dependent on the form of communication the complainant uses.*
- This change improves the consistency and proportionality of the revised statute. The commentary to the RCC sexual abuse of a minor statute has been updated to reflect that this is a change to current law.
- (5) *The CCRC recommends replacing “supported by” with “based on” in subparagraphs (g)(2)(A)(ii) and (g)(2)(B)(ii) so that the actor’s reasonable belief must be “based on” an oral or written statement of age. The basis of the actor’s belief must be an oral or written statement of age and “supported by” is potentially confusing.*
- This change improves the clarity of the revised statute.
- (6) *USAO, App. C at 323, recommends deleting the reasonable mistake of age defense. USAO relies on the rationale in its General Comments to RCC Chapter 13 (App. C at 313-316). There, USAO states “there is no reason to change these offenses’ strict liability to allow for the defense of reasonable ignorance of the complainant’s age.” USAO states that “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,”³¹⁰ as well as “extremely*

³¹⁰ USAO further states that 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,

prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act.”³¹¹ USAO states that this latter type of evidence “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.” USAO also notes that, as the RCC commentary recognizes, reasonable mistake of age is not “well-recognized or uniformly adopted by other jurisdictions.” USAO states that it “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.” However, 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.” In the alternative, USAO recommends keeping strict liability for sexual abuse of a minor when the complainant is 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 actor is in a position of trust with or authority over the complainant.

- The RCC does not incorporate USAO’s recommendation because it would authorize disproportionate penalties for consensual sexual conduct when the defendant reasonably believes the complainant is a certain age and the complainant actually is at least 14 years old. The RCC reasonable mistake of age defense has three requirements: 1) the defendant’s belief must be “reasonable”; 2) the defendant’s belief must be based on an oral statement of age that the complainant makes to the defendant; and 3) the complainant must be 14 years of age or older,³¹² regardless of the defendant’s mistake. In these limited situations, the RCC does not impose liability for consensual sexual conduct because the defendant is unaware that what he or she is doing is wrong due to the age of the complainant. The RCC sexual abuse of a minor statute retains strict liability as to age for any complainant that is under the age of 14 years. Given the narrow requirements of the defense, the RCC reasonable mistake of age defense does not “create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape

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.”

³¹¹ USAO states that this evidence “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.”

³¹² Although there are two reasonable mistake of age defenses with differing requirements, overall, they require that the complainant is, in fact at least 14 years of age. First degree, second degree, fourth degree, and fifth degree sexual abuse require that the complainant either be under 12 years of age or under 16 years of age. The reasonable mistake of age defense for these gradations, codified in [], requires that the complainant, in fact, be at least 14 years of age or older. Strict liability remains for complainants that are under the age of 14 years, regardless of the defendant’s mistake. Third degree and sixth degree require that the complainant be under the age of 18 years. The reasonable mistake of age defense, codified in [], requires that the complainant is, in fact, 16 years of age or older.

Shield Laws,”³¹³ which the RCC does not substantively change in any manner, or “extremely prejudicial, and otherwise inadmissible, evidence not specially covered by the Rape Shield Act.”³¹⁴ In addition, the American Law Institute’s most recent draft revised sexual abuse of a minor statute requires recklessness as to the age of the complainant, including a complainant under the age of 12 years, and also has a Rape Shield provision.³¹⁵ The RCC does not incorporate the alternative recommendation because it would lead to inconsistency.³¹⁶ The RCC reasonable mistake of age defense improves the proportionality of the revised statute.

³¹³ USAO lists several examples of “evidence that is known to the defendant” that it states would be admissible under the RCC sexual assault penalty enhancements to prove that the defendant was not reckless as to the age of the complainant, but would not be allowed by the current rape shield statute: “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.” USAO, App. C at 314. However, under the current D.C. Code and RCC rape shield statutes, it appears that this evidence would largely be excluded. To the extent that this evidence is opinion or reputation evidence of the complainant’s “past sexual behavior,” it is excluded under the current and RCC rape shield statutes. See D.C. Code § 22-3021(a); RCC § 22E-1311(a). To the extent that this evidence is evidence of the complainant’s “past sexual behavior” and is not reputation or opinion evidence, it is not admissible unless certain procedural requirements are met and it fits it within specific narrow categories. These narrow categories are: 1) evidence that is “constitutionally required to be admitted” (D.C. Code 22-3022(a)(1); RCC § 22E-1311(b)(1)(A)); 2) evidence of past sexual behavior with persons other than the actor, offered by the actor, on the issue of whether or not the actor is the source of semen or bodily injury (D.C. Code § 22-3022(a)(2)(A); RCC § 22E-1311(b)(2)(B)(i)); or 3) evidence of past sexual behavior with the actor where the consent of the complainant is at issue and is offered by the actor on the issue of consent (D.C. Code § 22-3022(a)(3)); RCC § 22E-1311(b)(1)(B)(ii) (requiring the RCC defined term “effective consent.”). Whether the actor was reckless as to the complainant’s age may not categorically fit into these specific categories. The current rape shield statutes and the RCC define “past sexual behavior” as “sexual behavior other than the sexual behavior with respect to which” certain sex offenses is alleged. D.C. Code § 22-3021(b); RCC § 22E-1311.

³¹⁴ USAO lists several examples of “extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act” that it states would be admissible under the RCC sexual assault penalty enhancements: “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.”

³¹⁵ American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.8; 213.11.

³¹⁶ In the alternative, 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 actor is in a position of trust with or authority over the complainant.” USAO, App. C at 315. The RCC sexual abuse of a minor statute does retain strict liability for a complainant under the age of 14 years when the actor is not in a position of trust with or authority over the complainant. The RCC reasonable mistake of age does not apply to the gradations of the offense for a complainant under the age of 16 (first degree, second degree, fourth degree, or fifth degree) unless the complainant actually is 14 years of age or older. Thus, if a complainant under 14 years of age, strict liability applies. The alternative recommendation to require strict liability for a complainant that is under the age of 18 when an actor is in a position of trust with or authority over the complainant would give complainants that are 16 years of age or older, but under 18 years of age, less autonomy in their sexual decision-making than complainants under the age of 16 years, solely because the actor is in a position of trust with or authority over the complainant.

(7) USAO, *App. C at 323*, recommends that, if the RCC does not incorporate its recommendation to delete the reasonable mistake of age defense, that the reasonable mistake of age defense be limited to an oral statement the complainant made “to the defendant.” The reasonable mistake of age defense as previously drafted required an “oral statement by the complainant about the complainant’s age” without specifying the recipient. USAO states that the “only relevance of the complainant making an oral statement about the complainant’s age is if the defendant was aware of that statement.” USAO states that “[g]iven 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.”

- The RCC incorporates this recommendation by revising subparagraphs (g)(2)(B) and (g)(3)(B) to require that the reasonable belief is supported by an oral or written statement “that the complainant made to the actor about the complainant’s age.” This change improves the clarity and consistency of the revised statute.

(8) USAO, *App. C at 323*, recommends that, if the RCC does not incorporate its recommendation to delete the reasonable mistake of age defense, that the reasonable mistake of age defense be revised to include as an additional requirement that the “actor had not had a reasonable opportunity to observe the complainant.” USAO states that this is consistent with the current sex trafficking of children statute (D.C. Code § 22-1834(b)) and the federal sex trafficking of children statute (18 U.S.C. § 1591(c)), under which the government need not prove the defendant’s knowledge or recklessness as to the complainant’s age if the defendant had a “reasonable opportunity to observe the complainant.”

- The RCC does not incorporate USAO’s recommendation because it is inconsistent with the requirements for liability in the RCC sexual abuse of a minor statute and the other provisions of the RCC reasonable mistake of age defense. The RCC sexual abuse of a minor statute requires that a “sexual act” or “sexual contact” occur. Unlike the current D.C. Code child sex trafficking statute,³¹⁷ where a business or individual can traffic a complainant without ever seeing the complainant, it is very likely that the defendant in the RCC sexual abuse of a minor statute will have an opportunity to observe the defendant. In addition, as is discussed above, the RCC reasonable mistake of age defense has been limited to an oral or written statement of age that the complainant makes to the defendant, which also makes it likely that the defendant will have an opportunity to observe the complainant. Finally, the reasonable mistake of age defense requires that the defendant’s belief be “reasonable,” and a fact finder may consider whether the defendant had a reasonable opportunity to observe the complainant in assessing whether the belief was “reasonable.” The

³¹⁷ D.C. Code § 22-1834(a) (“It is unlawful for an individual or a business knowingly to recruit, entice, harbor, transport, provide, obtain, or maintain by any means a person who will be caused as a result to engage in a commercial sex act knowing or in reckless disregard of the fact that the person has not attained the age of 18 years.”).

proposed recommendation would negate the defense and is inconsistent with the other requirements of the statute.

(9) *USAO, App. C at 323-324, recommends that, if the RCC does not incorporate its recommendation to delete the reasonable mistake of age defense, the reasonable mistake of age defense be revised to specify that strict liability (“in fact”) applies to the actual age of the complainant. USAO states that “it believes that it is the RCC’s intent to have strict liability in these situations” and that adding “in fact” clarifies this.*

- The RCC incorporates USAO’s recommendation by specifying strict liability in paragraphs (g)(2) and (g)(3) of the reasonable mistake of age defense, which applies to each element in subparagraphs (g)(2)(A) – (g)(2)(C) and subparagraphs (g)(3)(A)-(g)(3)(C), including the actual age of the complainant. This change clarifies the revised statute.

(10) *The CCRC recommends specifying strict liability (“in fact”) in paragraphs (g)(2) and (g)(3), which, per the rule of construction in RCC § 22E-207, applies to each element in subparagraphs (g)(2)(A) – (g)(2)(C) and subparagraphs (g)(3)(A)-(g)(3)(C). With this change, it is clear that there is no culpable mental state for the fact that the actor has a reasonable belief that the complainant is a certain age, that the reasonable belief is based on an oral or written statement that the complainant made to the actor about the complainant’s age, or the actual, required age of the complainant. For example, the actor need not “know” that his or her belief is reasonable. The previous version of the reasonable mistake of age defense did not specify whether a culpable mental state or strict liability applied to these requirements.*

- This change improves the clarity of the revised statute.

(11) *The CCRC recommends in subparagraphs (g)(2)(A), (g)(2)(C), (g)(3)(A), and (g)(3)(C) of the reasonable mistake of age defense replacing “at the time of the offense” with “at the time of the sexual act or sexual contact.” This is consistent with a revision made to the RCC sexual assault penalty enhancements.*

- This revision improves the clarity of the revised statute.

(12) *PDS, App. C at 270-271, objects to the limitations placed on the affirmative defense of reasonable mistake of age. PDS states that “[a]bsent 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 age will always be a “she said, he said” issue and an issue of credibility. In addition, PDS states that an oral statement “might be one aspect of whether the actor’s belief that the complainant was 16 (or 18) or older was reasonable.” PDS gives as examples of evidence that might make an actor’s belief reasonable: the actor and complainant may have met at a bar that “cards” every patron; the actor may have asked if the complainant were a certain age and the complainant nodded in assent; or that the complainant may have shown the actor a fake ID. PDS also gives as examples evidence that make an actor’s belief unreasonable despite a complainant’s oral statement of age, such as meeting the complainant outside a middle school. PDS states 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” and that “[i]n 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.”

- The CCRC partially incorporates PDS’ recommendation to strike the limitations on the reasonable mistake of age defense by including within the offense written statements of age by the complainant to the actor. This revision is discussed further above in this Appendix. Although the defendant’s belief must be based on an oral or written statement of age, a jury may also be able to consider the types of evidence PDS raises in determining whether the defendant’s belief is “reasonable.”

(13) USAO, App. C at 316, recommends applying all the sexual abuse aggravating circumstances in current law³¹⁸ to all sex offenses in RCC §§ 22E-1301-1307, including sexual abuse of a minor. USAO states that it “is important that these offenses apply to all sexual offenses, as the conduct they seek to deter merits an enhancement.” USAO offers as an example a defendant that “engaged in a non-forced sexual act with his 13-year-old biological daughter,” which is criminalized as second degree sexual abuse of a minor in the RCC. USAO states that the relationship between the parties “renders the offense far more heinous, and worthy of a more significant penalty, than if the defendant had no significant relationship with the complainant,” which the RCC sexual abuse of a minor statute does not take into consideration. USAO notes that “although the [RCC] 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 (RCC § 22E-1305) and arranging for sexual conduct with a minor (RCC § 22E-1306), do not. USAO states that an enhancement for the complainant’s age in these offenses would “account for that additional vulnerability.”

- The RCC partially incorporates USAO’s recommendation by codifying in the RCC sexual abuse of a minor statute the RCC sexual assault penalty enhancements that do not overlap³¹⁹ with the elements of the RCC sexual abuse of a minor offense or are not inapplicable to the offense³²⁰: 1) the

³¹⁸ D.C. Code § 22-3020(a)(1) – (a)(6) (“(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.”).

³¹⁹ The RCC sexual assault penalty enhancements that overlap with the elements of the RCC sexual abuse of a minor statute, and are not included as penalty enhancements in the RCC sexual abuse of a minor offense, are: 1) the complainant was under the age of 12 and the actor was at least 4 years older; 2) the complainant was under the age of 16 years and the actor was at least 4 years older; and 3) as it pertains to third degree and sixth degree sexual abuse of a minor, that the actor was in a position of trust with or authority over the complainant.

³²⁰ The RCC sexual assault statute has penalty enhancements for elderly complainants and a complainant that is a “vulnerable adult,” which are inapplicable to the RCC sexual abuse of a minor statute.

use or display of a dangerous weapon or imitation dangerous weapon; 2) acting with one or more accomplices; 3) causing serious bodily injury to the complainant; or 4) for first degree, second degree, fourth degree, and fifth degree, the actor knew that he or she was in a position of trust with or authority over complainant.³²¹ Notably, while the statistical evidence available to the CCRC is limited as to the operation of specific enhancements,³²² Superior Court statistics for 2009-2015 indicate only five instances during those six years where an aggravating factor for a sex offense resulted in a sentence higher than the otherwise-authorized statutory maximum—and in all five instances the aggravator concerned the relationship of the actor to the complainant, not priors or multiple victims.³²³ This change improves the consistency and proportionality of the revised statutes.

(14) USAO, App. C at 324, recommends in third degree and sixth degree of the RCC sexual abuse of a minor statute removing the four year age gap between the actor and the complainant. With this change, third degree and sixth degree of the RCC sexual abuse of a minor statute would require only that the defendant is at least 18 years of age, the complainant is under 18 years of age, and the actor is in a position of trust with or authority over the complainant. USAO states that this change is “consistent with current law” and relies on the rationale set forth in its General Comments to RCC Chapter 13 (App. C, 313-316). USAO states that 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.” In addition, USAO states that the RCC noted that 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.”³²⁴

- The RCC does not incorporate USAO’s recommendation because it would be inconsistent with the liability requirements for a complainant that is under the age of 16 years. The current D.C. Code child sexual abuse statutes³²⁵ and the RCC sexual abuse of a minor statute require at least a four year age gap between an actor and a complainant under the age of 16 years. The current D.C. Code sexual abuse of a minor statutes do not require a four year age gap when the complainant is under the age of 18

³²¹ USAO separately raises, and the entry in this appendix for the RCC sexual assault statute separately addresses, the aggravator for prior convictions in the current D.C. Code sexual abuse statutes.

³²² The CCRC analysis of court statistics provided in Advisory Group Memo #28 do not differentiate between non-while armed enhancements.

³²³ See Advisory Group Memo #10 Appendix C - Sentencing Commission Statistics on District Penalty Enhancements (6-7-17). According to the analysis provided by the Sentencing Commission, four life sentences were given for First Degree Child Sexual Abuse, D.C. Code § 22-3008, and one sentence of 408 months was given for First Degree Sexual Abuse, D.C. Code § 22-3002, based on the aggravator in D.C. Code §22-3020(a)(2) enhancement (“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).

³²⁴ USAO, App. C at 315, quoting RCC, App. J at 261-63.

³²⁵ D.C. Code §§ 22-3008, 22-3009, 22-3001(3) (defining “child” as “a person who has not yet attained the age of 16 years.”).

years and the actor is at least 18 and in a “significant relationship” with the complainant.³²⁶ Third degree and sixth degree of the RCC sexual abuse of a minor statutes added a four year age gap to parallel the age gap requirement in the child sexual abuse statutes. The four year age gap avoids criminalizing otherwise consensual sexual conduct between an actor that is at least 18 years of age and a complainant that is between 16 years and 18 years of age solely because the actor is in a position of trust with or authority over the complainant. Finally, while RCC Appendix J noted that 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,”³²⁷ this is also due, in part, to the fact that only a narrow minority of reformed jurisdictions have liability at all for sexual conduct with complainants under 18 years of age.³²⁸

(15) OAG, App. C at 251, recommends removing the reference to “domestic partnerships” in the marriage or domestic partnership defense. OAG states that, due to the current and RCC definition of “domestic partnership,” the District only recognizes domestic partnerships where the parties are at least 18 years old—either domestic partnerships registered in the District or domestic partnerships that are “substantially similar” to District domestic partnerships. OAG states that since the RCC sexual abuse of a minor statute requires the complainant to be under 18 years of age, “there is never a situation where a person will be able to use the domestic partnership defense.”

- The RCC does not incorporate OAG’s recommendation because it may lead to inconsistencies with the District law governing domestic partnerships. It appears possible for the District to recognize a domestic partnership in another jurisdiction even if the parties are not at least 18 years of age. The RCC marriage and domestic partnership defense and the RCC definition of “domestic partnership” are substantively identical to the defense³²⁹ and definition³³⁰ in the current D.C. Code sexual abuse statutes.

³²⁶ D.C. Code §§ 22-3008, 22-3009, 22-3001(5A) (defining “minor” as “a person who has not yet attained the age of 18 years.”).

³²⁷ RCC App. J at 258-260.

³²⁸ RCC App. J noted, with footnotes omitted here:

At least 14 of the 29 reformed jurisdictions have gradations in their sex offenses for a complainant under the age of 18 years when the actor is in a position of trust with or authority over the complainant. Five of these 14 reformed jurisdictions require an age gap between the actor and the complainant in at least one of the offenses or gradations and one jurisdiction makes the age gap an affirmative defense. An additional jurisdiction narrows the offense not by an age gap requirement, but by requiring that the actor use the position of authority to coerce the complainant.

³²⁹ D.C. Code § 22-3011(b) (“Marriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence, to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, involving only the defendant and the child or minor.”).

³³⁰ RCC § 22E-701 defines “domestic partnership” as having the same meaning as D.C. Code § 32-701(4). The current D.C. Code sexual abuse statutes use the D.C. Code § 32-701(4) definition of “domestic

Under the current D.C. Code definition of “domestic partnership,” the District does require individuals to be at least 18 years of age in order to register a domestic partnership in the District, but “relationships established in accordance with the laws of other jurisdictions, other than marriages, that are substantially similar to domestic partnerships established by this chapter, as certified by the Mayor, shall be recognized as domestic partnerships in the District.”³³¹ It appears possible that the Mayor could recognize a relationship in another jurisdiction as “substantially similar” to a domestic partnership in the District even if the individuals were not at least 18 years of age.³³² In addition, the current definition of “domestic partnership” states that “the Mayor shall broadly construe the term ‘substantially similar’ to maximize the recognition of relationships from other jurisdictions as domestic partnerships in the District,”³³³ and has a provision that requires the Mayor in certain circumstances to recognize relationships in other jurisdictions as domestic partnerships, regardless of how they are treated in those jurisdictions.³³⁴ The RCC marriage and domestic partnership defense is consistent with current District law.

(16) USAO, App. C at 324-325, recommends adding a paragraph (g)(4) that states “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.” USAO

partnership.” D.C. Code § 22-3001(4B) (“‘Domestic partnership’ shall have the same meaning as provided in § 32-701(4).”).

³³¹ RCC § 22E-701 defines “domestic partnership” as having the same meaning as D.C. Code § 32-701(4). D.C. Code § 32-701(4) defines “domestic partnership” as the “relationship between 2 persons who become domestic partners by registering in accordance with § 32-702(a) or whose relationship is recognized under § 32-702(i).” Under D.C. Code § 32-702(a), individuals must be at least 18 years old to register a domestic partnership in the District. However, under D.C. Code § 32-702(i), “relationships established in accordance with the laws of other jurisdictions, other than marriages, that are substantially similar to domestic partnerships established by this chapter, as certified by the Mayor, shall be recognized as domestic partnerships in the District.”

³³² Consider, for example, if the individuals entered into the relationship in the other jurisdiction when one or both individuals was 17 and-a-half years of age and the individuals seek to register the relationship in the District just shy of an 18th birthday. Or consider if one or both individuals was significantly younger than 18 years of age when they entered the relationship in the other jurisdiction, but at the time of seeking to register in the District, the relevant party or parties are 18 years of age or well older than 18 years of age.

³³³ D.C. Code § 32-702(i)(1).

³³⁴ D.C. Code § 32-702(i)(1) requires the Mayor to “establish and maintain a certified list of jurisdictions” that are recognized as having substantially similar domestic partnerships. However, in the event of a jurisdiction that is not on this list,

(2) If the Mayor has not yet certified, pursuant to paragraph (1) of this subsection, that the laws of a jurisdiction permit the establishment of relationships substantially similar to domestic partnerships established by this chapter, and if the laws of that jurisdiction prescribe that the relationship, regardless of the term or phrase used to refer to the relationship, has all the rights and responsibilities of marriage under the laws of that jurisdiction, the relationship shall be recognized as a domestic partnership in the District and the Mayor shall include that jurisdiction in the certified list required under paragraph (1) of this subsection.

D.C. Code § 32-702(i)(2).

states that this is “implied” in the RCC sexual abuse of a minor statute as drafted, but that it should be explicitly stated “to eliminate any potential confusion, particularly given the potential change in law regarding a reasonable mistake of age defense.” USAO states that this is consistent with current law.

- The RCC does not incorporate USAO’s recommendation because it introduces ambiguity into the revised statute. Nothing in the RCC sexual abuse of a minor statute suggests that consent is a defense. Codifying a provision that explicitly states consent is not a defense is potentially confusing for other RCC offenses which do not take this approach of stating defenses that do not apply. However, the commentary to the RCC sexual abuse of a minor statute has been updated to reflect that the statute deletes the current prohibition on consent as a defense as a clarificatory change.

(17) The CCRC recommends in paragraph (g)(1) of the marriage or domestic partnership defense replacing “at the time of the offense” with “at the time of the sexual act or sexual contact.” This is consistent with a revision made to the RCC sexual assault penalty enhancements.

- This revision improves the clarity of the revised statute. The commentary to the RCC sexual abuse of a minor statute has been updated to reflect that this is a clarificatory change to current District law.

(18) The CCRC recommends in paragraph (g)(1) applying strict liability (“in fact”) to the element that the actor and the complainant are in a marriage or domestic partnership at the time of the sexual act or sexual contact. With this change, paragraph (g)(1) requires that the actor and the complainant “are, in fact, in a marriage or domestic partnership at the time of the sexual act or sexual contact.” The previous version of the consent defense did not specify whether a culpable mental state or strict liability applied.

- This change improves the clarity of the revised statute. The commentary to the RCC sexual abuse of a minor statute has been updated to reflect that this a clarificatory change to current District law.

(19) The CCRC recommends deleting the burden of proof requirements for the affirmative defenses (previously paragraph (g)(3)). The RCC has a general provision that addresses the burden of proof for all affirmative defenses in the RCC (RCC § 22E-XX).

- This change improves the clarity and consistency of the revised statute.

RCC § 22E-1303. Sexual Abuse by Exploitation.

- (1) *OAG, App. C at 251-252, recommends changing the name of the offense from “sexual exploitation of an adult” to “sexual exploitation.” OAG states that the offense title is “misleading” because the offense applies to certain students that are under the age of 20 years.*
 - The RCC partially incorporates this recommendation by changing the name of the offense to “sexual abuse by exploitation.” The reference to “sexual abuse” is consistent with “abuse” in the RCC “sexual abuse of minor” offense (RCC § 22E-1302). Like the RCC sexual abuse of a minor offense, the sexual abuse by exploitation offense criminalizes otherwise consensual sexual conduct due to the relationship between the parties. This change improves the clarity of the revised statute.
- (2) *USAO, App. C at 325-326, recommends adding “engages in” to paragraphs (a)(1) and (b)(1) so that they prohibit “engages in or causes the complainant to engage in or submit to” the sexual act or sexual contact, as opposed to “causes the complainant to engage in or submit to” a sexual act or sexual contact. USAO states that this is consistent with the current sexual abuse of a ward statutes,³³⁵ which prohibit “engages in” a sexual act or sexual contact, and the current sexual abuse of a patient or client statutes,³³⁶ which are limited to “engages in” a sexual act or sexual contact. USAO states “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.” USAO gives as a hypothetical if “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 prisoner to engage in the conduct.” USAO states that liability should “still attach in this situation, as the adult defendant acted culpably by engaging in sexual conduct with the complainant.”*
 - The RCC incorporates this recommendation by adding to paragraph (a)(1) that the actor “engages in a sexual act with the complainant” and adding to paragraph (b)(1) that the actor “engages in a sexual contact with the complainant.” This change improves the clarity and consistency of the revised statute. The commentary to the RCC sexual abuse by exploitation statute has been updated to include this change in the discussion of the “causes the complainant to engage in or submit to” language. The commentary to the RCC sexual abuse by exploitation statute has been updated to reflect this is a possible change in law.
- (3) *The CCRC recommends replacing “In one or more of the following ways” in paragraphs (a)(2) and (b)(2) with “In one or more of the following situations.” “In one or more of the following situations” clarifies that there is no a causation requirement between the sexual act or sexual contact and the prohibited scenarios-i.e., when the actor is a specified individual at a secondary school, etc.*

³³⁵ D.C. Code §§ 22-3013; 22-3014.

³³⁶ D.C. Code §§ 22-3015; 22-3016.

- This change improves the clarity of the revised statute.
- (4) *USAO, App. C at 325, recommends adding “or other person of authority” to the list of specified secondary school employees (subparagraphs (a)(2)(A) and (b)(2)(A)). With USAO’s recommendation, the statute provisions would read “The actor is a teacher, counselor, principal, administrator, nurse, coach, or security officer, or other person of authority in a secondary school.” USAO states that such a catch-all is included in the current sexual abuse of a secondary education student statutes³³⁷ and that it is important to have a catch-all “for any individuals [the RCC] list may inadvertently fail to include.” As a hypothetical, USAO states that “a doctor at the school would not be included in this list,” but “a nurse would.”*
- The RCC does not incorporate this recommendation because it would introduce ambiguity into the statute and risk disproportionate penalties. The current D.C. Code sexual abuse of a secondary education student statutes prohibit sexual activity between certain students that are under the age of 20 years and certain “teacher[s], counselor[s], principal[s], coach[es], or other person[s] of authority in a secondary school.”³³⁸ From the current D.C. Code statutes, the RCC sexual abuse by exploitation statute retained “teacher,” “counselor,” “principal,” and “coach,” but deleted the “other person of authority in a secondary school” catch-all. The RCC sexual abuse by exploitation statute also codified three additional types of actors, “administrator,” “nurse,” and “security guard.” As a result, the RCC sexual abuse by exploitation statute is limited to five types of actors (teacher, counselor, principal, administrator, nurse, coach, or security officer) that are uniquely positioned in a secondary school such that a sexual relationship with a student under the age of 20 years can be deemed inherently coercive. Other individuals at a secondary school that engage in sexual activity with students that are at least 18 years of age, but under the age of 20 years,³³⁹ may face liability under second degree or fourth degree of the revised sexual assault statute (RCC § 22E-1301) if the actor uses his or her position to coerce the complainant. In addition, under USAO’s hypothetical of a doctor that engages in sexual activity with a student under the age of 20 years, there may be liability under subparagraphs (a)(2)(C) and (b)(2)(C) of the RCC sexual abuse by exploitation offense pertaining to health professionals. A “doctor” is not typically an employee at a school, but a “nurse” is, justifying its inclusion in the secondary education student provision of the RCC sexual abuse by exploitation offense.

³³⁷ D.C. Code §§ 22-3009.03; 22-3009.04.

³³⁸ D.C. Code §§ 22-3009.03; 22-3009.04.

³³⁹ If the student is under the age of 18 years, there is liability under third degree or sixth degree of the RCC sexual abuse of a minor statute (RCC § 22E-1302) if the actor is in a “position of trust with or authority over” the complainant and if the actor is at least 18 years of age and at least four years older than the complainant.

- (5) *OAG, App. C at 252, recommends defining the term “clergy” in the sexual abuse by exploitation offense, as opposed to stating the intended scope in the commentary. OAG recommends defining “clergy” as “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.”*
- The RCC partially incorporates this recommendation by replacing a “member of the clergy” in subparagraphs (a)(2)(C) and (b)(2)(C) with “a religious leader described in D.C. Code § 14-309.” The discussion in the commentary of the intended broad scope of this provision remains unchanged. D.C. Code § 14-309 refers to a “priest, clergyman, rabbi, or other duly licensed, ordained, or consecrated minister of a religion authorized to perform a marriage ceremony in the District of Columbia or duly accredited practitioner of Christian Science.”³⁴⁰ This change improves the clarity of the revised statute. The commentary to the RCC sexual abuse by exploitation statute has been updated to reflect that this definition is part of a change in law.
- (6) *USAO, App. C at 326, recommends adding “medical or therapeutic” to sub-subparagraphs (a)(2)(C)(i) and (b)(2)(C)(i) so that the provisions prohibit falsely representing that the sexual act or sexual contact is for a “bona fide professional, medical, or therapeutic purpose,” as opposed to a “bona fide professional purpose.” USAO states that the current sexual abuse of a patient or client statutes provide liability for 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.”³⁴¹ USAO states the revised statute should be “consistent with current law” and this revision would “ensure that the medical and therapeutic purposes are expressly included” in the revised statute.*
- The RCC incorporates this recommendation by adding a “medical” or “therapeutic” purpose to sub-subparagraphs (a)(2)(C)(i) and (b)(2)(C)(i). This change improves the clarity of the revised statute.
- (7) *USAO, App. C at 325, recommends replacing the “recklessly” culpable mental state that applies to sub-subparagraphs (a)(2)(A)(i)(I), (b)(2)(A)(i)(I), (a)(2)(A)(i)(II), and (b)(2)(A)(i)(II) with strict liability (“in fact.”). USAO further recommends applying strict liability to subparagraphs (a)(2)(A) and (b)(2)(A).³⁴² With these changes, these provisions would require that the actor is “in fact” a specified member of a secondary school and that the complainant is “in fact” an enrolled student in the same secondary school as the actor or that the complainant “in fact” receives services or attends programming at the same secondary school as the actor. USAO states that this change is “consistent with*

³⁴⁰ D.C. Code § 14-309.

³⁴¹ D.C. Code §§ 22-3015(a)(1); 22-3016(a)(1).

³⁴² Per the rule of construction in RCC § 22E-207, the “knowingly” culpable mental state in paragraphs (a)(1) and (b)(1) applies to all elements in subparagraphs (a)(1)(A) and (b)(1)(A) until the “recklessly” culpable mental state is specified in those subparagraphs.

current law” and relies on the rationale in its General Comments to RCC Chapter 13, App. C at 313-316, which is specific to removing the requirement of recklessness as to the complainant’s age.

- The RCC does not incorporate this recommendation because requiring strict liability for these elements may authorize disproportionate penalties. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle,³⁴³ but recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.³⁴⁴ Given the heightened responsibility that comes with the specified secondary school positions in subparagraphs (a)(2)(A) and (b)(2)(A), a “knowingly” culpable mental state is proportionate. This heightened responsibility makes proportionate the lower culpable mental state of “recklessly” for the requirements pertaining to the complainant—that the complainant is an enrolled student in the same secondary school as the actor or that the complainant receives services or attends programming at the same secondary school as the actor. The “knowingly” and “recklessly” culpable mental states improve the proportionality of the revised statute.

(8) *USAO, App. C at 325, recommends replacing the “recklessly” culpable mental state that applies to sub-subparagraphs (a)(2)(A)(i)(II) and (b)(2)(A)(ii) with strict liability (“in fact.”) With these changes, these sub-subparagraphs would require that the complainant “in fact” is under the age of 20 years. USAO states that this change is “consistent with current law” and relies on the rationale in its General Comments to RCC Chapter 13 (App. C at 313-316). There, USAO states “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.” USAO states that “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,”³⁴⁵ as well as “extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act.”³⁴⁶ USAO states that this latter type of evidence “would not only serve to embarrass a victim*

³⁴³ *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

³⁴⁴ *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) (“There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.

³⁴⁵ USAO further states that 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.”

³⁴⁶ USAO states that this evidence “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.”

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.” USAO states that it “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.” However, 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.”

- The RCC does not incorporate USAO's recommendation because the “recklessly” culpable mental state improves the proportionality of the revised statute. The RCC sexual abuse by exploitation statute criminalizes sexual activity with complainants that are adults, i.e., over the age of 18 years, solely because of the school-based relationship between the actor and the complainant. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.³⁴⁷ However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.³⁴⁸ In addition, although the current D.C. Code sexual abuse of a secondary education student statutes do not specify any culpable mental states, the strict liability statute in current D.C. Code § 22-3012 does not appear to apply to them.³⁴⁹ There is no DCCA case law on the current D.C. Code sexual abuse of a secondary education student statutes, making it unclear whether requiring a “recklessly” culpable mental state for the

³⁴⁷ *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

³⁴⁸ *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) (“There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.

³⁴⁹ D.C. Code § 22-3012 states, “In a prosecution under §§ 22-3008 to 22-3010, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, the government need not prove that the defendant knew the child's age or the age difference between himself or herself and the child.” D.C. Code § 22-3012. The current D.C. Code sexual abuse of a secondary education student statutes are codified at D.C. Code §§ 22-3009.03 and 22-3009.04, which fall within the specified range of statutes, but it is unclear if the Council intended for D.C. § 22-3012 to apply to the secondary education student statutes or realized that it would. The current secondary education statutes do not use the term “child” or require an age gap, and D.C. Code § 22-3012 has not been revised since the 1994 Anti-Sexual Abuse Act. The secondary education students were codified in 2010.

Similarly, D.C. Code § 22-3011(a) states that “mistake of age . . . is [not] a defense to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403.” D.C. Code § 22-3011(a). The current D.C. Code sexual abuse of a secondary education student statutes fall within the specified range of D.C. Code §§ 22-3008 to 22-3010.01, but this appears to be a result of the codification of the misdemeanor sexual abuse of a child or minor statute at D.C. Code § 22-3010.01. The current D.C. Code misdemeanor sexual abuse of a child or minor statute was enacted in 2007, and as part of the legislation, D.C. Code § 22-3011(a) was amended to make D.C. Code § 22-3010.01 the end of the specified range of statutes. Since the current sexual abuse of a secondary education student statutes were not enacted until 2010, it is unclear if the Council intended for § 22-3011 to apply to the secondary education student statutes, or realized that it did.

age of a secondary education student complainant is a change to current law. The “recklessly” culpable mental state does not “create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,”³⁵⁰ which the RCC does not substantively change in any manner, or “extremely prejudicial, and otherwise inadmissible, evidence not specially covered by the Rape Shield Act.”³⁵¹ Requiring recklessness as to the age of the secondary education student is not inconsistent with robust rape shield laws as, for example, the current D.C. Code sex trafficking of children statute³⁵² already combines a recklessness requirement for the age of the complainant with a Rape Shield law.³⁵³ In addition, the American Law Institute’s most recent draft revised sexual abuse of a minor statute requires recklessness as to the age of the complainant, including a complainant under the age of 12 years, and also has a Rape Shield provision.³⁵⁴

- (9) *USAO, App. C at 326, recommends adding a subsection that states “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.” USAO states that this is “implied” in the RCC sexual abuse by exploitation statute as drafted, but that it*

³⁵⁰ USAO lists several examples of “evidence that is known to the defendant” that it states would be admissible under the RCC sexual assault penalty enhancements to prove that the defendant was not reckless as to the age of the complainant, but would not be allowed by the current rape shield statute: “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.” USAO, App. C at 314. However, under the current D.C. Code and RCC rape shield statutes, it appears that this evidence would largely be excluded. To the extent that this evidence is opinion or reputation evidence of the complainant’s “past sexual behavior,” it is excluded under the current and RCC rape shield statutes. See D.C. Code § 22-3021(a); RCC § 22E-1311(a). To the extent that this evidence is evidence of the complainant’s “past sexual behavior” and is not reputation or opinion evidence, it is not admissible unless certain procedural requirements are met and it fits it within specific narrow categories. These narrow categories are: 1) evidence that is “constitutionally required to be admitted” (D.C. Code 22-3022(a)(1); RCC § 22E-1311(b)(1)(A)); 2) evidence of past sexual behavior with persons other than the actor, offered by the actor, on the issue of whether or not the actor is the source of semen or bodily injury (D.C. Code § 22-3022(a)(2)(A); RCC § 22E-1311(b)(2)(B)(i)); or 3) evidence of past sexual behavior with the actor where the consent of the complainant is at issue and is offered by the actor on the issue of consent (D.C. Code § 22-3022(a)(3)); RCC § 22E-1311(b)(1)(B)(ii) (requiring the RCC defined term “effective consent.”). Whether the actor was reckless as to the complainant’s age may not categorically fit into these specific categories. The current rape shield statutes and the RCC define “past sexual behavior” as “sexual behavior other than the sexual behavior with respect to which” certain sex offenses is alleged. D.C. Code § 22-3021(b); RCC § 22E-1311.

³⁵¹ USAO lists several examples of “extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act” that it states would be admissible under the RCC sexual assault penalty enhancements: “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.”

³⁵² D.C. Code § 22-1834.

³⁵³ D.C. Code § 22-1839.

³⁵⁴ American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.8; 213.11.

- should be explicitly stated “to eliminate any potential confusion.” USAO states that this is consistent with current law in D.C. Code § 22-3017(a).*
- The RCC does not incorporate USAO’s recommendation because it introduces ambiguity into the revised statute. Nothing in the RCC sexual abuse by exploitation statute suggests that consent is a defense. Codifying a provision that explicitly states consent is not a defense is potentially confusing, particularly when other RCC offenses do not take this approach. However, the commentary to the RCC sexual abuse by exploitation statute has been updated to reflect that the statute deletes the current prohibition on consent as a defense as a clarificatory change.
- (10) *The CCRC recommends replacing “at the time of the offense” with “at the time of the sexual act or sexual contact” the marriage or domestic partnership defense. This is consistent with a revision made to the RCC sexual assault penalty enhancements.*
- This revision improves the clarity of the revised statute. The commentary to the RCC sexual abuse by exploitation statute has been updated to reflect that this is a clarificatory change to current District law.
- (11) *The CCRC recommends in subsection (c) applying strict liability (“in fact”) to the element that the actor and the complainant are in a marriage or domestic partnership at the time of the sexual act or sexual contact. With this change, subsection (c) requires that the actor and the complainant “are, in fact, in a marriage or domestic partnership at the time of the sexual act or sexual contact.” The previous version of the consent defense did not specify whether a culpable mental state or strict liability applied.*
- This change improves the clarity of the revised statute. The commentary to the RCC sexual abuse by exploitation statute has been updated to reflect that this a clarificatory change to current District law.
- (12) *The CCRC recommends deleting the burden of proof requirements for the affirmative defense in subsection (c). The RCC has a general provision that addresses the burden of proof for all affirmative defenses in the RCC (RCC § 22E-201).*
- This change improves the clarity and consistency of the revised statute.
- (13) *USAO, App. C at 316, recommends applying all the sexual abuse aggravating circumstances in current law³⁵⁵ to all sex offenses in RCC §§ 22E-1301-1307, including sexual abuse by exploitation. USAO states that it “is important that these offenses apply to all sexual offenses, as the conduct they seek to deter merits an enhancement.” USAO offers as an example a defendant that “engaged in a non-forced sexual act with his 13-year-old biological daughter,”*

³⁵⁵ D.C. Code § 22-3020(a)(1) – (a)(6) (“(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.”).

which is criminalized as second degree sexual abuse of a minor in the RCC. USAO states that the relationship between the parties “renders the offense far more heinous, and worthy of a more significant penalty, than if the defendant had no significant relationship with the complainant,” which the RCC sexual abuse of a minor statute does not take into consideration. USAO notes that “although the [RCC] 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 (RCC § 22E-1305) and arranging for sexual conduct with a minor (RCC § 22E-1306), do not. USAO states that an enhancement for the complainant’s age in these offenses would “account for that additional vulnerability.” There is no discussion in USAO’s comment of how the current penalty enhancements would affect the RCC sexual abuse by exploitation statute.

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC sexual abuse by exploitation statute is limited to sexual conduct that occurs without the use of force, threats, or coercion. If the RCC sexual assault penalty enhancements applied to the RCC sexual abuse by exploitation offense, similar conduct could receive significantly different penalties.³⁵⁶

³⁵⁶ If, for example, a prison guard uses a weapon to coerce an inmate into having sex with the prison guard, that behavior is more proportionately charged as sexual assault.

RCC § 22E-1304. Sexually Suggestive Conduct with a Minor.

- (1) *USAO, App. C at 327, recommends replacing “contact” with “conduct” in subsection (a) so that the subsection reads “An actor commits sexually suggestive conduct with a minor when that actor.” USAO states that this clarifies the statute.*
- The RCC incorporates this recommendation by replacing “contact” with “conduct.” This change resolves a typographical error and improves the clarity of the revised statute.
- (2) *The CCRC recommends replacing “Knowingly touches the actor’s genitalia or that of a third person in the sight of the complainant with intent that the complaint’s presence cause the sexual arousal or sexual gratification of any person” (previously subparagraph (a)(1)(D)) with the actor “Purposely engages in: (i) A sexual act that is visible to the complainant; (ii) A sexual contact that is visible to the complainant; or (iii) A sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering, that is visible to the complainant.” There are two changes with this revision. First, the scope of prohibited conduct is expanded to include, if visible to the complainant, a sexual act, a sexual contact, and sexualized displays of the genitals, pubic area, or anus. This is consistent with the scope of the RCC indecent exposure statute (RCC § 22E-4206), the one exception being that the sexually suggestive conduct with a minor statute does not require less than a full opaque covering for sexualized displays. Displays of the genitals, pubic area, and anus to a minor complainant may still be sexualized even when there is a full opaque covering (e.g., an erection covered by underwear but visible). Second, the “purposely” culpable mental state replaces “with intent that the complainant’s presence cause the sexual arousal or sexual gratification of any person.” This previous language was drafted to avoid criminalizing adult sexual conduct in front of a minor in a small living space. However, the “purposely” culpable mental state has the same effect by requiring that the defendant consciously desires that the sexual act, sexual contact, or sexualized display is visible to the complainant.*
- This change improves the clarity, consistency, and proportionality of the revised statute. The commentary to the RCC sexually suggestive conduct with a minor statute has been updated to reflect this is a change in law.
- (3) *The CCRC recommends expanding the prohibited conduct to “engages in with the complainant or causes the complainant to engage in or submit to.” The current D.C. Code misdemeanor sexual abuse of a child or minor statute³⁵⁷ and the previous version of the RCC sexually suggestive conduct with a minor statute were limited to the actor touching or kissing the complainant and there would be*

³⁵⁷ D.C. Code § 22-3010.01(b)(1) – (b)(3) (“(1) Touching a child or minor inside his or her clothing; (2) Touching a child or minor inside or outside his or her clothing close to the genitalia, anus, breast, or buttocks; (3) Placing one’s tongue in the mouth of the child or minor.”). The fourth type of prohibited conduct in the current statute, “[t]ouching one’s own genitalia or that of a third person,” has been interpreted by the DCCA to mean doing so in view of the complainant, and is unrelated to either the actor or a third person touching the complainant.

no liability for the actor making the complainant touch or kiss the actor or a third party or submit to touching or kissing by a third party. Prohibiting “engages in” or “causes the complainant to engage in or submit to” is consistent with the scope of the other RCC sex offenses.

- This change improves the consistency of the revised statute and removes gaps in liability. The commentary to the RCC sexually suggestive conduct with a minor statute has been updated to reflect this is a change in law.
- (4) *The CCRC recommends replacing “Touches the complainant inside his or her clothing . . . ; (B) Touches the complainant inside or outside his or her clothing close to the genitalia, anus, breast, or buttocks . . . ; (C) Places the actor’s tongue in the mouth of the complainant . . . ” (previous subparagraphs (a)(1)(A), (a)(1)(B), and (a)(1)(C)) with “(a) Touching or kissing any person, either directly or through the clothing.” This revision simplifies the requirements for touching a minor complainant by removing the focus on where and how the complainant was touched and instead making the defendant’s intent the deciding factor. For example, under the current D.C. Code misdemeanor sexual abuse of a child or minor statute³⁵⁸ and the previous draft of the RCC sexually suggestive conduct with a minor statute, a defendant would not have liability for touching a minor complainant on the complainant’s bare foot or licking the complainant’s face with the intent to sexually arouse or gratify himself or herself.*
- This change improves the clarity of the revised statute and removes gaps in liability. The commentary to the RCC sexually suggestive conduct with a minor statute has been updated to reflect that this is a change in current law.
- (5) *The CCRC recommends including as a basis for liability engaging in or causing the complainant to engage in or submit to “removing clothing from any person.” Under the current D.C. Code misdemeanor sexual abuse of a child or minor statute³⁵⁹ and the previous draft of the RCC sexually suggestive conduct with a minor statute, there was no liability for this conduct. This is a gap in liability that may encourage defendants to make a minor complainant undress so that the defendants avoid liability by not touching the complainant.*
- This change removes a gap in liability. The commentary to the RCC sexually suggestive conduct with a minor statute has been updated to reflect this is a change in law.

³⁵⁸ D.C. Code § 22-3010.01(b)(1) – (b)(3) (“(1) Touching a child or minor inside his or her clothing; (2) Touching a child or minor inside or outside his or her clothing close to the genitalia, anus, breast, or buttocks; (3) Placing one’s tongue in the mouth of the child or minor.”). The fourth type of prohibited conduct in the current statute, “[t]ouching one’s own genitalia or that of a third person,” has been interpreted by the DCCA to mean doing so in view of the complainant, and is unrelated to either the actor or a third person touching the complainant.

³⁵⁹ D.C. Code § 22-3010.01(b)(1) – (b)(3) (“(1) Touching a child or minor inside his or her clothing; (2) Touching a child or minor inside or outside his or her clothing close to the genitalia, anus, breast, or buttocks; (3) Placing one’s tongue in the mouth of the child or minor.”). The fourth type of prohibited conduct in the current statute, “[t]ouching one’s own genitalia or that of a third person,” has been interpreted by the DCCA to mean doing so in view of the complainant, and is unrelated to either the actor or a third person touching the complainant.

- (6) USAO, *App. C at 328*, recommends revising what was previously subparagraph (a)(1)(A) to prohibit “Touches the complainant directly or causes the complainant to touch the actor directly, or inside the complainant’s or actor’s clothing with intent to cause the sexual arousal or sexual gratification of any person.” USAO states “it is appropriate to modify the language to include touching that are either direct or inside the clothing” because “if a person is naked, it is unclear whether a touching would be ‘inside’ the clothing.” USAO further states that it is “appropriate to include liability for either the defendant touching the complainant, or the defendant causing the complainant to touch the defendant.” USAO gives as a hypothetical a defendant that would face liability for touching a complainant, but not face liability for making the complainant touch the defendant in the same way.
- The RCC incorporates this recommendation by prohibiting in sub-subparagraph (a)(2)(B)(i) “engages in one of the following with the complainant or causes the complainant to engage in or submit to one of the following.” This revision is discussed above. This change improves the consistency of the revised statute and removes gaps in liability. The commentary to the RCC sexually suggestive conduct with a minor statute has been updated to reflect this is a change in law.
- (7) USAO, *App. C at 328*, recommends revising what was previously subparagraph (a)(1)(B) by replacing the words “inside his or her clothing” with “directly or through the complainant’s clothing.” With this change, the subparagraph would read “Touches the complainant directly or through the complainant’s clothing.” USAO states that although the previous subparagraph followed current law, it is unclear if touching a naked minor would be considered touching “inside or outside his or her clothing.” USAO states that it is “equally (or more) culpable to engage in this sexual conduct with a naked child as with a clothed child.” USAO states that the proposed language tracks the RCC definition of “sexual contact.”
- The RCC incorporates this recommendation by specifying “either directly or through the clothing” in sub-subparagraph (a)(2)(B)(i)(a). The RCC does not specify that the clothing must be the “complainant’s” because, as is discussed above, the scope of the offense now includes the complainant touching the actor or a third party in addition to himself or herself.
- (8) USAO, *App. C at 328*, recommends specifying in what was previously subparagraph (a)(1)(B) that the “genitalia, anus, breast, or buttocks” must be “the complainant’s.” USAO states that without this language, “it could be vague” that the intimate parts belong to the actor.
- The RCC does not incorporate this recommendation because, as is discussed above, the scope of the offense now includes the complainant touching the actor or a third party in addition to himself or herself.
- (9) USAO, *App. C at 328*, recommends specifying in what was previously subparagraph (a)(1)(B) the “complainant’s” genitalia, anus, breast, or buttocks so that the provision reads “Touches the complainant inside or outside his or her clothing close to the genitalia, anus, breast, or buttocks . . .” USAO states that

this “clarifies that the intimate body parts must belong to the complainant, not to the actor, which could be vague.”

- The RCC does not incorporate this recommendation because the sexually suggestive conduct with a minor statute no longer has this provision. In addition, the sexually suggestive conduct with a minor statute has an expanded scope, prohibiting causing the complainant to engage in or submit to touching or kissing any person, which would include touching the actor. This scope is consistent with the scope of the other RCC sex offenses and improves the clarity and consistency of the revised statute.

(10) *OAG, App. C at 252-253, recommends deleting “with intent to cause the sexual arousal or sexual gratification of any person” from what was previously subparagraph (a)(1)(C) of the sexually suggestive conduct with a minor statute, which prohibited the actor from placing his or her tongue in the mouth of a minor. OAG states that there may be legitimate reasons for an actor to engage in the other prohibited conduct with a minor, making it necessary to include the sexual intent requirement for those subsections (subsections (A), (B), and (D)). However, “it is less apparent when a person would have a legitimate reason [to] place their tongue in a minor’s mouth.” In lieu of striking the intent language, OAG states the commentary should be revised to include examples of legitimate reasons why a person would put their tongue in a minor’s mouth.*

- The RCC does not incorporate this recommendation because it would lead to inconsistent liability. The RCC sexually suggestive conduct statute as now drafted no longer has a separate subparagraph for placing the tongue in the mouth of a minor. Instead, all forms of touching or kissing are broadly prohibited in sub-subparagraph (a)(2)(B)(i)(a) and there are appropriate non-sexual reasons for an actor to kiss a minor.

(11) *USAO recommends replacing the culpable mental state of “recklessly” with strict liability (“in fact”) for the ages of the complainants. With this change, what is now sub-paragraph (a)(1)(A) would require that “the complainant is, in fact, under 16 years of age,” and what is now sub-subparagraph (a)(1)(B)(i) would require that “the complainant is, in fact, under 18 years of age.” USAO states that this change “is consistent with current law” and “relies on the rationale” in its General Comments to Chapter 13 of the RCC (App. C at 313-316). There, USAO states “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.” USAO states that “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,”³⁶⁰ as well as “extremely prejudicial, and otherwise*

³⁶⁰ USAO further states that 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,

inadmissible, evidence not specifically covered by the Rape Shield Act.”³⁶¹ USAO states that this latter type of evidence “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.” USAO states that it “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.” However, 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.” In the alternative, USAO recommends keeping strict liability for sexually suggestive conduct with a minor when the complainant is 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 actor is in a position of trust with or authority over the complainant.

- The RCC does not incorporate USAO’s recommendation because the “recklessly” culpable mental state improves the proportionality of the revised statute. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.³⁶² However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.³⁶³ A “recklessly” culpable mental state is proportionate given the comparatively less serious conduct that the sexually suggestive conduct statute prohibits. The “recklessly” culpable mental state does not “create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,”³⁶⁴

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.”

³⁶¹ USAO states that this evidence “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.”

³⁶² *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

³⁶³ *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring)(“There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.

³⁶⁴ USAO lists several examples of “evidence that is known to the defendant” that it states would be admissible under the RCC sexual assault penalty enhancements to prove that the defendant was not reckless as to the age of the complainant, but would not be allowed by the current rape shield statute: “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.” USAO, App. C at 314. However, under the current D.C. Code and RCC rape shield statutes, it appears that this evidence would largely be excluded. To the extent that this evidence is opinion or reputation evidence of the complainant’s “past sexual behavior,” it is excluded under the current and RCC rape shield statutes. See D.C. Code § 22-3021(a); RCC § 22E-1311(a). To the extent that this evidence is evidence of the complainant’s “past sexual behavior” and is not reputation or opinion evidence, it is not admissible unless certain procedural requirements are met and it fits it within specific narrow categories. These narrow

which the RCC does not substantively change in any manner, or “extremely prejudicial, and otherwise inadmissible, evidence not specially covered by the Rape Shield Act.”³⁶⁵ Requiring recklessness as to the age of the minor is not inconsistent with robust rape shield laws as, for example, the current D.C. Code sex trafficking of children statute³⁶⁶ already combines a recklessness requirement for the age of the complainant with a Rape Shield law.³⁶⁷ In addition, the American Law Institute’s most recent draft revised sexual abuse of a minor statute requires recklessness as to the age of the complainant, including a complainant under the age of 12 years, and also has a Rape Shield provision.³⁶⁸

(12) USAO, *App. C at 327*, recommends replacing the culpable mental state of “knowingly” with strict liability (“in fact”) for the fact that the actor is in a “position of trust with or authority over” a complainant that is under 18 years of age. USAO states that this is “consistent with current law” and relies on the rationale in its General Comments to RCC Chapter 13 (*App. C at 313-316*). However, there is no specific discussion for the “knowingly” culpable mental state as to the element of “position of trust with or authority over.”

- The RCC does not incorporate this recommendation because requiring strict liability for this element risks disproportionate penalties. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.³⁶⁹ Given the heightened responsibility that comes with being a person in a position of trust with or authority over a complainant, a “knowingly” culpable mental state is proportionate. The “knowingly” culpable mental state improves the proportionality of the revised statute.

(13) USAO, *App. C at 327*, recommends adding as a basis for liability that the actor “Engages in or causes the complainant to engage in or submit to a sexual act or sexual contact.” USAO states that this would make sexually suggestive conduct

categories are: 1) evidence that is “constitutionally required to be admitted” (D.C. Code 22-3022(a)(1); RCC § 22E-1311(b)(1)(A)); 2) evidence of past sexual behavior with persons other than the actor, offered by the actor, on the issue of whether or not the actor is the source of semen or bodily injury (D.C. Code § 22-3022(a)(2)(A); RCC § 22E-1311(b)(2)(B)(i)); or 3) evidence of past sexual behavior with the actor where the consent of the complainant is at issue and is offered by the actor on the issue of consent (D.C. Code § 22-3022(a)(3)); RCC § 22E-1311(b)(1)(B)(ii) (requiring the RCC defined term “effective consent.”). Whether the actor was reckless as to the complainant’s age may not categorically fit into these specific categories. The current rape shield statutes and the RCC define “past sexual behavior” as “sexual behavior other than the sexual behavior with respect to which” certain sex offenses is alleged. D.C. Code § 22-3021(b); RCC § 22E-1311.

³⁶⁵ USAO lists several examples of “extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act” that it states would be admissible under the RCC sexual assault penalty enhancements: “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.”

³⁶⁶ D.C. Code § 22-1834.

³⁶⁷ D.C. Code § 22-1839.

³⁶⁸ American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.8; 213.11.

³⁶⁹ *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

with a minor a lesser included offense of second degree and fifth degree sexual abuse of a minor. USAO states that the current misdemeanor sexual abuse of a child or minor statute “is frequently treated for plea purposes as a lesser charge to First and Second Degree Child Sexual Abuse” and this change “allows this current practice to continue.” In addition, USAO states [a]ssuming 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.”

- The RCC incorporates this recommendation by requiring in subparagraph (a)(2)(C) “Knowingly engages in a sexual act or sexual contact with the complainant or causes the complainant to engage in or submit to a sexual act or sexual contact.” This change improves the consistency and proportionality of the revised statute.

(14) *The CCRC recommends in subsection (b) applying strict liability (“in fact”) to the element that the actor and the complainant are in a marriage or domestic partnership at the time of the prohibited conduct. With this change, subsection (b) requires that the actor and the complainant “are, in fact, in a marriage or domestic partnership at the time of the prohibited conduct.” The previous version of the defense did not specify whether a culpable mental state or strict liability applied.*

- This change improves the clarity of the revised statute. The commentary to the RCC sexually suggestive conduct with a minor statute has been updated to reflect that this a clarificatory change to current District law.

(15) *The CCRC recommends deleting the burden of proof requirements in the affirmative defense in subsection (b). The RCC has a general provision that addresses the burden of proof for all affirmative defenses in the RCC (RCC § 22E-XX).*

- This change improves the clarity and consistency of the revised statute.

(16) *OAG, App. C at 251, recommends removing the reference to “domestic partnerships” in the marriage or domestic partnership defense. OAG states that, due to the current and RCC definition of “domestic partnership,” the District only recognizes domestic partnerships where the parties are at least 18 years old—either domestic partnerships registered in the District or domestic partnerships that are “substantially similar” to District domestic partnerships. OAG states that since the RCC sexually suggestive conduct with a minor statute requires the complainant to be under 18 years of age, “there is never a situation where a person will be able to use the domestic partnership defense.”*

- The RCC does not incorporate OAG’s recommendation because it may lead to inconsistencies with the District law governing domestic partnerships. It appears possible for the District to recognize a domestic partnership in another jurisdiction even if the parties are not at least 18 years of age. The RCC marriage and domestic partnership defense and the RCC definition of “domestic partnership” are substantively identical to the

defense³⁷⁰ and definition³⁷¹ in the current D.C. Code sexual abuse statutes. Under the current D.C. Code definition of “domestic partnership,” the District does require individuals to be at least 18 years of age in order to register a domestic partnership in the District, but “relationships established in accordance with the laws of other jurisdictions, other than marriages, that are substantially similar to domestic partnerships established by this chapter, as certified by the Mayor, shall be recognized as domestic partnerships in the District.”³⁷² It appears possible that the Mayor could recognize a relationship in another jurisdiction as “substantially similar” to a domestic partnership in the District even if the individuals were not at least 18 years of age.³⁷³ In addition, the current D.C. Code definition of “domestic partnership” states that “the Mayor shall broadly construe the term ‘substantially similar’ to maximize the recognition of relationships from other jurisdictions as domestic partnerships in the District,”³⁷⁴ and has a provision that requires the Mayor in certain circumstances to recognize relationships in other jurisdictions as domestic partnerships, regardless of how they are treated in those jurisdictions.³⁷⁵ The RCC marriage and domestic partnership defense is consistent with current District law.

³⁷⁰ D.C. Code § 22-3011(b) (“Marriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence, to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, involving only the defendant and the child or minor.”).

³⁷¹ RCC § 22E-701 defines “domestic partnership” as having the same meaning as D.C. Code § 32-701(4). The current sexual abuse statutes use the D.C. Code § 32-701(4) definition of “domestic partnership.” D.C. Code § 22-3001(4B) (“‘Domestic partnership’ shall have the same meaning as provided in § 32-701(4).”).

³⁷² RCC § 22E-701 defines “domestic partnership” as having the same meaning as D.C. Code § 32-701(4). D.C. Code § 32-701(4) defines “domestic partnership” as the “relationship between 2 persons who become domestic partners by registering in accordance with § 32-702(a) or whose relationship is recognized under § 32-702(i).” Under D.C. Code § 32-702(a), individuals must be at least 18 years old to register a domestic partnership in the District. However, under D.C. Code § 32-702(i), “relationships established in accordance with the laws of other jurisdictions, other than marriages, that are substantially similar to domestic partnerships established by this chapter, as certified by the Mayor, shall be recognized as domestic partnerships in the District.”

³⁷³ Consider, for example, if the individuals entered into the relationship in the other jurisdiction when one or both individuals was 17 and-a-half years of age and the individuals seek to register the relationship in the District just shy of an 18th birthday. Or consider if one or both individuals was significantly younger than 18 years of age when they entered the relationship in the other jurisdiction, but at the time of seeking to register in the District, the relevant party or parties are 18 years of age or well older than 18 years of age.

³⁷⁴ D.C. Code § 32-702(i)(1).

³⁷⁵ D.C. Code § 32-702(i)(1) requires the Mayor to “establish and maintain a certified list of jurisdictions” that are recognized as having substantially similar domestic partnerships. However, in the event of a jurisdiction that is not on this list,

(2) If the Mayor has not yet certified, pursuant to paragraph (1) of this subsection, that the laws of a jurisdiction permit the establishment of relationships substantially similar to domestic partnerships established by this chapter, and if the laws of that jurisdiction prescribe that the relationship, regardless of the term or phrase used to refer to the relationship, has all the rights and responsibilities of marriage under the laws of that jurisdiction, the relationship shall be recognized as a domestic partnership in the District

(17) USAO, *App. C at 316*, recommends applying all the sexual abuse aggravating circumstances in current law³⁷⁶ to all sex offenses in RCC §§ 22E-1301-1307, including sexually suggestive conduct with a minor. USAO states that it “is important that these offenses apply to all sexual offenses, as the conduct they seek to deter merits an enhancement.” USAO offers as an example a defendant that “engaged in a non-forced sexual act with his 13-year-old biological daughter,” which is criminalized as second degree sexual abuse of a minor in the RCC. USAO states that the relationship between the parties “renders the offense far more heinous, and worthy of a more significant penalty, than if the defendant had no significant relationship with the complainant,” which the RCC sexual abuse of a minor statute does not take into consideration. USAO notes that “although the [RCC] 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 (RCC § 22E-1305) and arranging for sexual conduct with a minor (RCC § 22E-1306), do not. USAO states that an enhancement for the complainant’s age in these offenses would “account for that additional vulnerability.”

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC sexually suggestive conduct with a minor statute is limited to sexual conduct that occurs without the use of force, threats, or coercion. If the RCC sexual assault penalty enhancements applied to the RCC sexually suggestive conduct with a minor offense, similar conduct could receive significantly different penalties.³⁷⁷

(18) USAO, *App. C at 329*, recommends adding a subsection that states “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.” USAO states that this is “implied” in the RCC statute as drafted, but that it should be explicitly stated “to eliminate any potential confusion, particularly given the potential change in law requiring recklessness as to the complainant’s age.” USAO states that this is consistent with current law in D.C. Code § 22-3011(a).

and the Mayor shall include that jurisdiction in the certified list required under paragraph (1) of this subsection.

D.C. Code § 32-702(i)(2).

³⁷⁶ D.C. Code § 22-3020(a)(1) – (a)(6) (“(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.”).

³⁷⁷ If many of the RCC sexual assault penalty enhancements applied to the prohibited conduct in the RCC sexually suggestive conduct with a minor offense, that offense would be more proportionately charged as attempted sexual assault, attempted sexual abuse of a minor, or another RCC offense against persons. For example, if a defendant recklessly caused serious bodily injury during the offense, that would be more proportionately charged under the RCC assault statute.

- The RCC does not incorporate USAO’s recommendation because it introduces ambiguity into the revised statute. Nothing in the RCC sexually suggestive conduct with a minor statute suggests that consent is a defense. Codifying a provision that explicitly states consent is not a defense is potentially confusing, particularly when other RCC offenses do not take this approach. However, the commentary to the RCC sexually suggestive conduct with a minor statute has been updated to reflect that the statute deletes the current prohibition on consent as a defense as a clarificatory change.
- (19) *The CCRC recommends replacing “at the time of the offense” with “at the time of the prohibited conduct” in the marriage or domestic partnership defense. This is consistent with a revision made to the RCC sexual assault penalty enhancements.*
- This revision improves the clarity of the revised statute. The commentary to the RCC sexually suggestive conduct with a minor statute has been updated to reflect that this is a clarificatory change to current District law.
- (20) *The CCRC recommends deleting the jury demandability provisions in what was previously subsection (e). The RCC now addresses jury demandability for all RCC offenses in a general provision (RCC § 22E-XX).*
- This revision improves the clarity, consistency, and proportionality of the revised statute.
- (21) *USAO, App. C 415-419, appears to recommend against creation of a right to a jury trial for sexually suggestive conduct with a minor (including attempts). USAO states that requiring jury trials in cases that are non-jury demandable under current law will create a tremendous strain on limited judicial resources.*
- The RCC does not incorporate this recommendation because it would be inconsistent with the RCC general approach to jury demandability. As of the First Draft of Report #41 (October 15, 2019) and the Second Draft of Report #41, the RCC sexually suggestive conduct with a minor statute is a Class A misdemeanor with a maximum term of imprisonment of one year, as opposed to 180 days in current law for the misdemeanor sexual abuse of a child or minor statute.³⁷⁸ The increased penalty in the RCC as compared to current law is justified by the sexual nature of the offense with certain complainants under the age of 18 years. Under both current law and the RCC approach to jury demandability, an offense with a maximum term of imprisonment of one year is jury demandable. The Second Draft of Report #41, recommends a right to a jury for all completed or attempted Class A and Class B misdemeanors and any other misdemeanor which is sex offender registration offense, which would include attempted sexually suggestive conduct with a minor.

³⁷⁸ D.C. Code § 22-3010.01.

RCC § 22E-1305. Enticing a Minor into Sexual Conduct.

- (1) *The CCRC recommends deleting what was previously subparagraph (a)(1)(B) in the prior draft: “Persuades or entices, or attempts to persuade or entice, the complainant to go to another location and plans to cause the complainant to engage in or submit to a sexual act or sexual contact at that location.” When the actor successfully persuades or entices the complainant to go somewhere, this provision overlaps with the RCC kidnapping offense (RCC § 22E-1401), and when the actor does not succeed, this provision overlaps with the RCC attempted kidnapping offense under the general RCC attempt statute (RCC § 22E-301). The RCC kidnapping and RCC attempted kidnapping offenses have higher penalties than the RCC enticing statute and providing separate liability in the RCC enticing statute risks disproportionate penalties for similar conduct. Consequently, the revised statute deletes prior subparagraph (a)(1)(B) and relies on the more severe RCC kidnapping statute for the conduct of relocating (or attempting to relocate) the complainant to commit a sex crime.*
 - This revision reduces unnecessary overlap and improves the clarity, consistency, and proportionality of the revised statutes. The commentary to the RCC enticing statute has been updated to reflect this change to District law.
- (2) *The CCRC recommends replacing “Knowingly persuades or entices, or attempts to persuade or entice” in what was previously paragraph (a)(1)(A) with “Knowingly commands, requests, or tries to persuade.” With this change, what is now paragraph (a)(1) reads “Knowingly commands, requests, or tries to persuade the complainant to engage in or submit to a sexual act or sexual contact.” “Commands, requests, or tries to persuade” matches the language in the RCC solicitation statute (RCC § 22E-302). With this change, the RCC solicitation statute and the RCC enticing statute differ primarily in the required culpable mental state—enticing requires “knowingly” and solicitation requires “purposely.” The RCC enticing statute has a set penalty, which is proportionate to the inchoate nature of the offense and the lower “knowingly” culpable mental state, whereas the penalty for the RCC solicitation offense depends on the penalty of the underlying offense. This change also removes from the RCC enticing statute “attempts to persuade or entice” as a completed form of the offense. In the current D.C. Code enticing statute, the scope of “attempts” to persuade or entice is unclear, but generally this conduct is covered by the revised statute’s language “tries to persuade.” To the extent the “attempts” language in the current D.C. Code enticing statute prohibits conduct broader than “tries to persuade,” liability (though with a reduced penalty) would remain in the revised offense to the extent the under the general RCC attempt statute (RCC § 22E-301) covers such conduct.*
 - This change reduces unnecessary overlap and improves the clarity, consistency, and proportionality of the revised statute. The commentary to the RCC enticing statute has been updated to reflect that this is a possible change in law.

- (3) *The CCRC recommends in subparagraph (a)(3)(B) referring to the “purported age of the complainant” as opposed to “the complainant purports to be” a certain age. With this change, subparagraph (a)(3)(B) will require that the actor “is reckless as to the fact that the purported age of the complainant is under 16 years of age.” The revised language is consistent with the reference in paragraph (a)(3) to the “purported age of the complainant.”*
- This change improves the clarity and consistency of the revised statute.
- (4) *OAG, App. C at 253, comments that the phrase “purported age” in what is now paragraph (a)(3) makes it appear that “the minor must actually state his or her age (whether it is their actual age or not).” OAG states that “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,” as when, for example, “a minor refers to their elementary or middle school” and 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.”*
- The provision in now paragraph (a)(3) is specific to when the complainant is a law enforcement officer. The language “purports to be” is necessary because a law enforcement officer is likely not, in fact, going to satisfy the age requirements for complainants in the enticing statute. The commentary to the RCC enticing statute has been updated to further clarify that “purports to be” does not mean that the law enforcement officer has to state an actual purported age.
- (5) *USAO recommends replacing the culpable mental state of “recklessly” with strict liability (“in fact”) for the ages of the complainants. With this change, what is now subparagraph (a)(2)(A) would require that “the complainant is, in fact, under 16 years of age,” what is now sub-subparagraph (a)(2)(B)(i) would require that “the complainant is, in fact, under 18 years of age,” and what is now subparagraph (a)(3)(B) would require that the “the purported age of the complainant is, in fact, under 16 years of age.” USAO states that this change “is consistent with current law” and “relies on the rationale” in its General Comments to Chapter 13 of the RCC (App. C at 313-316). There, USAO states “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.” USAO states that “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,”³⁷⁹ as well as “extremely prejudicial, and otherwise*

³⁷⁹ USAO further states that 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.”

inadmissible, evidence not specifically covered by the Rape Shield Act.”³⁸⁰ USAO states that this latter type of evidence “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.” USAO states that it “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.” However, 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.” In the alternative, USAO recommends keeping strict liability for sexual abuse of a minor when the complainant is 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 actor is in a position of trust with or authority over the complainant.

- The RCC does not incorporate USAO’s recommendation because the “recklessly” culpable mental state improves the proportionality of the revised statute. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.³⁸¹ However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.³⁸² A “recklessly” culpable mental state is proportionate given the inchoate nature of the offense and that the actor may engage with the complainant through text message, phone calls, or social media. The “recklessly” culpable mental state does not “create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,”³⁸³ which the RCC does

³⁸⁰ USAO states that this evidence “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.”

³⁸¹ *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

³⁸² *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring)(“There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.

³⁸³ USAO lists several examples of “evidence that is known to the defendant” that it states would be admissible under the RCC sexual assault penalty enhancements to prove that the defendant was not reckless as to the age of the complainant, but would not be allowed by the current rape shield statute: “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.” USAO, App. C at 314. However, under the current and RCC rape shield statutes, it appears that this evidence would largely be excluded. To the extent that this evidence is opinion or reputation evidence of the complainant’s “past sexual behavior,” it is excluded under the current D.C. Code and RCC rape shield statutes. See D.C. Code § 22-3021(a); RCC § 22E-1311(a). To the extent that this evidence is evidence of the complainant’s “past sexual behavior” and is not reputation or opinion evidence, it is not admissible unless certain procedural requirements are met and it fits it within specific narrow categories. These narrow categories are: 1) evidence that is “constitutionally required to be admitted” (D.C. Code 22-3022(a)(1); RCC § 22E-1311(b)(1)(A)); 2) evidence of past sexual behavior with persons other than the actor, offered by the actor,

not substantively change in any manner, or “extremely prejudicial, and otherwise inadmissible, evidence not specially covered by the Rape Shield Act.”³⁸⁴ Requiring recklessness as to the age of the minor is not inconsistent with robust rape shield laws as, for example, the current D.C. Code sex trafficking of children statute³⁸⁵ already combines a recklessness requirement for the age of the complainant with a Rape Shield law.³⁸⁶ In addition, the American Law Institute’s most recent draft revised sexual abuse of a minor statute requires recklessness as to the age of the complainant, including a complainant under the age of 12 years, and also has a Rape Shield provision.³⁸⁷

(6) *USAO, App. C at 329, recommends replacing the culpable mental state of “knowingly” with strict liability (“in fact”) for the fact that the actor is in a “position of trust with or authority over” a complainant that is under the age of 18. USAO states that this is “consistent with current law” and relies on the rationale in its General Comments to RCC Chapter 13 (App. C at 313-316). However, there is no specific discussion for the “knowingly” culpable mental state as to the element of “position of trust with or authority over.”*

- The RCC does not incorporate this recommendation because requiring strict liability for this element risks disproportionate penalties. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.³⁸⁸ Given the heightened responsibility that comes with being a person in a position of trust with or authority over a complainant, a “knowingly” culpable mental state is proportionate. The “knowingly” culpable mental state improves the proportionality of the revised statute.

(7) *USAO, App. C at 329, recommends deleting the four year age gap between an actor that is at least 18 years of age and in a position of trust with our authority over a complainant under the age of 18 years. With this change, for complainants under the age of 18 years, the RCC enticing statute would require only that the actor is at least 18 years of age and in a position of trust with or authority over*

on the issue of whether or not the actor is the source of semen or bodily injury (D.C. Code § 22-3022(a)(2)(A); RCC § 22E-1311(b)(2)(B)(i)); or 3) evidence of past sexual behavior with the actor where the consent of the complainant is at issue and is offered by the actor on the issue of consent (D.C. Code § 22-3022(a)(3)); RCC § 22E-1311(b)(1)(B)(ii) (requiring the RCC defined term “effective consent.”). Whether the actor was reckless as to the complainant’s age may not categorically fit into these specific categories. The current rape shield statutes and the RCC define “past sexual behavior” as “sexual behavior other than the sexual behavior with respect to which” certain sex offenses is alleged. D.C. Code § 22-3021(b); RCC § 22E-1311.

³⁸⁴ USAO lists several examples of “extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act” that it states would be admissible under the RCC sexual assault penalty enhancements: “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.”

³⁸⁵ D.C. Code § 22-1834.

³⁸⁶ D.C. Code § 22-1839.

³⁸⁷ American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.8; 213.11.

³⁸⁸ *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

the complainant. USAO states that this change is “consistent with current law” and relies on the rationale set forth in its General Comments to RCC Chapter 13 (App. C, 313-316). There, USAO states that the “important consideration is the power dynamic between the defendant and the complainant, not on the age differential.”

- The RCC does not incorporate USAO’s recommendation because it would be inconsistent with the liability requirements for a complainant that is under the age of 16 years. The current D.C. Code³⁸⁹ and RCC enticing statutes require at least a four year age gap between an actor and a complainant under the age of 16 years. The current D.C. Cod enticing statute does not require a four year age gap when the complainant is under the age of 18 years and the actor is in a “significant relationship” with the complainant.³⁹⁰ The RCC enticing statute added a four year age gap to parallel the age gap requirement for complainants under the age of 16 years. The four year age gap avoids criminalizing otherwise consensual sexual conduct between an actor that is at least 18 years of age and a complainant that is between 16 years and 18 years of age solely because the actor is in a position of trust with or authority over the complainant.
- (8) *The CCRC recommends replacing “at the time of the offense” with “at the time of the sexual act or sexual contact” in the marriage or domestic partnership affirmative defense. This is consistent with a revision made to the RCC sexual assault penalty enhancements.*
- This revision improves the clarity of the revised statute. The commentary to the RCC sexual abuse by exploitation statute has been updated to reflect that this is a clarificatory change to current District law.
- (9) *The CCRC recommends in subsection (b) applying strict liability (“in fact”) to the element that the actor and the complainant are in a marriage or domestic partnership at the time of the sexual act or sexual contact. With this change, subsection (b) requires that the actor and the complainant “are, in fact, in a marriage or domestic partnership at the time of the sexual act or sexual contact.” The previous version of the consent defense did not specify whether a culpable mental state or strict liability applied.*
- This change improves the clarity of the revised statute. The commentary to the RCC enticing statute has been updated to reflect that this a clarificatory change to current District law.
- (10) *The CCRC recommends deleting the burden of proof requirements for the affirmative defense in subsection (b). The RCC has a general provision that addresses the burden of proof for all affirmative defenses in the RCC (RCC § 22E-XX).*
- This change improves the clarity and consistency of the revised statute.

³⁸⁹ D.C. Code §§ 22-3010(a) (“Whoever, being at least 4 years older than a child”; 22-3001(3) (defining “child” as “a person who has not yet attained the age of 16 years.”).

³⁹⁰ D.C. Code §§ 22-3010(a) (“Whoever . . . being in a significant relationship with a minor”); 22-3001(5A) (defining “minor” as “a person who has not yet attained the age of 18 years.”).

(11) *USAO, App. C at 316, recommends applying all the sexual abuse aggravating circumstances in current law³⁹¹ to all sex offenses in RCC §§ 22E-1301-1307, including enticing. USAO states that it “is important that these offenses apply to all sexual offenses, as the conduct they seek to deter merits an enhancement.” USAO offers as an example a defendant that “engaged in a non-forced sexual act with his 13-year-old biological daughter,” which is criminalized as second degree sexual abuse of a minor in the RCC. USAO states that the relationship between the parties “renders the offense far more heinous, and worthy of a more significant penalty, than if the defendant had no significant relationship with the complainant,” which the RCC sexual abuse of a minor statute does not take into consideration. USAO notes that “although the [RCC] 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 (RCC § 22E-1305) and arranging for sexual conduct with a minor (RCC § 22E-1306), do not. USAO states that an enhancement for the complainant’s age in these offenses would “account for that additional vulnerability.”*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC enticing statute is an inchoate offense that is limited to commanding, requesting, or trying to persuade a complainant without the use of force, threats, or coercion. Much more severe penalties are available under other RCC statutes for purposely soliciting a child for sex act or sexual contact.³⁹²

(12) *USAO, App. C at 330, recommends adding a subsection that states “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.” USAO states that this is “implied” in the RCC enticing statute as drafted, but that it should be explicitly stated “to eliminate any potential confusion, particularly given the potential change in law requiring recklessness as to the complainant’s age.” USAO states that this is consistent with current law codified at D.C. Code § 22-3011(a).*

- The RCC does not incorporate USAO’s recommendation because it introduces ambiguity into the revised statute. Nothing in the RCC enticing statute suggests that consent is a defense. Codifying a provision that

³⁹¹ D.C. Code § 22-3020(a)(1) – (a)(6) (“(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.”).

³⁹² For example, if a defendant tries to persuade a complainant that is under the age of 12 years to engage in or submit to a sexual act or sexual contact, that conduct, if done “purposely,” is more proportionately charged under the RCC solicitation statute, as first degree or fourth degree sexual abuse of a minor statute. The penalty for solicitation under the RCC is one-half the maximum punishment applicable to that offense. Applying the RCC solicitation statute results in more proportionate penalties than increasing the enticing statute by one class of severity with an enhancement.

explicitly states consent is not a defense is potentially confusing, particularly when other RCC offenses do not take this approach. However, the commentary to the RCC enticing statute has been updated to reflect that the statute deletes the current prohibition on consent as a defense as a clarificatory change.

RCC § 22E-1306. Arranging for Sexual Conduct with a Minor.

- (1) *The CCRC recommends replacing “arranges for a sexual act or sexual contact between: (A) The actor and the complainant; or (B) A third person and the complainant” with “Gives effective consent for the complainant to engage in or submit to a sexual act or sexual contact.” The scope of “arranges” is unclear in the current D.C. Code arranging statute. Requiring that the defendant knowingly gives “effective consent” for the complainant to engage in or submit to a sexual act or sexual contact encompasses arranging, but the requirements are clearer. The language is also consistent with a provision in the RCC trafficking an obscene image of a minor statute (RCC § 22E-1807) and RCC arranging a live sexual performance of a minor statute (RCC § 22E-1809).*
- This change improves the clarity of the revised statute. The commentary to the RCC arranging statute has been updated to reflect that this is a change in law.
- (2) *The CCRC recommends replacing the age requirements for the actor, the complainant, and a third party with the requirements that the actor is “a person with a responsibility under civil law for the health, welfare, or supervision of the complainant” and the complainant is under the age of 18 years. The current D.C. Code arranging statute does not specify any culpable mental states.³⁹³ The RCC uses a “knowingly” culpable mental state to be consistent with other RCC sex offenses and because a “purposely” culpable mental state would make the statute duplicative with accomplice liability. However, the “knowingly” culpable mental state essentially allows accomplice liability to be imposed with a lower culpable mental state than otherwise would be required. This lower culpable mental state is justified if the defendant has a responsibility for the complainant under civil law. The phrase “as a person with a responsibility under civil law for the health, welfare, or supervision of the complainant” is identical to the language used elsewhere in the RCC. This language focuses on the relationship between the defendant and the complainant instead of the various age requirements in the current D.C. Code and RCC arranging statutes, which can lead to counterintuitive results.*
- This change improves the clarity, consistency, and proportionality of the revised statute. The commentary to the RCC arranging statute has been updated to reflect that this is a change in law.
- (3) *OAG, App. C at 253, recommends renumbering the statutory language in the RCC arranging statute to clarify the requirements for liability in what was previously paragraphs (a)(1), (a)(2), and (a)(3). Specifically, OAG states that, as previously drafted, the statute suggested that paragraphs (a)(1), (a)(2), and (a)(3) all had to be met for liability, or, in the alternative, that meeting only one of these paragraphs was sufficient. OAG states that it appears that the RCC intended to require what was previously paragraph (a)(1) to be met and then either (a)(2) or (a)(3), and provides a recommendation for reorganizing and renumbering these paragraphs*

³⁹³ D.C. Code § 22-3010.02.

- The RCC does not incorporate this recommendation because the requirements for liability have been simplified, addressing OAG’s concern.
- (4) *OAG, App. C at 253, states that, as previously drafted, it would not be an offense for a 17 year old to arrange for a 12 year old to have sex with a 30 year old, “which could encourage juveniles to run prostitution rings for adults as the youth would not be committing an offense” even though the harm to the 12 year old is the same regardless of the age of the defendant. OAG recommends revising what was subparagraph (a)(3) to read “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,” as opposed to “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.”*
- The RCC does not incorporate this recommendation because the age of the actor is no longer a factor in determining liability. As drafted now, an actor that is under the age of 18 may have liability under the arranging offense if the actor is also “a person with a responsibility under civil law for the health, welfare, or supervision of the complainant.” If an actor that is under the age of 18 years does not have such a responsibility under civil law, as in OAG’s hypothetical of a 17 year old arranging for a 12 year to have sex with a 30 year old, there may be liability under other RCC sex offenses and types of liability (e.g., solicitation, accomplice, conspiracy), depending on the actor’s culpable mental state, whether there was force, etc., and if the sexual act actually occurred.³⁹⁴
- (5) *USAO, App. C at 330, recommends replacing the culpable mental state of “knowingly” with strict liability (“in fact”) for the fact that the actor is in a “position of trust with or authority over” a complainant that is under the age of 18. USAO states that this is “consistent with current law” and relies on the rationale in its General Comments to RCC Chapter 13 (App. C at 313-316). However, there is no specific discussion for the “knowingly” culpable mental state as to the element of “position of trust with or authority over.”*

³⁹⁴ If a 17 year old actor “knowingly” arranges for a 12 year old to have sex with a 30 year old that 17 year may have liability under second degree of the RCC sexual abuse of a minor statute (knowingly causes a complainant under 16 years of age to engage in or submit to a sexual act and the actor is at least four years older than the complainant). If the actor uses force, specified threats, or involuntary intoxication to arrange for the sex, there would be liability under first degree of the RCC sexual assault statute (knowingly causes the complainant to engage in or submit to a sexual act by specified means). If the actor uses threats other than those specified in first degree sexual assault, there may be liability under second degree sexual assault for knowingly causing the complainant to engage in or submit to a sexual act by a “coercive threat.”

If the sex does not actually occur, or if the actor does not satisfy the “knowingly causes” requirement in the RCC sexual abuse of a minor statute or RCC sexual assault statute, there may be liability under the RCC enticing offense (knowingly “commands, requests, or tries to persuade” the complainant to engage in or submit to a sexual act or sexual contact) or attempt liability under RCC § 22E-301 as applied to the RCC sexual assault or RCC sexual abuse of a minor statute. There may also be conspiracy liability (RCC § 22E-303) or solicitation liability (RCC § 22E-302), if the actor has a “purposely” culpable mental state and otherwise satisfies the heightened requirements of those offenses.

- The RCC does not incorporate this recommendation because the arranging statute no longer requires “position of trust with or authority over” as an element.
- (6) *USAO, App. C at 329, recommends deleting the four year age gap between an actor that is at least 18 years of age and in a position of trust with our authority over a complainant under the age of 18 years. USAO states that this change is “consistent with current law” and relies on the rationale set forth in its General Comments to RCC Chapter 13 (App. C, 313-316). There, USAO states that the “important consideration is the power dynamic between the defendant and the complainant, not on the age differential.”*
- The RCC does not incorporate this recommendation because the arranging statute no longer requires an age gap between the actor and the complainant.
- (7) *USAO recommends replacing the culpable mental state of “recklessly” with strict liability (“in fact”) for the ages of the complainants. USAO states that this change “is consistent with current law” and “relies on the rationale” in its General Comments to Chapter 13 of the RCC (App. C at 313-316). There, USAO states “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.” USAO states that “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,”³⁹⁵ as well as “extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act.”³⁹⁶ USAO states that this latter type of evidence “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.” USAO states that it “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.” However, 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.” In the alternative, USAO recommends keeping strict liability for sexual abuse of a minor when the complainant is under the age of 14 when the actor is not in a*

³⁹⁵ USAO further states that 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.”

³⁹⁶ USAO states that this evidence “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.”

position of trust with or authority over the complainant or under the age of 18 when the actor is in a position of trust with or authority over the complainant.

- The RCC does not incorporate USAO’s recommendation because the “recklessly” culpable mental state improves the proportionality of the revised statute. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.³⁹⁷ However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.³⁹⁸ A “recklessly” culpable mental state is proportionate given the inchoate nature of the offense and that the actor may engage with the complainant through text message, phone calls, or social media. The “recklessly” culpable mental state does not “create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,”³⁹⁹ which the RCC does not substantively change in any manner, or “extremely prejudicial, and otherwise inadmissible, evidence not specially covered by the Rape Shield Act.”⁴⁰⁰ Requiring recklessness as to the age of the minor is not inconsistent with robust rape shield laws as, for example, the current D.C.

³⁹⁷ *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

³⁹⁸ *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) (“There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.

³⁹⁹ USAO lists several examples of “evidence that is known to the defendant” that it states would be admissible under the RCC sexual assault penalty enhancements to prove that the defendant was not reckless as to the age of the complainant, but would not be allowed by the current rape shield statute: “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.” USAO, App. C at 314. However, under the current D.C. Code and RCC rape shield statutes, it appears that this evidence would largely be excluded. To the extent that this evidence is opinion or reputation evidence of the complainant’s “past sexual behavior,” it is excluded under the current and RCC rape shield statutes. See D.C. Code § 22-3021(a); RCC § 22E-1311(a). To the extent that this evidence is evidence of the complainant’s “past sexual behavior” and is not reputation or opinion evidence, it is not admissible unless certain procedural requirements are met and it fits it within specific narrow categories. These narrow categories are: 1) evidence that is “constitutionally required to be admitted” (D.C. Code 22-3022(a)(1); RCC § 22E-1311(b)(1)(A)); 2) evidence of past sexual behavior with persons other than the actor, offered by the actor, on the issue of whether or not the actor is the source of semen or bodily injury (D.C. Code § 22-3022(a)(2)(A); RCC § 22E-1311(b)(2)(B)(i)); or 3) evidence of past sexual behavior with the actor where the consent of the complainant is at issue and is offered by the actor on the issue of consent (D.C. Code § 22-3022(a)(3)); RCC § 22E-1311(b)(1)(B)(ii) (requiring the RCC defined term “effective consent.”). Whether the actor was reckless as to the complainant’s age may not categorically fit into these specific categories. The current rape shield statutes and the RCC define “past sexual behavior” as “sexual behavior other than the sexual behavior with respect to which” certain sex offenses is alleged. D.C. Code § 22-3021(b); RCC § 22E-1311.

⁴⁰⁰ USAO lists several examples of “extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act” that it states would be admissible under the RCC sexual assault penalty enhancements: “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.”

Code sex trafficking of children statute⁴⁰¹ already combines a recklessness requirement for the age of the complainant with a Rape Shield law.⁴⁰² In addition, the American Law Institute’s most recent draft revised sexual abuse of a minor statute requires recklessness as to the age of the complainant, including a complainant under the age of 12 years, and also has a Rape Shield provision.⁴⁰³

(8) *USAO, App. C at 316, recommends applying all the sexual abuse aggravating circumstances in current law⁴⁰⁴ to all sex offenses in RCC §§ 22E-1301-1307, including arranging. USAO states that it “is important that these offenses apply to all sexual offenses, as the conduct they seek to deter merits an enhancement.” USAO offers as an example a defendant that “engaged in a non-forced sexual act with his 13-year-old biological daughter,” which is criminalized as second degree sexual abuse of a minor in the RCC. USAO states that the relationship between the parties “renders the offense far more heinous, and worthy of a more significant penalty, than if the defendant had no significant relationship with the complainant,” which the RCC sexual abuse of a minor statute does not take into consideration. USAO notes that “although the [RCC] 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 (RCC § 22E-1305) and arranging for sexual conduct with a minor (RCC § 22E-1306), do not. USAO states that an enhancement for the complainant’s age in these offenses would “account for that additional vulnerability.”*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC arranging statute is an inchoate offense that is limited to giving effective consent for the complainant to engage in or submit to sexual conduct. Much more severe penalties are available under other RCC statutes for being an accomplice to a child sex act or sexual contact.⁴⁰⁵

⁴⁰¹ D.C. Code § 22-1834.

⁴⁰² D.C. Code § 22-1839.

⁴⁰³ American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.8; 213.11.

⁴⁰⁴ D.C. Code § 22-3020(a)(1) – (a)(6) (“(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.”).

⁴⁰⁵ For example, if a defendant gives effective consent for a complainant that is under the age of 12 years to engage in or submit to a sexual act or sexual contact and the sexual act or sexual contact does not occur, that conduct, if done “purposely,” is more proportionately charged under the RCC solicitation statute, as first degree or fourth degree sexual abuse of a minor. The penalty for solicitation under the RCC is one-half the maximum punishment applicable to that offense. Applying the RCC solicitation statute results in more proportionate penalties than increasing the arranging statute by one class of severity with an enhancement. Accomplice liability or conspiracy liability may result in punishment equal to the same or half of that of the predicate offense, e.g., first degree or fourth degree sexual abuse of a minor.

(9) *USAO, App. C at 330-331, recommends adding a subsection that states “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.” USAO states that this is “implied” in the RCC arranging statute as drafted, but that it should be explicitly stated “to eliminate any potential confusion, particularly given the potential change in law regarding a reasonable mistake of age defense.” USAO states that this is consistent with current law codified at D.C. Code § 22-3011(a).*

- The RCC does not incorporate USAO’s recommendation because it introduces ambiguity into the revised statute. Nothing in the RCC arranging statute suggests that consent is a defense and it is unclear whether the prohibition on consent as a defense in current law applies to the current D.C. Code arranging statute.⁴⁰⁶ Codifying a provision that explicitly states consent is not a defense is potentially confusing, particularly when other RCC offenses do not take this approach.

⁴⁰⁶ Current D.C. Code § 22-3011(a) states, in relevant part, that consent is not a defense to “a prosecution under §§ 22-3008 to 22-3010.01.” The current D.C. Code arranging statute is codified at D.C. Code § 22-3010.02, which falls outside the range of statutes specified in D.C. Code § 22-3011(a). D.C. Code § 22-3011 was enacted in 1995 as part of the original Anti-Sexual Abuse Act. It was amended in 2007 to reflect the codification of the sexual abuse of a minor statutes and misdemeanor sexual abuse of a child or minor statute, but was never amended to address the arranging statute, which was enacted in 2011. Indeed, the same legislation that enacted the arranging statute in 2011 also amended D.C. Code § 22-3011 to include a reference to domestic partnerships in the marriage or domestic partnership defense in D.C. Code § 22-3011(b). It seems likely that the failure of D.C. Code § 22-3011(a) to include the arranging statute is a drafting error, but it is ultimately unclear.

RCC § 22E-1307. Nonconsensual Sexual Conduct.

- (1) *The CCRC recommends adding to what is now paragraph (a)(1) that the actor “engages in a sexual act with the complainant” and adding to what is now paragraph (b)(1) that the actor “engages in a sexual contact with the complainant.” With this change, paragraphs (a)(1) and (b)(1) would prohibit an actor from engaging in a sexual act or sexual contact with the complainant or causing the complainant to engage in or submit to a sexual act or sexual contact. This change makes the RCC nonconsensual sexual conduct offense consistent with the other RCC sexual assault offenses that have been revised to include “engages in” language.*
- This change improves the clarity, consistency, and proportionality of the revised statute. The commentary to the RCC nonconsensual sexual conduct offense has been updated to reflect that this is a possible change in law.
- (2) *USAO, App. C at 331, recommends replacing the “recklessly” culpable mental state with a “knowingly” culpable mental state for the prohibited conduct (engaging in or causing the complainant to engage in or submit to the sexual act or sexual contact). With this change, what is now paragraphs (a)(1) and (b)(1) would require that the actor “knowingly” engages in a sexual act or sexual contact with the complainant or causes the complainant to engage in or submit to a sexual act or sexual contact. USAO states that this change makes the offense “consistent with the other sexual assault provisions” and that it is “appropriate for the defendant to be required to act ‘knowingly’ with respect to his actions.”*
- The RCC incorporates this recommendation by requiring in what is now paragraph (a)(1) “[k]nowingly engages in a sexual act with the complainant or causes the complainant to engage in or submit to a sexual act” and in subparagraph (b)(1) “[k]nowingly engages in a sexual contact with the complainant or causes the complainant to engage in or submit to a sexual contact.” This change improves the clarity of the revised statute and its consistency with the other RCC sexual assault offenses. The commentary to the RCC nonconsensual sexual conduct offense has been updated to reflect that this is a possible change in law.
- (3) *USAO, App. C at 331-332, recommends replacing the “recklessly” culpable mental state as to the complainant’s lack of consent with “negligence.” USAO states that the current misdemeanor sexual abuse statute “essentially assigns a negligence standard” to this element because it requires “have knowledge or reason to know.” USAO disagrees with the RCC’s assessment of *Owens v. United States*, 90 A.3d 1118 (D.C. 2014), given a 2019 DCCA opinion interpreting the District’s current stalking statute (*Coleman v. United States*, 202 A.3d 1127 (D.C. 2019)). USAO quotes *Coleman*: “The ‘should have known’ language [in the District’s current stalking statute] 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.” USAO states that a negligence standard in the RCC nonconsensual sexual conduct statute “is consistent with the plain language of the current*

misdemeanor sexual abuse statute, the jury instructions on misdemeanor sexual abuse...and with case law defining misdemeanor sexual abuse [citing Mungo v. United States, 772 A.2d 240, 244-45 (D.C. 2001)].”

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties to allow a conviction, particularly a felony conviction that per the RCC requires sex offender registry, on the basis of negligence. In addition, the current D.C. Code misdemeanor sexual abuse statute requires “*should* have knowledge or reason to know,”⁴⁰⁷ not “have knowledge or reason to know.”⁴⁰⁸ The current D.C. Code misdemeanor sexual abuse language does not appear to fit neatly into either category of mental state discussed in *Owens* (“reason to believe”) or *Coleman* (“should have known.”). The commentary to the RCC nonconsensual sexual conduct statute has been updated to reflect this discussion and the DCCA’s opinion in *Coleman v. United States*.
- (4) *USAO, App. C at 332, recommends deleting subsection (c), which excludes from liability “deception that induces the complainant to consent to the sexual act or sexual contact,” but includes “deception that as to the nature of the sexual act or sexual contact.” USAO states that this provision is “confusing and may inadvertently exclude conduct that should be criminalized.” The RCC nonconsensual sexual conduct offense requires lack of “effective consent,” and RCC § 22E-701 defines “effective consent” to include consent other than consent induced by “deception.”*
- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. Subsection (c) excludes from liability the use of deception “that induces the complainant to consent to the sexual act or sexual contact.” But for the exclusion, as defined in RCC § 22E-701, “deception” could include statements such as, “I’m a prince.” It would be disproportionate to penalize deceptive statements that induce consent the same as deception as to the nature of the sexual act or sexual contact. As is noted in the commentary to this offense, criminalizing sexual conduct by deception is largely disfavored in current American criminal law,⁴⁰⁹ with the exceptions of falsely represented medical procedures and impersonation of a woman’s husband.⁴¹⁰

⁴⁰⁷ D.C. Code § 22-3010.01.

⁴⁰⁸ As is noted in the commentary, however, District case law and District practice consistently construe the language in the current misdemeanor sexual abuse statute as “know or should have known,” without discussion of the discrepancy with the statutory language (“*should* have knowledge or reason to know”) (emphasis added).

⁴⁰⁹ See, e.g., Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 Yale L.J. 1372, 1372, (2013) (stating that “[r]ape-by-deception” is almost universally rejected in American criminal law.”).

⁴¹⁰ See, e.g., Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 Yale L.J. 1372, 1397 (2013) (noting that “sex falsely represented as a medical procedure, and impersonation of a woman’s husband--have been for over a hundred years the only generally recognized situations in which Anglo-American courts convict for rape-by-deception.”) (citing Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 Brook. L. Rev. 39, 119 (1998)).

(5) *USAO, App. C at 316, recommends applying all the sexual abuse aggravating circumstances in current law⁴¹¹ to all sex offenses in RCC §§ 22E-1301-1307, including nonconsensual sexual conduct. USAO states that it “is important that these offenses apply to all sexual offenses, as the conduct they seek to deter merits an enhancement.” USAO offers as an example a defendant that “engaged in a non-forced sexual act with his 13-year-old biological daughter,” which is criminalized as second degree sexual abuse of a minor in the RCC. USAO states that the relationship between the parties “renders the offense far more heinous, and worthy of a more significant penalty, than if the defendant had no significant relationship with the complainant,” which the RCC sexual abuse of a minor statute does not take into consideration. USAO notes that “although the [RCC] 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 (RCC § 22E-1305) and arranging for sexual conduct with a minor (RCC § 22E-1306), do not. USAO states that an enhancement for the complainant’s age in these offenses would “account for that additional vulnerability.” There is no discussion in USAO’s comment of how the current penalty enhancements would affect the RCC nonconsensual sexual conduct statute.*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC nonconsensual sexual conduct statute is limited to sexual conduct that occurs without the use of force, threats, or coercion. If the RCC sexual assault penalty enhancements applied to the RCC nonconsensual sexual conduct offense, similar conduct could receive significantly different penalties.⁴¹²

(6) *OAG, App. C at 405, recommends that the penalty for nonconsensual sexual conduct “to be raised to be commensurate” with first degree arranging for sexual conduct with a minor.⁴¹³ OAG states that first degree nonconsensual sexual conduct is a class 9 felony, second degree nonconsensual sexual conduct is a class A misdemeanor, and arranging for sexual conduct with a minor is a class 8 felony. OAG states that “[n]otwithstanding 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.”*

⁴¹¹ D.C. Code § 22-3020(a)(1) – (a)(6) (“(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.”).

⁴¹² For example, if a defendant uses physical force, resulting in bodily injury to the complainant, that behavior is more proportionately charged as first degree or third degree sexual assault.

⁴¹³ As there is only a single gradation of the RCC arranging offense, it appears that OAG means to recommend increasing the penalty of first degree nonconsensual sexual conduct (a class 9 felony), to be a class 8 felony like the arranging statute.

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. As the OAG comment recognizes, the RCC arranging for sexual conduct with a minor statute applies to complainants under the age of 18 years. The RCC arranging statute does not require a sexual act or sexual contact to occur, but it is proportionate to penalize the offense a class higher than nonconsensual sexual conduct, which could apply to adults or complainants under the age of 18 years. In addition, as is discussed in this appendix entry for the RCC arranging statute, the offense now applies to any person under the age of 18 years if the defendant has a responsibility under civil law for the health, welfare, or supervision of the complainant. There is no such requirement in the nonconsensual sexual conduct statute and this further justifies the higher penalty for arranging. More generally, both the RCC nonconsensual sexual conduct and arranging for sexual conduct with a minor statutes are, like their corresponding statutes in the current D.C. Code, designed to be broad, low level offenses that sweep in conduct that falls somewhat short of the stricter requirements and penalties for sexual assault, sexual abuse of a minor, and other RCC felony sex offenses. The latter are, in the RCC and current D.C. Code, among the most serious crimes. The proportionality of the penalty for RCC nonconsensual sexual conduct must be considered against this constellation of more severe RCC offenses criminalizing a narrower but overlapping scope of conduct.
- (7) *USAO, App. C 415-419, appears to recommend against creation of a right to a jury trial for nonconsensual sexual conduct (including attempts). USAO states that requiring jury trials in cases that are non-jury demandable under current law will create a tremendous strain on limited judicial resources.*
- The RCC does not incorporate this recommendation because it would be inconsistent with the RCC general approach to jury demandability. As of the First Draft of Report #41 (October 15, 2019) and the Second Draft of Report #41, first degree of the RCC nonconsensual sexual conduct offense is a Class 9 felony and second degree of the RCC nonconsensual sexual conduct offense is a Class A misdemeanor. Although the precise statutory maxima for RCC offenses has not been set, the maximum term of imprisonment for a Class 9 felony and a Class A misdemeanor in the RCC will satisfy jury demandability requirements under current law. The Second Draft of Report #41, confers a right to a jury for all completed or attempted Class A and Class B misdemeanors and any other misdemeanor which is a sex offender registration offense, which would include attempted first degree and attempted second degree nonconsensual sexual conduct. Because the facts involved in a charge for nonconsensual sexual conduct may turn not only on the actor's intent and credibility, but judgments about what constitutes effective consent in a sexual situation, allowing community norms to be brought to bear in the form of a jury appears particularly appropriate.

RCC § 22E-1309. Duty to Report a Sex Crime Involving a Person Under 16 Years of Age.

- (1) *USAO, App. C at 332, recommends moving RCC § 22E-1309 and RCC § 22E-1310 (Civil Infraction for Failure to Report a Sex Crime Involving a Person Under 16 Years of Age) to the same location in the D.C. Code as the mandatory reporting laws in D.C. Code § 4-1321.01, et. seq. USAO states that this would be a change from the statutes' current location in the D.C. Code (Chapter 30 of Title 22; Sexual Abuse). USAO states that this would "reduce confusion about mandatory reporting obligations."*
 - The RCC does not incorporate this recommendation at this time, reserving the question as to relocation of these statutes until other reform recommendations are finalized. After the Advisory Group votes to approve final recommendations, time permitting the CCRC will include recommendations to the Council and Mayor for conforming amendments, but will not recommend moving RCC § 22E-1309 and RCC § 22E-1310 to Title 4 of the D.C. Code. The mandatory reporting laws in current D.C. Code § 4-1321.01, et. seq., pertain to abused or neglected children and are broader than the duty to report a sex crime in current D.C. Code § 22-3020.51, et. seq., and RCC § 22E-1309. Keeping the duty to report a sex crime and accompanying civil infraction statutes with the RCC sex offenses may improve the organization and consistency of the RCC.
- (2) *USAO, App. C at 332, recommends adding "universal" to the heading of this provision. With this change, the heading would read "Universal Duty to Report a Sex a Crime Involving a Person Under 16 Years of Age." USAO states it is "appropriate to clarify that this provision applies 'universally'" because the scope of the 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." USAO states that including "universal" in the heading "provides notice to all adults that they are obligated to report child sex crimes to the authorities."*
 - The RCC does not incorporate this recommendation because it would create ambiguity with the requirements in the duty to report statute. The duty to report is not, in fact, universal; it excludes individuals in subsection (b). Referring to a "duty" in the statute heading is sufficiently broad to put individuals on notice that they may be subject to the duty to report.
- (3) *The CCRC recommends in paragraph (b)(3) replacing 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" with a "religious leader described in D.C. Code § 14-309." This change provides greater clarity as to what religious leaders are covered in the RCC duty to report statute and improves the consistency of the revised statute with RCC § 22E-1303, which includes these*

*religious leaders in the RCC sexual abuse by exploitation statute, and the evidentiary provisions in D.C. Code § 14-309.*⁴¹⁴

- This change improves the clarity and consistency of the revised statute. The RCC commentary to the duty to report a sex crime statute has been updated to reflect that this is a possible change in law.
- (4) *USAO, App. C at 332-333, recommends including in subsection (b) a new paragraph (b)(4) that states “No legal privilege, except the privileges set forth above in subsection (b) shall apply. USAO states that this is “implied” in the RCC version, but that the statement “clarifies that other privileged relationships do not create an exemption from mandatory reporting.” USAO states that this provision is included in current law at D.C. Code § 22-3020.52(c).*
- The RCC incorporates this recommendation by adding a new paragraph (b)(2) that states: “No legal privilege, except the privileges set forth in subsection (b) of this section, shall apply to the duty to report in subsection (a) of this section.” Similarly, the commentary to the RCC duty to report statute has been updated to reflect that subsection (e) accounts for the language “[n]o other legally recognized privilege, except for the following” from current D.C. Code § 22-3020.52(c) and that it is a clarificatory change in law.
- (5) *USAO, App. C at 333, recommends adding a new subparagraph (b)(3)(E) that states “A confession or communication made under any other circumstances does not fall under this exemption.” USAO states that this language is currently codified at D.C. Code § 22-3020.52(c)(2)(B) and that it is “appropriate to include it here to clarify the law.”*
- The RCC does not incorporate this recommendation because it introduces ambiguity into the revised statute. Nothing in subparagraph (b)(1)(C) of the RCC duty to report statute suggests that confessions or communications that do not satisfy the requirements in sub-subparagraphs (b)(1)(C)(i) through (b)(1)(C)(iv) would be privileged, and the new paragraph (b)(2) clearly establishes that no other privileges than those described in subsection (b) apply. Codifying a provision that explicitly states other confessions or communications are *not* privileged is potentially confusing for other provisions that do not similarly list what is “not” included. However, the commentary to the RCC duty to report statute has been updated to reflect that the statute deletes the language “A confession or communication made under any other circumstances does

⁴¹⁴ D.C. Code § 14-309 refers to a “priest, clergyman, rabbi, or other duly licensed, ordained, or consecrated minister of a religion authorized to perform a marriage ceremony in the District of Columbia or duly accredited practitioner of Christian Science.” The current D.C. Code duty to report a sex crime statute (D.C. Code § 22-3020.52(c)(2)(A)) and the previous version of the RCC statute specified 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.” The main difference between D.C. Code § 14-309 and D.C. Code § 14-309 appears to be that the latter refers to specified religious leaders that are “authorized to perform a marriage ceremony” in the District, and the current D.C. code statute and the previous RCC version referred to a duly appointed, licensed, ordained, or consecrated minister “of a given religion” in the District.

not fall under this exemption” from current D.C. Code § 22-3020.52(c)(2)(B) and that it is a clarificatory change in law.

(6) *The CCRC recommends including three additional offenses in the definition of “predicate crime” in subsection (e): 1) Trafficking in a Commercial Sex Act under RCC § 22E-1604; 2) Commercial Sex with a Trafficked Person under RCC § 22E-1608; and 3) Incest (through the inclusion of any RCC sex offense in RCC Chapter 13). The current D.C. Code duty to report a sex crime statute defines a predicate crime, in relevant part, as including current D.C. Code § 22-1834 (sex trafficking of children) and any sex offense in Chapter 13 of current D.C. Code Title 22.⁴¹⁵ D.C. Code § 22-1834 is specific to sex trafficking of children, but there are two other human trafficking crimes in the current D.C. Code and the RCC that are sex-related and could apply when the complainant is a child, though they do not require the complainant to be a child— Trafficking in Commercial Sex under RCC § 22E-1604, or Commercial Sex with a Trafficked Person under RCC § 22E-1608. The RCC specifically includes these human trafficking offenses, which is consistent with the current D.C. Code duty to report statute including any sex offense in Chapter 30 of Title 22 in its definition of a predicate crime. Similarly, the RCC duty to report statute includes incest. The current incest statute is codified at D.C. Code § 22-1901, and, as a result, is not included in Chapter 30 of current D.C. Code Title 22. The RCC codifies incest as a sex offense in Chapter 13 of Title 22E, which includes incest as a “predicate crime” for the RCC duty to report a sex crime statute.*

- This change improves the clarity, consistency, and the proportionality of the revised statute.

⁴¹⁵ D.C. Code §§ 22-3020.51(4) (defining “sexual abuse” for the purposes of the duty to report a sex crime and related statutes as “any act that is a violation of: (A) Section 22-1834; (B) Section 22-2704; (C) This chapter; or (D) Section 22-3102.”).

RCC § 22E-1310. Civil Infraction for Failure to Report a Sex Crime Involving a Person Under 16 Years of Age.

(1) *USAO, App. C at 332, recommends moving RCC § 22E-1309 (Duty to Report a Sex Crime Involving a Person Under 16 Years of Age) and RCC § 22E-1310 to the same location in the D.C. Code as the mandatory reporting laws in D.C. Code § 4-1321.01, et. seq. USAO states that this would be a change from the statutes' current location in the D.C. Code (Chapter 30 of Title 22; Sexual Abuse). USAO states that this would "reduce confusion about mandatory reporting obligations."*

- The RCC does not incorporate this recommendation at this time, reserving the question as to relocation of these statutes until other reform recommendations are finalized. After the Advisory Group votes to approve final recommendations, time permitting the CCRC will include recommendations to the Council and Mayor for conforming amendments, but will not recommend moving RCC § 22E-1309 and RCC § 22E-1310 to Title 4 of the D.C. Code. The mandatory reporting laws in current D.C. Code § 4-1321.01, *et. seq.*, pertain to abused or neglected children and are broader than the duty to report a sex crime in current D.C. Code § 22-3020.51, *et. seq.*, and RCC § 22E-1309. Keeping the duty to report a sex crime and accompanying civil infraction statutes with the RCC sex offenses may improve the organization and consistency of the RCC.

RCC § 22E-1311. Admission of Evidence in Sexual Assault and Related Cases.

(1) The CCRC recommends revising the definition of “past sexual behavior” in subsection (g) so that it refers to sexual behavior “other than the sexual behavior” with respect to which an offense under RCC Chapter 13 is alleged. This language is in the current statute and was omitted in error.

- This change improves the clarity of the revised statute.

RCC § 22E-1312. Incest.

(1) *PDS, App. C at 449, recommends decriminalizing incest. PDS states that “[c]onsensual 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 the RCC sexual abuse of a minor statute. PDS states that “incest criminalizes consensual sexual conduct between adults [that] may be viewed as socially or morally repugnant,” but there is “no clear justification” for criminalizing it. As a hypothetical, PDS states that incest would criminalize consensual sexual conduct between a “similarly aged niece and an uncle by marriage [and] [w]hile 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.” PDS states that for a variety of factors, such as the size of families and age differences in marriages, “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, PDS states “an adopted teenage sibling may never share the same house as his or her brother or sister who left home at 18.” PDS states that “[r]ather than allowing prosecutions in myriad situations that should be outside the scope of the court system, the RCC should decriminalize this conduct.”*

- The RCC does not incorporate this recommendation because it may create a gap in liability. The revised incest offense may apply in situations that lie beyond the age requirements of the RCC sexual abuse of a minor statute.⁴¹⁶ In addition, as discussed below, the RCC incest statute adopts PDS’s recommendation to replace the terms “aunt,” “uncle,” “nephew,” and “niece” and instead requires “A parent’s sibling or a sibling’s child by blood,” which would exclude the PDS hypothetical of a niece engaging in consensual sexual conduct with her aunt’s husband. While an adopted sibling may never share the same house as his or her brother, sexual acts between adopted siblings can still be harmful to familial relationships and adopted siblings are included in the scope of several current and RCC sex offenses if certain requirements are met.⁴¹⁷

⁴¹⁶ First degree and second degree of the RCC sexual abuse of a minor statute require a sexual act when the complainant is under the age of 16 years and the defendant is at least four years older than the complainant. If a defendant is within this four year age gap, these gradations of the RCC sexual abuse of a minor statute would not criminalize sexual conduct with a complainant under the age of 16 years—for example, a defendant sibling that is 17 years old when the complainant is 15 years old. Similarly, third degree of the RCC sexual abuse of a minor statute requires a sexual act when the defendant is at least 18 years of age, at least four years older than a complainant under the age of 18 years, and in a position of trust with or authority over the complainant. Third degree sexual abuse of a minor would not criminalize, for example, sexual conduct between specified individuals in the incest statute if there is less than a four year age gap between the individuals or the defendant is not at least 18 years of age.

⁴¹⁷ Current District law includes adopted siblings in the definition of “significant relationship.” D.C. Code § 22-3001(10) (defining “significant relationship” to include “A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption.”). The current D.C. Code sexual abuse of a minor statutes prohibit an actor that is 18 years of age or older and in a “significant relationship”

(2) *PDS, App. C at 449-450, recommends deleting the terms “legitimately or illegitimately” from the statute. PDS states that the RCC does not define these terms.*

- The RCC incorporates this recommendation by deleting “legitimately or illegitimately” and revising the commentary accordingly.

(3) *PDS, App. C at 450, recommends using the terms “sibling,” “half-sibling,” and “step-sibling” rather than “binary gendered terms” of “brother” and “sister.” PDS further recommends replacing “aunt, uncle, nephew or niece” with “a parent’s sibling or sibling’s child.”*

- The RCC incorporates the recommendation for the use of “sibling” and “half-sibling” by replacing “brother [or] sister, or brother or sister by adoption” with “A sibling, by blood or adoption” in subsection subparagraph (a)(2)(C).
- The RCC incorporates the recommendation for the use of “step-sibling” by codifying as a new subparagraph (a)(2)(E) “A step-sibling, while the marriage creating the relationship exists.”
- The RCC incorporates the recommendation for replacing “aunt, uncle, nephew, or niece” by replacing “aunt, uncle, nephew, or niece” with a “parent’s sibling or a sibling’s child by blood.”

with a person under the age of 18 years from engaging in a sexual act with that younger person. D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor), 22-3001(5A) (defining a “minor” as a “person who has not yet attained the age of 18 years.”). The current D.C. Code misdemeanor sexual abuse of a child or minor statute (D.C. Code § 22-3010.01) and the current D.C. Code enticing a minor statute (D.C. Code § 22-3010) also require that the defendant be in a “significant relationship,” but prohibit different conduct and have different requirements.

The RCC sex offenses in Chapter 13 of the RCC have a similar scope as current law through the definition of “position of trust with or authority over” in RCC § 22E-701.

Kidnapping. RCC § 22E-1401.

- (1) *OAG at App. C. 254, says that the commentary to the revised kidnapping statute should be clarified as to whether the offense includes causing another person to believe the complainant will not be released, even if the actor does not intend for anyone to have that belief.*
 - The RCC incorporates this comment by updating the commentary to clarify that the actor must intend for a person to believe that the complainant will not be released. This change clarifies the revised statute's commentary.
- (2) *The CCRC recommends re-drafting the exclusion to liability to include persons who reasonably believe they are acting at the direction of a close relative. This change improves the clarity and may improve the proportionality of the revised statutes.*
 - This revision will distinguish between the revised kidnapping statute and the revised parental kidnapping statute. The parental kidnapping offense is a less serious offense intended to cover taking children by relatives or persons acting at the direction of relatives, with intent to interfere with another custodian's right to custody. Due to the lesser harm and danger to the complainant, parental kidnapping is subject to less severe penalties than ordinary kidnapping. The prior draft kidnapping statute included an exclusion to liability for close relatives, but the exclusion did not specifically include persons who reasonably believed they are acting at the direction of relatives. Such drafting is unclear as to the liability of persons acting at the direction of a close relative, who may be considered agents of such close relatives. Without this revision to the revised kidnapping statute, a person who takes a child acting at the direction of a relative may be liable for both kidnapping and parental kidnapping. This change improves the proportionality of the revised code, and eliminates unnecessary overlap between the two offenses.
- (3) *USAO at App. C. 333, recommends replacing the words "any felony" to the words "any criminal offense," in subparagraphs (a)(3)(C) and (b)(3)(C). USAO also recommends replacing the words "commit a sexual offense defined in Chapter 13 of this title" with the words "Commit any criminal offense" in subparagraphs (a)(3)(E) and (b)(3)(E).*
 - The RCC does not incorporate this recommendation because it would authorize disproportionate penalties. The revised kidnapping statute is intended to cover restraints of movement that cause, or create heightened risk of, significant harm to the complainant. In addition to criminalizing intent to commit a sexual offense, the revised statute also includes restraining a person with intent to inflict bodily injury upon the complainant. Including intent to commit *any* offense would be overbroad, and include cases in which there is not sufficiently greater harm or increased risk of harm to the complainant to warrant kidnapping liability. Misdemeanors are generally less serious, and restraining a person to facilitate commission of a misdemeanor does not create the same inherent

risk of harm to the complainant as facilitating commission of a felony. For example, a person who locks a store employee in a back room for several minutes in order to shoplift goods has not caused, or created risk of, significant harm to warrant a kidnapping conviction.⁴¹⁸ The RCC provides liability for restraining a person's freedom of movement in connection with any sex offense as kidnapping (or aggravated kidnapping, depending on the circumstances of the complainant). The RCC provides liability for restraining a person's freedom of movement in connection with a non-sex offense misdemeanor under RCC § 22E-1402, the general criminal restraint statute, which is subject to a lower penalty classification.

(4) *USAO, at App. C. 334, recommends amending the exclusion to liability under subsection (c) to include a requirement that the actor did not commit a sex offense against the complainant, or threaten to commit a sex offense against the complainant.*

- The RCC partially incorporates this recommendation by requiring that the actor “Does not cause or threaten to cause bodily injury to the complainant, and does not cause or threaten to cause the complainant to engage in a sexual contact or sexual act.” This change improves the clarity and proportionality of the revised statutes.

(5) *USAO, at App. C 334 recommends replacing the words “has been affirmed” with “becomes final” in the merger provision in subsection (e).*

- The RCC does not incorporate this recommendation. Instead, the words “has been affirmed” will be replaced with the phrase “the appeal from the judgment of conviction has been decided.” This language is consistent with the general merger provision in RCC § 22E-214.⁴¹⁹

(6) *USAO, App. C. 272, recommends that throughout the RCC, when a penalty enhancement or grade of an offense requires that the actor “used or displayed” a dangerous weapon or imitation dangerous weapon, the offense or enhancement instead should only require that the actor committed the offense “while armed.”*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC eliminates a general “while armed” penalty enhancement for crimes of violence in favor of incorporating gradations for the use or display of a weapon into violent offenses and retaining an array of separate offenses, such as: carrying a dangerous weapon (RCC § 22E-4102); possession of a dangerous weapon with intent to commit crime (RCC § 22E-4103); and possessing a

⁴¹⁸ In the case USAO cites, *Gooch v. United States*, 297 U.S. 124 (1936), the appellants, while heavily armed, seized two law enforcement officers in order to avoid arrest for an unspecified offense, inflicted serious injuries to one of the officers, and drove both officers across state lines from Texas to Oklahoma. On these facts, there are at least two possible theories of liability under the revised kidnapping statute: 1) if the unspecified offense was a felony, then the restraint would constitute intent to facilitate commission or flight from a felony; 2) since the appellants were heavily armed, drove the officers out of state, and inflicted serious bodily injury on one of the officers, there would have been intent to cause a person to believe the officers would not be released without having suffered significant bodily injury.

⁴¹⁹ RCC § 22E-214 will also be amended to change the words: “The judgment appealed from has been decided” to “The appeal from the judgment of conviction has been decided.”

dangerous weapon during a crime (RCC § 22E-4104). Commentary for the offense gradation specifies that the phrase “by displaying or using” a weapon “should be broadly construed to include making a weapon known by sight, sound, or touch.”⁴²⁰ When an actor does not satisfy this requirement for displaying or using a weapon, the complainant does not experience increased fear of serious harm and the impact of the encounter is likely to be significantly less traumatic. Although there may be an increased risk of harm when an actor simply possesses or carries a dangerous weapon, this is accounted for by the various separate RCC Chapter 41 weapons offenses for which the actor would be liable and may be sentenced consecutively. The USAO recommendation would treat as equivalent the display or use of a dangerous weapon during an encounter with less severe conduct.

- Polling of District voters also suggests that the harm caused by actual use or display of a dangerous weapon differs from mere possession or carrying a dangerous weapon. See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.⁴²¹

(7) USAO, App. C. 273, recommends that throughout the RCC, when the complainant’s status as a protected person increases applicable penalties, instead of requiring recklessness as to the status, strict liability should apply. In addition, USAO recommends that the RCC should include 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.” USAO also recommends that this defense must “be established by a preponderance of the evidence.” As applied to this statute, this recommendation would change the element in sub-subparagraph (a)(2)(B)(i) under aggravated kidnapping.

- The RCC does not incorporate this recommendation for the reasons described in response to the identical recommendation regarding the RCC murder statute.

⁴²⁰ Commentary to the revised robbery statute references commentary to RCC § 22E-1203. Menacing.

⁴²¹ Question 1.18 provides the scenario “Robbing someone’s wallet by punching them, which caused minor injury.” The mean response to this scenario was 6. Question 1.16 provides the scenario “Robbing someone’s wallet by threatening to kill them. The robber secretly carried, but never displayed, a gun.” The mean response to this scenario was 6.2, only slightly higher than the mean response for unarmed robbery. Question 1.17 provides the scenario, “Robbing someone’s wallet by displaying a gun and threatening to kill them.” The mean response to this scenario was a 7. The responses to these three scenarios suggest that the public believes that while actually displaying or using a weapon while committing robbery justifies an increase in penalty severity by one class, there is relatively little distinction between an unarmed robbery and robbery while possessing, but not displaying or using, a weapon.

Criminal Restraint. RCC § 22E-1402.

- (1) *USAO, App. C. 272, recommends that throughout the RCC, when a penalty enhancement or grade of an offense requires that the actor “used or displayed” a dangerous weapon or imitation dangerous weapon, the offense or enhancement instead should only require that the actor committed the offense “while armed.”*
- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC eliminates a general “while armed” penalty enhancement for crimes of violence in favor of incorporating gradations for the use or display of a weapon into violent offenses and retaining an array of separate offenses, such as: carrying a dangerous weapon (RCC § 22E-4102); possession of a dangerous weapon with intent to commit crime (RCC § 22E-4103); and possessing a dangerous weapon during a crime (RCC § 22E-4104). Commentary for the offense gradation specifies that the phrase “by displaying or using” a weapon “should be broadly construed to include making a weapon known by sight, sound, or touch.”⁴²² When an actor does not satisfy this requirement for displaying or using a weapon, the complainant does not experience increased fear of serious harm and the impact of the encounter is likely to be significantly less traumatic. Although there may be an increased risk of harm when an actor simply possesses or carries a dangerous weapon, this is accounted for by the various separate RCC Chapter 41 weapons offenses for which the actor would be liable and may be sentenced consecutively. The USAO recommendation would treat as equivalent the display or use of a dangerous weapon during an encounter with less severe conduct.
 - Polling of District voters also suggests that the harm caused by actual use or display of a dangerous weapon differs from mere possession or carrying a dangerous weapon. See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.⁴²³
- (2) *USAO, App. C. 273, recommends that throughout the RCC, when the complainant’s status as a protected person increases applicable penalties, instead of requiring recklessness as to the status, strict liability should apply. In addition, USAO recommends that the RCC should include an affirmative defense that “the accused was negligent as to the fact that the victim was a protected person at the*

⁴²² Commentary to the revised robbery statute references commentary to RCC § 22E-1203. Menacing.

⁴²³ Question 1.18 provides the scenario “Robbing someone’s wallet by punching them, which caused minor injury.” The mean response to this scenario was 6. Question 1.16 provides the scenario “Robbing someone’s wallet by threatening to kill them. The robber secretly carried, but never displayed, a gun.” The mean response to this scenario was 6.2, only slightly higher than the mean response for unarmed robbery. Question 1.17 provides the scenario, “Robbing someone’s wallet by displaying a gun and threatening to kill them.” The mean response to this scenario was a 7. The responses to these three scenarios suggest that the public believes that while actually displaying or using a weapon while committing robbery justifies an increase in penalty severity by one class, there is relatively little distinction between an unarmed robbery and robbery while possessing, but not displaying or using, a weapon.

time of the offense.” USAO also recommends that this defense must “be established by a preponderance of the evidence.” As applied to this statute, this recommendation would change the element in sub-subparagraph (a)(2)(B)(i) under aggravated criminal restraint.

- The RCC does not incorporate this recommendation for the reasons described in response to the identical recommendation regarding the RCC murder statute.
- (3) *The CCRC recommends re-drafting the exclusions to liability under (c)(1), (c)(2)(B)(ii), and (c)(2)(C)(ii) to clarify that the coercive threat may be either explicit or implicit.*
- This does not substantively change the scope of the exclusions. The prior definition of “coercive threat” included explicit or implicit threats. The definition has been revised to omit reference to explicit or implicit threats, and instead the revised statute specifies that explicit and implicit threats are included. This change improves the clarity of the revised code.
- (4) *The CCRC recommends re-drafting the exclusion to liability under subparagraph (c)(2)(C) to include persons who reasonably believe they are acting at the direction of a close relative. This change improves the clarity and may improve the proportionality of the revised statutes.*
- This revision will distinguish between the revised criminal restraint statute and the revised parental kidnapping statute. The CCRC recommends this change for the same reasons discussed in the identical change to the revised kidnapping statute.

Blackmail. RCC § 22E-1403.

(1) *OAG, at App. C. 436-437, recommends revising the blackmail statute to require an “intent to extort.” OAG raises concerns that, as drafted, the blackmail statute may criminalize speech that is protected under the First Amendment.*

- The RCC partially incorporates this recommendation by amending the blackmail defense under subsection (c) to address OAG’s concerns with respect to overbreadth. The CCRC recommends replacing the words “Take reasonable action to correct the wrong that is the subject of the accusation” with “take or refrain from reasonable action *related* to the wrong that is the subject of the accusation[.]”⁴²⁴ The revised wording broadens the scope of conduct that falls within the defense. There may be some reasonable demands that are related to the wrong, even if they do not specifically *correct* the wrong that is the subject of the accusation.⁴²⁵ This change addresses the two hypothetical cases of protected speech in OAG’s comments: first, a person who threatens to publicize a business’s editorial practices unless the business changes those practices; second, threatening to run ads against an elected official unless the official changes his or her stance on a given issue. In both cases, the actor’s purpose was to cause another person to take reasonable action that is related to the wrong that is the subject of the accusation or assertion, and would therefore not be criminalized.
- In addition, commentary to the revised blackmail statute clarifies that the offense does not include threats to reveal *any* information that is embarrassing or harmful to reputation. The commentary notes that “[t]hreats to reveal minimally embarrassing information would not suffice under this form of blackmail. This form of blackmail is intended to include threats to expose secrets or assert facts that would have traditionally constituted blackmail.” Although publicizing unsavory editorial practices or running political advertisements against a public official may be embarrassing, these types of threats would not necessarily be sufficiently embarrassing or harmful to a person’s reputation to constitute blackmail.
- Other reform jurisdictions have codified analogous offenses that criminalize causing a person to act or refrain from acting by threatening to reveal secrets that subject a person to hatred, contempt, or ridicule, that include a defense similar to that codified in the revised blackmail

⁴²⁴ See, *State v. Jorgenson*, 934 N.W.2d 362, 375 (Minn. Ct. App. 2019), review granted (Dec. 17, 2019) (In holding that Minnesota’s coercion statute, which is similar to the RCC’s blackmail offense was facially unconstitutional, the Minnesota Court of Appeals noted that the offense did not include “an affirmative defense of protected speech similar to the Model Penal Code”[.]”

⁴²⁵ For example, the defense would apply to a person who threatens to run negative political advertisements about a public official if he or she does not vote for a bill, even if the advertisements do not specifically address the bill at issue.

statute.⁴²⁶ Such drafting has withstood constitutional challenges and is clearer than reference to an undefined intent to “extort.”

(2) *USAO, at App. C. 462 recommends redrafting subsection (a)(1) to read “Purposely causes or intends to cause another person to do or refrain from doing any act.” USAO says that liability should depend “on the defendant’s intent and actions, rather than what those actions actually cause a complainant to do.”*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties and expand the scope of the offense to include constitutionally protected speech.
- Lowering the culpable mental state for blackmail would exacerbate concerns (including those raised by OAG) with respect to criminalization of protected speech, and conduct that does not warrant criminalization would constitute blackmail. For example, when a person threatens to report a crime, he or she may know that as a result the person engaging in the crime will engage in or refrain from some act, such as destroying evidence or going into hiding. Mere knowledge that the threat to report criminal activity will cause the other person to act is not sufficient to warrant criminal liability. Although “intent and action” may be sufficient for attempt liability, the RCC generally requires that the actor actually cause the prohibited result in order for complete liability to apply.

(3) *USAO, at App. C. 463, recommends amending subparagraph (a)(2)(E) to read “Impair the reputation of another person, including a deceased person[.]” Under USAO’s proposal the revised blackmail statute would include threats to impair the reputation of living, as well as deceased, persons.*

- The RCC does not incorporate this recommendation because it is inconsistent with other RCC blackmail language, may authorize disproportionate punishments, and may expand the scope of the offense to include constitutionally protected speech. With respect to living persons, the RCC blackmail statute already separately includes threats to accuse a person of a crime, or to “[e]xpose 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 . . . [h]atred, contempt, ridicule, or other significant injury to personal reputation[.]” This more specific language limits the ways in which reputational harm may constitute a crime, eliminating the overlap in the current D.C. Code provisions’ multiple references to reputational harms.⁴²⁷ Expanding blackmail liability to reach any impairment of reputation also would exacerbate concerns (including those raised by OAG) with respect to criminalization of protected speech, and conduct that does not warrant criminalization would constitute blackmail.

⁴²⁶ E.g. Alaska Stat. Ann. § 11.41.530; Ky. Rev. Stat. Ann. § 509.080; 18 Pa. Stat. and Cons. Stat. Ann. § 2906; N.J. Stat. Ann. § 2C:13-5. See also, § 20.4(a) Statutory extortion or blackmail, 3 Subst. Crim. L. § 20.4(a) (3d ed.) (noting that most blackmail and extortion statutes “threats to expose some disgraceful defect or secret of the victim which, when known, would subject him to public ridicule or disgrace”).

⁴²⁷ D.C. Code § 22-3252 (a)(2)-(4).

(4) *The CCRC recommends replacing the words “impair the reputation of a deceased person” with the words “significantly impair the reputation of a deceased person.”*

- This change clarifies that threats to impair a deceased person’s reputation trivially is not sufficient for blackmail. This makes the offense more consistent with respect to threats to impair the reputation of living and deceased persons.
- Requiring that the threat would significantly impair a deceased person’s reputation also addresses OAG’s concern with criminalizing protected speech. For example, threatening to reveal that a deceased politician had been a rude and demanding employer may impair that person’s reputation without doing *significant* injury to that person’s reputation.

RCC § 22E-1501. Criminal Abuse of a Minor.

(1) *USAO, App. C at 334-335, recommends deleting paragraphs (a)(1), (b)(1), and (c)(1), which require that the defendant is “[r]eckless 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” and requiring elsewhere in the offense that the complainant “in fact” is under 18 years of age. With this change, the RCC criminal abuse of a minor statute would require only that the complainant, in fact, be under the age of 18 years, and that the defendant engaged in the prohibited conduct. USAO states that requiring a relationship between the defendant and the complainant is “a change from current law and is not warranted.” USAO refers to the current child cruelty statute, which does not require a relationship between the parties, “both in situations where there is a relationship between the parties and when there is not, and both applications of the statute are appropriate.” USAO gives as hypotheticals “if a stranger walks up to a child and tips over the child’s stroller, 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.”*

- The RCC does not incorporate this recommendation because it would create unnecessary overlap between criminal offenses and may authorize disproportionate penalties. The current D.C. Code child cruelty statute’s provisions concerning physical injury are unclear,⁴²⁸ but appear to completely overlap with the District’s current misdemeanor assault, felony assault, and aggravated assault statutes, which authorize maximum terms of imprisonment of 180 days, three years, or 10 years depending on the severity of the resulting injury, if any, and the defendant’s culpable mental states.⁴²⁹ It is difficult to precisely compare the current D.C. Code child cruelty and assault statutes, but to the extent the offenses overlap, the child cruelty statute authorizes significantly higher penalties than the current assault statutes. (The current child cruelty statute has a maximum term of imprisonment of 15 years for creating a grave risk of bodily injury to a child and in doing so recklessly causes “bodily injury.”⁴³⁰) The RCC

⁴²⁸ The primary ambiguity is the scope of the phrase “Maltreats a child or engages in conduct which causes a grave risk of bodily injury to a child” in second degree child cruelty, D.C. Code § 22-1101(b)(1).

⁴²⁹ D.C. Code §§ 22-404(a)(1) (assault statute authorizing a maximum term of imprisonment of 180 days for “Whoever unlawfully assaults, or threatens another in a menacing manner.”); 22-404(a)(2) (felony assault statute authorizing a maximum term of imprisonment of three years for “Whoever unlawfully assaults, or threatens another in a menacing manner, and intentionally, knowingly, or recklessly causes significant bodily injury to another.”); 22-404.01(a)(1), (a)(2), (b) (aggravated assault statute authorizing a maximum term of imprisonment of 10 years for a person who “(1) By any means, that person knowingly or purposely causes serious bodily injury to another person; or (2) Under circumstances manifesting extreme indifference to human life, that person intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person, and thereby causes serious bodily injury.”). 22-404.01.

⁴³⁰ D.C. Code § 22-1101(a) (“A person commits the crime of cruelty to children in the first degree if that person intentionally, knowingly, or recklessly tortures, beats, or otherwise willfully maltreats a child under 18 years of age or engages in conduct which creates a grave risk of bodily injury to a child, and thereby

reduces unnecessary overlap between assault and criminal abuse of a minor statutes by limiting the latter to instances where the actor has a special duty of care toward the complainant—but higher penalties remain for both assaults of minors generally and minors to whom the actor has a duty of care.

- The RCC criminal abuse of a minor statute generally authorizes higher penalties for assaultive conduct compared to the RCC assault offense, but improves the proportionality of the higher penalties by requiring that the defendant have a responsibility under civil law for the health, welfare, or supervision of the complainant under the age of 18 years. The RCC, through “protected person” gradations in various offenses against persons, authorizes enhanced penalties when the complainant is under the age of 18 years if the defendant is at least 18 years old and at least four years older. These “protected person” gradations provide a penalty enhancement for certain offenses against persons when there is no relationship between the defendant and the complainant.
- Under USAO’s hypotheticals of a stranger tipping over a child’s stroller or a neighbor hitting a child, there is an enhanced penalty available under the RCC assault statute if the requirements for the offense and the “protected person” gradations are met (such as being a minor). Notably, such a penalty enhancement for bodily injury assault against a minor or other defined “protected person” is a new recommendation in the RCC that does not exist for simple assault in current law.⁴³¹ By providing such protected person enhancements, however, the RCC proportionately penalizes assaults against young complainants when there is no relationship with the defendant, as compared to the RCC criminal abuse of a minor statute where a relationship is required. The key differences between the RCC criminal abuse of a minor and RCC assault statutes are that the former includes some non-physical injuries, the precise grading and penalties vary (although both provide enhancements as compared to physical injuries to a non-minor), and there is a distinct label for harms caused by parents, caretakers, and others who have a responsibility for the complainant under civil law for the health, welfare, or supervision of the minor complainant.

(2) *USAO, App. C at 335, recommends deleting “under civil law” from paragraphs (a)(1), (b)(1), and (c)(1) if the RCC criminal abuse of a minor statute retains the*

causes bodily injury.”); (c)(1) (“Any person convicted of cruelty to children in the first degree shall be fined not more than \$10,000 or be imprisoned not more than 15 years, or both.”). “Bodily injury” is undefined for the current child cruelty statute, but DCCA case law suggests that it is a low standard for physical harm. *See, e.g., Jones v. United States*, 67 A.3d 547, 548, 550 (finding the evidence sufficient for second degree child cruelty when the child sustained a “large raised bump on her head.”).

⁴³¹ Current D.C. Code § 22-3611 codifies a general penalty enhancement for specified crimes when the actor is 18 years of age or older, the complainant is under 18 years of age, and the actor is at least two years older than the complainant. These specified crimes include aggravated assault, felony assault, and first degree child cruelty, but not misdemeanor assault. D.C. Code §§ 22-3611(c)(2); 23-1331(4). As is discussed in the RCC commentary to the definition of “protected person” in RCC § 22E-701, the RCC increases the required age gap to four years, but keeps the other age and age gap requirements the same.

requirement that the defendant has a “responsibility under civil law for the health, welfare, or supervision of the complainant who is under 18 years of age.” USAO states that “under civil law” is “confusing and needlessly require[s] a reliance on civil law to understand criminal law.”

- The RCC does not incorporate this recommendation because it would reduce the clarity of the revised statute. Leaving ambiguous the basis for determining what relationships are “responsible for the health, welfare, or supervision of the complainant simply would leave courts to either look to civil law standards, or to create new, piecemeal standards for these relationships in a criminal context with no legislative guidance. Referring to civil law in the statute provides notice and specifies an objective standard for determining when an individual is responsible for a minor and clarifies the revised definition.
- (3) *The CCRC recommends adding electronic stalking (RCC § 22E-1802) to the list of offenses included in third degree criminal abuse of a minor. The list of offenses already includes stalking (RCC § 22E-1801). Electronic stalking is a recently revised offense with a similar scope of conduct and the same penalty.*
- This change improves the clarity, consistency, and proportionality of the revised statute.
- (4) *USAO, App. C at 335, recommends including in what is now paragraph (c)(2) that the defendant commits “assault, per RCC § 22E-1202,” “kidnapping, per RCC § 22E-1401,” and both types of offensive contact prohibited in the RCC offensive physical contact offense (RCC § 1205)—contact with bodily fluid or excrement and general offensive physical contact.⁴³² USAO states that assault is “implicitly included” in what was previously subparagraph (c)(2)(C) (“recklessly causes bodily injury to the complainant”), but it should be expressly included to “eliminate confusion.” USAO states that since criminal restraint is included in the list of offenses in what is now paragraph (c)(2), kidnapping should be included as well. Finally, USAO states that a “primary distinction” between assault and what is now third degree offensive physical contact is “whether the complainant suffered ‘bodily injury.’” USAO states “[p]articularly 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” and a “third-party witness may not be able to either ascertain or testify beyond a reasonable doubt that the a child was in ‘physical pain.’” As a result, USAO states that “what appears to be a clear assault on a child may only be prosecutable” as what is now third degree offensive physical contact.*
- The RCC partially incorporates the recommendation to include assault in the list of specified offenses in paragraph (c)(2) by including sixth degree assault under RCC § 22E-1202(f). Sixth degree assault requires recklessly causing bodily injury to a complainant and is identical to what previously

⁴³² When USAO submitted its comment, the RCC offensive physical contact offense had two gradations. As is discussed elsewhere in this appendix, the RCC offensive physical contact offense now has three gradations because it includes two “protected person” gradations.

subparagraph (c)(2)(C). The RCC does not include first degree, second degree, or third degree assault because they have higher penalties than third degree criminal abuse of minor and including them would authorize a lower penalty for substantially similar conduct. The RCC does not include fourth degree assault in paragraph (c)(2) because it now has the same penalty as third degree criminal abuse of a minor (Class 9 felony) for the same conduct (recklessly causing significant bodily injury). The RCC does not include fifth degree of the RCC assault statute in paragraph (c)(2) because it already includes higher penalty based on the victim's status as a minor.

- The RCC does not incorporate the recommendation to include kidnapping in the list of specified offenses in paragraph (c)(2). Both kidnapping and aggravated kidnapping in the RCC have higher penalties than third degree criminal abuse of a minor. Including them in third degree criminal abuse of a minor would authorize a lower penalty for the same conduct.
- The RCC incorporates the recommendation to include both types of offensive contact prohibited in the RCC offensive physical contact offense (RCC § 1205)—contact with bodily fluid or excrement and general offensive physical contact—by including the offensive physical contact offense in the list of specified offenses in paragraph (c)(2).

(5) *The CCRC recommends deleting what was previously subparagraph (c)(2)(B) (“Purposely causes significant emotional distress by confining the complainant.”). An actor that purposely causes significant emotional distress by confining the complainant has likely committed criminal restraint, which is included in the list of offenses in paragraph (c)(2) of the statute. To the extent that an actor purposely causes significant emotional distress by confining the complainant and does not satisfy the requirements of the RCC criminal restraint statute, there may still be liability under the provisions of the statute that prohibit causing serious mental injury (subparagraphs (a)(2)(B) and (b)(2)(A)) or the RCC criminal neglect of a minor statute that prohibit creating a risk of serious mental injury. This change ensures that the revised criminal abuse of a minor statute retains the high threshold for psychological harms that exists in current law.*

- This change improves the clarity, consistency, and proportionality of the revised statute.

(6) *USAO, App. C, at 336 recommends in subparagraph (c)(2)(B) changing the culpable mental state from “purposely” to “knowingly” and deleting the words “by confining.” With these changes, subparagraph (c)(2)(B) would require that the defendant “knowingly causes significant emotional distress” to the complainant instead of “purposely causes significant emotional distress by confining the complainant.” USAO states that “knowingly” is the appropriate culpable mental state because “purposely” is a “mens rea that is too high.” USAO states that under the current child cruelty statute, the only culpable mental states are intentionally, knowledge, or recklessness. USAO states it is unclear why confinement “is the only way to cause significant emotional distress under the statute” and that “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.”

- The RCC does not incorporate this recommendation because, as is discussed above, the CCRC recommends deleting subparagraph (c)(2)(B).
- (7) *USAO, App. C at 336, recommends requiring in subparagraph (c)(2)(C) “or engages in conduct that creates a grave risk of causing bodily injury to the complainant.” With this change, subparagraph (c)(2)(C) would require “recklessly causes bodily injury to the complainant, or engages in conduct that creates a grave risk of causing bodily injury to the complainant.” USAO states that this conduct is included in second degree of the current child cruelty statute “and should be included here.” USAO states that the RCC commentary states that this conduct could be prosecuted as an attempt, or criminal neglect of a minor, 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. In addition, USAO states that creating a “grave risk” of causing a 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 current law.”*
- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties and would be inconsistent with the related criminal neglect of a minor statute. The RCC criminal abuse of a minor statute requires that the complainant experience a specified type of harm and generally has higher penalties than the RCC criminal neglect of a minor statute, which is limited to risk creation. It would be both inconsistent with the other provisions in the RCC criminal abuse of a minor statute and disproportionate to include mere risk creation in the statute. The commentary to the RCC criminal abuse of a minor statute recognizes that not every instance of creating a risk of bodily injury will be covered by the criminal neglect of a minor statute or attempted criminal abuse of a minor. The commentary to the RCC criminal abuse of a minor statute has been updated to reflect that the RCC criminal neglect of a minor statute does not include the risk of “bodily injury” because, given the RCC definition of “bodily injury,” this may criminalize the risk of comparatively trivial harms that are part of everyday life, such as allowing a child to play on playground monkey bars.
- (8) *USAO, App. C at 415-419, appears to recommend against creation of a right to a jury trial for third degree criminal abuse of a minor (“likely including attempts.”). USAO states that requiring jury trials in cases that are non-jury demandable under current law will create a tremendous strain on limited judicial resources.*
- The RCC does not incorporate this recommendation because it would be inconsistent with the RCC general approach to jury demandability. As of the Second Draft of Report #41, third degree of the RCC criminal abuse of a minor statute is a Class 9 felony. Although the precise statutory for RCC offenses has not been set, the maximum term of imprisonment for a Class 9 felony in the RCC will satisfy jury demandability requirements

under current law, as will the maximum term of imprisonment for an attempted Class 9 felony. Although it is difficult to precisely compare the current D.C. Code child cruelty statute to third degree of the RCC criminal abuse of a minor statute, to the extent they overlap, there is a jury trial under current law for completed first degree and second degree child cruelty⁴³³ and attempted first degree child cruelty.⁴³⁴ To the extent that third degree of the RCC criminal abuse of a minor statute overlaps with those offense, the RCC is not changing current law for jury demandability, but it is for attempted second degree child cruelty.

(9) *The CCRC recommends reducing the penalty classification for second degree criminal abuse of a minor from a Class 7 felony to a Class 8 felony, and reducing the penalty classification for third degree criminal abuse of a minor from a Class 8 felony to a Class 9 felony. First degree criminal abuse of a minor remains a Class 6 felony, which is the same classification as first degree of the RCC assault statute. As it pertains to “serious bodily injury,” first degree criminal abuse of a minor has a lower culpable mental state (“recklessly”) than first degree assault (“recklessly, with extreme difference to human life.”). The fact that the defendant must have a responsibility for the health, welfare, or supervision of the complainant under the criminal abuse of a minor statute justifies the equivalent penalty, despite the lower culpable mental state. As it pertains to recklessly causing “significant bodily injury,” however, keeping second degree criminal abuse of a minor a Class 7 felony is disproportionate to the penalty for fourth degree assault (recklessly causes significant bodily injury to any complainant), which is a Class 9 felony. A Class 8 felony (still higher than the equivalent bodily injury in assault) is more proportionate for second degree criminal abuse of a minor. Third degree criminal abuse of a minor, which has been revised to include sixth degree assault (Class B misdemeanor) and all gradations of the offensive physical contact offense (Class B misdemeanor and lower), similarly is more proportionately classified as a Class 9 felony (still higher than the equivalent bodily injury in assault).*

- This change improves the proportionality of the revised statute.

(10) *OAG, App. C at 255, state that footnote 26 on page 296 of the Commentary say, “If an accused reasonably believed that the complaining witness was not a minor,*

⁴³³ D.C. Code § 22-1101(c)(1), (c)(2) (“(c)(1) Any person convicted of cruelty to children in the first degree shall be fined not more than \$10,000 or be imprisoned not more than 15 years, or both. (2) Any person convicted of cruelty to children in the second degree shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 10 years, or both.”).

⁴³⁴ Under D.C. Code § 22-1803, the penalty for an attempt, unless otherwise statutorily specified, is 180 days if the offense is not a “crime of violence” or 5 years maximum for a “crime of violence.” “Crime of violence” is defined in D.C. Code § 22-1331(4) and includes first degree child cruelty. Thus, attempted first degree child cruelty would have a maximum term of imprisonment of five years and be jury demandable. Attempted second degree child cruelty would have a maximum term of imprisonment of 180 days not be jury demandable.

D.C. Code § 22-1101(c)(1), (c)(2) (“(c)(1) Any person convicted of cruelty to children in the first degree shall be fined not more than \$10,000 or be imprisoned not more than 15 years, or both. (2) Any person convicted of cruelty to children in the second degree shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 10 years, or both.”).

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.” OAG states that the commentary is “equating ‘reasonableness’ with ‘disregarding a substantial risk.’” OAG state that “it is not sure if that is a correct analysis of the proposed element” because a “reasonable belief that the person was not under 18 does not necessarily negate recklessness- not if the person believes that the other person is a minor, but also knows of (and disregards) a significant risk that that is not true.” OAG does not recommend any changes to the footnote.

- The RCC incorporates this recommendation by amending the footnote to add at the end a cross-reference to: “See RCC § 22E-208(b)(3) and accompanying commentary, providing that a reasonable mistake as to a circumstance element negates the existence of recklessness as to that element.” Other footnotes in the RCC commentary have been likewise clarified with the addition of this reference. This change improves the clarity of the revised commentary.

RCC § 22E-1502. Criminal Neglect of a Minor.

- (1) *USAO, App. C at 336-337, recommends deleting “under civil law” from paragraphs (a)(1), (b)(1), and (c)(1) so that they require that the defendant has a “responsibility for the health, welfare, or supervision of the complainant who is under 18 years of age.” USAO states that “under civil law” is “confusing and needlessly require[s] a reliance on civil law to understand criminal law.”*
 - The RCC does not incorporate this recommendation because it would reduce the clarity of the revised statute. Leaving ambiguous the basis for determining what relationships are “responsible for the health, welfare, or supervision of the complainant simply would leave courts to either look to civil law standards, or to create new, piecemeal standards for these relationships in a criminal context with no legislative guidance. Referring to civil law in the statute provides notice and specifies an objective standard for determining when an individual is responsible for a minor and clarifies the revised definition.
- (2) *The CCRC recommends deleting the jury demandability provisions in subsection (g). The RCC now addresses jury demandability for all RCC offenses in a general provision (RCC § 22E-XX).*
 - This revision improves the clarity, consistency, and proportionality of the revised statute.
- (3) *USAO, App. C at 415-419, appears to recommend against creation of a right to a jury trial for third degree criminal neglect of a minor (“including attempts.”). USAO states that requiring jury trials in cases that are non-jury demandable under current law will create a tremendous strain on limited judicial resources.*
 - The RCC does not incorporate this recommendation because it would be inconsistent with the RCC general approach to jury demandability. As of the Second Draft of Report #41, third degree of the RCC criminal neglect of a minor statute is a Class B felony. In the Second Draft of Report #41, the RCC specifies that in any case in which a person is not constitutionally entitled to a trial by jury, the trial shall be by a single judge, except for the following main offenses: a Class B offense or inchoate (attempt, conspiracy, etc.) forms of a Class B offense; an offense that requires sex-offender registration; or specified offenses in which the complainant is a law enforcement officer. Under this framework, third degree criminal neglect of a minor (a Class B misdemeanor) and attempted third degree criminal neglect of a minor are jury demandable. See the Second Draft of Report #41, for more details. This change improves the consistency of the revised statute.
- (4) *USAO, App. C at 427, recommends increasing the proposed penalties for criminal neglect of a minor. Specifically, USAO recommends that first degree and second degree of the RCC criminal neglect of a minor statute be classified as Class 6 felonies and that third degree of the RCC criminal neglect of a minor statute be classified as a Class 7 felony. USAO states that first degree and second degree of the RCC criminal neglect of a minor statute “have a higher standard than” first degree of the current child cruelty statute, because they require a risk of serious*

bodily injury, death, or significant bodily injury, whereas first degree of the current child cruelty statute prohibits “creates a grave risk of bodily injury to a child, and thereby causes bodily injury.” USAO recognizes that first degree child cruelty requires actual injury and the RCC criminal neglect of a minor statute does not, but states that given the overlap of first degree and second degree of the RCC criminal neglect of a minor statute with first degree child cruelty, the RCC gradations should have the same statutory maximum penalty as first degree child cruelty—15 years imprisonment. USAO also states that it is “concerned” that knowingly abandoning a child in third degree of the RCC criminal neglect of a minor statute be “appropriately punished.” USAO states that under current law, this is second degree cruelty to children with a maximum term of imprisonment of 10 years.

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. First degree and second degree of the RCC criminal neglect of a minor statute are limited to creating a risk of a specified type of harm—there need not be any resulting (actual) harm, and if there were such harm it would constitute the more severely punished offense of RCC criminal abuse of a minor. Ranking these offenses as a Class 6 felony would penalize a risk of harm the same as causing actual harm (serious mental injury or serious bodily injury) in first degree criminal abuse of a minor. Similarly, ranking third degree of the RCC criminal neglect of a minor statute as a Class 7 felony would rank knowingly abandoning the complainant the same as causing actual harm (serious mental injury or significant bodily injury) in second degree criminal abuse of a minor. Requiring harm for the RCC criminal abuse of a minor statute and limiting the RCC criminal neglect of a minor statute to risk creation improves the consistency and proportionality of the revised statutes.
- (5) *The CCRC recommends reducing the penalty classification for second and third degree of the criminal neglect of a minor offense by one class. Specifically, the CCRC recommends reducing second degree criminal neglect of a minor from a Class 9 felony to a Class A misdemeanor, and reducing third degree Criminal Neglect of a Minor from a Class A misdemeanor to a Class B misdemeanor. As is discussed in this Appendix for the RCC criminal abuse of a minor offense, second degree criminal abuse of a minor is now a Class 8 felony and third degree criminal abuse of a minor is now a Class 9 felony. Reducing the penalty classification by one class for second and third degree criminal neglect of a minor keeps the penalties proportionate as compared to the criminal abuse of a minor offense. The reduced penalties for creating a risk of physical harm in the criminal neglect of a minor statute are also proportionate compared to the RCC assault statute.⁴³⁵*

⁴³⁵ Fourth degree assault prohibits recklessly causing significant bodily injury and is a Class 9 felony. Second degree criminal neglect of a minor, which prohibits recklessly creating a risk of significant bodily injury, is now one penalty class lower, a Class A misdemeanor. Sixth degree assault prohibits recklessly causing bodily injury and is a Class B misdemeanor. Third degree criminal neglect of a minor, which

- This change improves the proportionality of the revised statutes.

prohibits abandonment and recklessly failing to provide and would entail risk of bodily harm, is now a Class B misdemeanor.

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

(1) *USAO, App. C at 337, recommends deleting paragraphs (a)(1), (b)(1), and (c)(1), which require that the defendant is “[r]eckless 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” and requiring elsewhere in the offense that the complainant “in fact” is a vulnerable adult or elderly person. With this change, the RCC criminal abuse of a vulnerable adult or elderly person statute would require only that the complainant, in fact, be a vulnerable adult or elderly person, and that the defendant engaged in the prohibited conduct. USAO states that requiring a relationship between the defendant and the complainant is “a change from current law and is not warranted.” USAO refers to the current D.C. Code § 22-933, the criminal abuse of a vulnerable adult or elderly person offense, which does not require a relationship between the parties, “both in situations where there is a relationship between the parties and when there is not, and both applications of the statute are appropriate.”*

- The RCC does not incorporate this recommendation because it would create unnecessary overlap between criminal offenses and may authorize disproportionate penalties. The current D.C. criminal abuse of a vulnerable adult statute’s provisions concerning physical injury are unclear,⁴³⁶ but appear to completely overlap with the District’s current misdemeanor assault, felony assault, and aggravated assault statutes, which authorize maximum terms of imprisonment of 180 days, three years, or 10 years depending on the severity of the resulting injury, if any, and the defendant’s culpable mental states.⁴³⁷ It is difficult to precisely compare the current criminal abuse of a vulnerable adult and assault statutes, but to the extent the offenses overlap, the criminal abuse of a vulnerable adult statute authorizes higher penalties than the current assault statutes. (The current criminal abuse of a vulnerable adult statute has a maximum term of imprisonment of 180 days for committing the offense with no specified amount of harm required, 10 years for causing “serious bodily injury” or “severe mental distress,” and 20 years for causing

⁴³⁶ The primary ambiguity is the scope of the phrase “Inflicts or threatens to inflict physical pain or injury by hitting, slapping, kicking, pinching, biting, pulling hair or other corporal means” in D.C. Code § 22-933(1).

⁴³⁷ D.C. Code §§ 22-404(a)(1) (assault statute authorizing a maximum term of imprisonment of 180 days for “Whoever unlawfully assaults, or threatens another in a menacing manner.”); 22-404(a)(2) (felony assault statute authorizing a maximum term of imprisonment of three years for “Whoever unlawfully assaults, or threatens another in a menacing manner, and intentionally, knowingly, or recklessly causes significant bodily injury to another.”); 22-404.01(a)(1), (a)(2), (b) (aggravated assault statute authorizing a maximum term of imprisonment of 10 years for a person who “(1) By any means, that person knowingly or purposely causes serious bodily injury to another person; or (2) Under circumstances manifesting extreme indifference to human life, that person intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person, and thereby causes serious bodily injury.”).

22-404.01.

“permanent bodily harm” or “death.”⁴³⁸) The RCC reduces unnecessary overlap between assault and criminal abuse of a vulnerable adult statutes by limiting the latter to instances where the actor has a special duty of care toward the complainant—but higher penalties remain for both assaults of vulnerable adults generally and vulnerable adults to whom the actor has a duty of care.

- The RCC criminal abuse of a vulnerable adult or elderly person statute generally authorizes higher penalties for assaultive conduct compared to the RCC assault offense, but improves the proportionality of the higher penalties by requiring that the defendant have a responsibility under civil law for the health, welfare, or supervision of the complainant. The RCC, through “protected person” gradations in various offenses against persons, authorizes enhanced penalties for a complainant that is a “vulnerable adult” or a complainant that is 65 years of age or older when the defendant is at least 10 years younger. These “protected person” gradations provide a penalty enhancement for certain offenses against persons when there is no relationship between the defendant and the complainant.
- Notably, none of the District’s current assault statutes have a penalty enhancement for a “vulnerable adult” and the District’s current penalty enhancement for complainants over the age of 65 years is limited to aggravated assault, and does not apply to either misdemeanor or felony assault.⁴³⁹ The RCC penalty enhancement for bodily injury assault against a vulnerable adult or other defined “protected person” is a new recommendation in the RCC. The RCC proportionately penalizes assaults against vulnerable adults and elderly complainants when there is no relationship with the defendant, as compared to the RCC criminal abuse of a vulnerable adult or elderly person statute where a relationship is required. The key differences between the RCC criminal abuse of a vulnerable adult and RCC assault statutes are that the former includes some non-physical injuries, the precise grading and penalties vary (although both provide enhancements as compared to physical injuries to a non-vulnerable adult or non-elderly person), and there is a distinct label for harms caused by parents, children, caretakers, and others who have a

⁴³⁸ D.C. Code §§ 22-933; 22-936(a), (b), (c) (“(a) A person who commits the offense of criminal abuse or criminal neglect of a vulnerable adult or elderly person shall be subject to a fine not more than the amount set forth in § 22-3571.01, imprisoned for not more than 180 days, or both. (b) A person who commits the offense of criminal abuse or criminal neglect of a vulnerable adult or elderly person which causes serious bodily injury or severe mental distress shall be subject to a fine of not more than the amount set forth in § 22-3571.01, imprisoned up to 10 years, or both. (c) A person who commits the offense of criminal abuse or criminal neglect of a vulnerable adult or elderly person which causes permanent bodily harm or death shall be subject to a fine of not more than the amount set forth in § 22-3571.01, imprisoned up to 20 years, or both.”). The terms “serious bodily injury” and “permanent bodily harm” are not statutorily defined for the current criminal abuse of a vulnerable adult or elderly person statute and there is no DCCA case law interpreting these terms for the current statute.

⁴³⁹ D.C. Code § 22-3601(b).

responsibility for the complainant under civil law for the health, welfare, or supervision of the vulnerable adult or elderly complainant.

- (2) USAO, *App. C at 337*, recommends deleting “under civil law” from paragraphs (a)(1), (b)(1), and (c)(1) so that they require that the defendant has a “responsibility for the health, welfare, or supervision of the complainant who is under 18 years of age.” USAO states that “under civil law” is “confusing and needlessly require[s] a reliance on civil law to understand criminal law.”
- The RCC does not incorporate this recommendation because it would reduce the clarity of the revised statute. Leaving ambiguous the basis for determining what relationships are “responsible for the health, welfare, or supervision of the complainant simply would leave courts to either look to civil law standards, or to create new, piecemeal standards for these relationships in a criminal context with no legislative guidance. Referring to civil law in the statute provides notice and specifies an objective standard for determining when an individual is responsible for a minor and clarifies the revised definition.
- (3) The CCRC recommends adding electronic stalking (RCC § 22E-1802) to the list of offenses included in third degree criminal abuse of a vulnerable adult or elderly person. The list of offenses already includes stalking (RCC § 22E-1801). Electronic stalking is a recently revised offense with a similar scope of conduct and the same penalty.
- This change improves the clarity, consistency, and proportionality of the revised statute.
- (4) USAO, *App. C at 337-338*, recommends including in what is now paragraph (c)(2) that the defendant commits “assault, per RCC § 22E-1202,” “kidnapping, per RCC § 22E-1401,” and both types of offensive contact prohibited in the RCC offensive physical contact offense (RCC § 1205)—contact with bodily fluid or excrement and general offensive physical contact.⁴⁴⁰ USAO states that assault is “implicitly included” in what was previously subparagraph (c)(2)(C) (“recklessly causes bodily injury to the complainant”), but it should be expressly included in subparagraph (c)(2)(C) to “eliminate confusion.” USAO states that since criminal restraint is included in the list of offenses in what is now paragraph (c)(2), kidnapping should be included as well. Finally, USAO states that “it is important to have a provision” for what is now third degree offensive physical contact because “[l]ike 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.” USAO states that “[e]ven if it is likely that the complainant suffered bodily injury, the government may not be able to prove it beyond a reasonable doubt.”
- The RCC partially incorporates the recommendation to include assault in the list of specified offenses in paragraph (c)(2) by including sixth degree assault under RCC § 22E-1202(f). Sixth degree assault requires

⁴⁴⁰ When USAO submitted its comment, the RCC offensive physical contact offense had two gradations. As is discussed elsewhere in this appendix, the RCC offensive physical contact offense now has three gradations because it includes two “protected person” gradations.

recklessly causing bodily injury to a complainant and is identical to what previously subparagraph (c)(2)(C). The RCC does not include first degree, second degree, or third degree assault because they have higher penalties than third degree criminal abuse of a vulnerable adult or elderly person. Including these assault gradations in paragraph (c)(2) would authorize a lower penalty for substantially similar conduct. The RCC does not include fourth degree assault in paragraph (c)(2) because it now has the same penalty as third degree criminal abuse of a vulnerable adult or elderly person (Class 9 felony) for the same conduct (recklessly causing significant bodily injury). The RCC does not include fifth degree of the RCC assault statute in paragraph (c)(2) because it already includes higher penalty based on the victim's status as a vulnerable adult or elderly person.

- The RCC does not incorporate the recommendation to include kidnapping in the list of specified offenses in paragraph (c)(2). Both kidnapping and aggravated kidnapping in the RCC have higher penalties than third degree criminal abuse of a vulnerable adult or elderly person. Including them in third degree criminal abuse of a vulnerable adult or elderly person would authorize a lower penalty for the same conduct.
 - The RCC incorporates the recommendation to include both types of offensive contact prohibited in the RCC offensive physical contact offense (RCC § 1205)—contact with bodily fluid or excrement and general offensive physical contact—by including the offensive physical contact offense in the list of specified offenses in paragraph (c)(2).
- (5) *The CCRC recommends deleting what was previously subparagraph (c)(2)(B) (“Purposely causes significant emotional distress by confining the complainant.”). An actor that purposely causes significant emotional distress by confining the complainant has likely committed criminal restraint, which is included in the list of offenses in paragraph (c)(2) of the statute. To the extent that an actor purposely causes significant emotional distress by confining the complainant and does not satisfy the requirements of the RCC criminal restraint statute, there may still be liability under the provisions of the statute that prohibit causing serious mental injury (subparagraphs (a)(2)(B) and (b)(2)(A)) or the RCC criminal neglect of a vulnerable adult or elderly person statute that prohibit creating a risk of serious mental injury.*
- This change improves the clarity, consistency, and proportionality of the revised statute.
- (6) *USAO, App. C, at 338 recommends in subparagraph (c)(2)(B) changing the culpable mental state from “purposely” to “knowingly” and deleting the words “by confining.” With these changes, subparagraph (c)(2)(B) would require that the defendant “knowingly causes significant emotional distress” to the complainant instead of “purposely causes significant emotional distress by confining the complainant.” USAO states that “knowingly” is the appropriate culpable mental state because “purposely” is a “mens rea that is too high.” USAO states that under the current criminal abuse of a vulnerable adult statute, the only culpable mental states are intentionally or knowledge. USAO states it is*

unclear why confinement “is the only way to cause significant emotional distress under the statute” and that “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.”

- The RCC does not incorporate this recommendation because, as is discussed above, the CCRC recommends deleting subparagraph (c)(2)(B).
- (7) *USAO, App. C at 336, recommends requiring in subparagraph (c)(2)(C) “or engages in conduct that creates a grave risk of causing bodily injury to the complainant.” With this change, subparagraph (c)(2)(C) would require “recklessly causes bodily injury to the complainant, or engages in conduct that creates a grave risk of causing bodily injury to the complainant.” USAO states that this language is consistent with USAO’s proposed change to the criminal abuse of a minor statute. In addition, USAO states that the current criminal abuse of a vulnerable adult statute includes “threaten[ing] to inflict physical pain or injury,” which means no infliction of bodily injury is required, and that this change is “consistent with current law.”*
- The RCC does not incorporate this recommendation for the reasons stated above for this recommendation in criminal abuse of a minor. In addition, while the current criminal abuse of a vulnerable adult or elderly person includes threats to inflict pain or injury, the RCC criminal abuse of a vulnerable adult or elderly person statute specifically includes committing threats in paragraph (c)(2) of third degree.
- (8) *The CCRC recommends reducing the penalty classification for second degree criminal abuse of a vulnerable adult or elderly person from a Class 7 felony to a Class 8 felony, and reducing the penalty classification for third degree criminal abuse of a vulnerable adult or elderly person from a Class 8 felony to a Class 9 felony. First degree criminal abuse of a vulnerable adult or elderly person remains a Class 6 felony, which is the same classification as first degree of the RCC assault statute. As it pertains to “serious bodily injury,” first degree criminal abuse of a vulnerable adult or elderly person has a lower culpable mental state (“recklessly”) than first degree assault (“recklessly, with extreme difference to human life.”). The fact that the defendant must have a responsibility for the health, welfare, or supervision of the complainant under the criminal abuse of a minor statute justifies the equivalent penalty, despite the lower culpable mental state. As it pertains to recklessly causing “significant bodily injury,” however, keeping second degree criminal abuse of a vulnerable adult or elderly person a Class 7 felony is disproportionate to the penalty for fourth degree assault (recklessly causes significant bodily injury to any complainant), which is a Class 9 felony. A Class 8 felony (still higher than the equivalent bodily injury in assault) is more proportionate for second degree criminal abuse of a vulnerable adult or elderly person. Third degree criminal abuse of a vulnerable adult or elderly person, which has been revised to include sixth degree assault (Class B misdemeanor) and all gradations of the offensive physical contact offense (Class B misdemeanor and lower), similarly is more proportionately classified as a Class 9 felony (still higher than the equivalent bodily injury in assault).*

- This change improves the proportionality of the revised statute.
- (9) *The CCRC recommends deleting the burden of proof requirements for the defense. The RCC has a general provision that addresses the burden of proof for all defenses in the RCC (RCC § 22E-XX).*
- This change improves the clarity and consistency of the revised statute.
- (10) *The CCRC recommends applying strict liability to the requirements of the defense. The language “in fact” in subsection (d), per the rule of construction in RCC § 22E-207, applies to the elements in paragraph (d)(1) and paragraph (d)(2). The previous version of the effective consent defense did not specify whether a culpable mental state or strict liability applied to these facts.*
- This change improves the clarity of the revised statute.

RCC § 22E-1504. Criminal Neglect of a Vulnerable Adult or Elderly Person.

- (1) *USAO, App. C at 338-339, recommends deleting “under civil law” from paragraphs (a)(1), (b)(1), and (c)(1) so that they require that the defendant has a “responsibility for the health, welfare, or supervision of the complainant.” USAO states that “under civil law” is “confusing and needlessly require[s] a reliance on civil law to understand criminal law.”*
 - The RCC does not incorporate this recommendation because it would reduce the clarity of the revised statute. Leaving ambiguous the basis for determining what relationships are “responsible for the health, welfare, or supervision of the complainant simply would leave courts to either look to civil law standards, or to create new, piecemeal standards for these relationships in a criminal context with no legislative guidance. Referring to civil law in the statute provides notice and specifies an objective standard for determining when an individual is responsible for a minor and clarifies the revised definition.
- (2) *USAO, App. C at 427, recommends increasing the proposed penalties for criminal neglect of a vulnerable adult or elderly person. Specifically, USAO recommends that first degree and second degree of the RCC criminal neglect of a vulnerable adult or elderly person statute be classified as Class 6 felonies and that third degree of the RCC criminal neglect of a vulnerable adult or elderly person statute be classified as a Class 7 felony. USAO relies on its reasoning for this recommendation in the RCC criminal neglect of a minor statute, discussed above.*
 - The RCC does not incorporate this recommendation for the reasons discussed above for this recommendation in the RCC criminal abuse of a minor statute.
- (3) *The CCRC recommends reducing the penalty classification for second and third degree of the criminal neglect of a vulnerable adult or elderly person offense by one class. Specifically, the CCRC recommends reducing second degree criminal neglect of a minor from a Class 9 felony to a Class A misdemeanor, and reducing third degree criminal neglect of a vulnerable adult or elderly person offense from a Class A misdemeanor to a Class B misdemeanor. As is discussed in this Appendix for the RCC criminal abuse of a vulnerable adult or elderly person offense, second degree criminal abuse of a vulnerable adult or elderly person offense is now a Class 8 felony and third degree criminal abuse of a vulnerable adult or elderly person offense is now a Class 9 felony. Reducing the penalty classification by one class for second and third degree criminal neglect of a vulnerable adult or elderly person offense keeps the penalties proportionate as compared to the criminal abuse of a vulnerable adult or elderly person offense. The reduced penalties for creating a risk of physical harm in the criminal neglect of a vulnerable adult or elderly person statute are also proportionate compared to the RCC assault statute.⁴⁴¹*

⁴⁴¹ Fourth degree assault prohibits recklessly causing significant bodily injury and is a Class 9 felony. Second degree criminal neglect of a vulnerable adult or elderly person, which prohibits recklessly creating a risk of significant bodily injury, is now one penalty classification lower, a Class A misdemeanor. Sixth

- This change improves the proportionality of the revised statutes.
- (4) *The CCRC recommends deleting the burden of proof requirements for the defense. The RCC has a general provision that addresses the burden of proof for all defenses in the RCC (RCC § 22E-XX).*
- This change improves the clarity and consistency of the revised statute.
- (5) *The CCRC recommends deleting the jury demandability provisions in subsection (g). The RCC now addresses jury demandability for all RCC offenses in a general provision (RCC § 22E-XX).*
- This revision improves the clarity, consistency, and proportionality of the revised statute.
- (6) *The CCRC recommends applying strict liability to the requirements of the defense. The language “in fact” in subsection (d), per the rule of construction in RCC § 22E-207, applies to the elements in paragraph (d)(1) and paragraph (d)(2). The previous version of the effective consent defense did not specify whether a culpable mental state or strict liability applied to these facts.*
- This change improves the clarity of the revised statute.

degree assault prohibits recklessly causing bodily injury and is a Class B misdemeanor. Third degree criminal neglect of a vulnerable adult or elderly person, which prohibits recklessly failing to provide and would entail risk of bodily harm, is now a Class B misdemeanor.

Forced Labor or Services. RCC § 22E-1601 & Forced Commercial Sex. RCC § 22E-1602.

- (1) *OAG at App. C. 255, and USAO at App. C. 339, notes that the terms “labor” and “debt bondage” are not defined under RCC § 22E-701, and recommends that the terms should be defined.*
 - The RCC incorporates this recommendation. This change will improve the clarity of the revised criminal code.
- (2) *The CCRC recommends re-drafting paragraph (a)(2) to clarify that the coercive threat may be either explicit or implicit.*
 - This does not substantively change the scope of the exclusions. The prior definition of “coercive threat” included explicit or implicit threats. The definition has been revised to omit reference to explicit or implicit threats, and instead the revised statute specifies that explicit and implicit threats are included. This change improves the clarity of the revised code.
- (3) *OAG at App. C. 255, recommends striking the word “ordinary” from the exclusion from liability for threats of employment actions. OAG says that if employment actions are legal, they should still be exempted from liability even if they are not ordinary.*
 - The RCC incorporates this recommendation by deleting the word “ordinary.” This change will improve the proportionality of the revised criminal code.
- (4) *USAO, at App. C. 339 recommends that subsection (c) should be re-drafted to require only strict liability instead of recklessness as to the complainant status as a protected person. USAO says, by way of explanation, that it “relies on the rationale set forth above in the General Comments to Chapter 13.”*
 - The RCC does not incorporate this recommendation because the USAO proposed change would change current District law in a way that is unclear and inconsistent with the RCC general approach to ensuring penalty enhancements help deter targeting certain protected categories of persons.
 - First, it is unclear whether or why USAO is recommending elimination of a recklessness requirement as to the age of the complainant for human trafficking offenses. The USAO general comments at App. C 313-315 do not discuss the current human trafficking statutes directly and appear to be based solely on arguments about how proving recklessness as to age would circumvent the District’s Rape Shield laws or change evidentiary practices around closely related types of information “not specifically covered by the Rape Shield Act.” These Rape Shield evidentiary arguments at App. C 313-315 do not appear applicable to forms of human trafficking offenses (such as RCC § 22E-1601, Forced Labor or Services) that do not involve sexual conduct as an element. Furthermore, the USAO “general comments” at App. C 272-274, which preface all USAO comments on the First Draft of Report #36, assert what appears to be a somewhat contradictory position about the mental state as to the appropriate mental state as to a minor complainant’s age. Without

distinguishing human trafficking or sex offenses, USAO App. C at 274 recommends that there be a new affirmative defense applying a negligence standard as to the defendant's age.⁴⁴² Lastly, none of the USAO comments address the fact that the one place where current D.C. Code human trafficking offenses refer to age as an element or enhancement, it is to require proof the actor was "knowing or in reckless disregard of the fact that the person has not attained the age of 18 years."⁴⁴³ The USAO recommendation for strict liability (or negligence), thus appears to be a change in law.

- Considering the USAO Comments at App. C 313-315 as applied to human trafficking offenses that involve sexual conduct and complainant's age as elements, the USAO evidentiary arguments that requiring recklessness as to age undermines Rape Shield laws are problematic for the reasons described in response to USAO comments as to offenses under Chapter 13. The "recklessly" culpable mental state does not "create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,"⁴⁴⁴ which the

⁴⁴² USAO App. C at 274 ("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.").

⁴⁴³ D.C. Code 22-1834. See Commentary regarding RCC § 22E-1605. Sex Trafficking of Minors:

"First, the revised sex trafficking of minors statute requires proof that a person was reckless as to the person trafficked being under 18. Subsection (a) of the current sex trafficking of children offense requires the actor to be 'knowing or in reckless disregard of the fact that the person has not attained the age of 18 years,' but does not define the culpable mental state terms. However, subsection (b) of the current statute further states that 'In a prosecution... in which the defendant had a reasonable opportunity to observe the person recruited, enticed... or maintained, the government need not prove that the defendant knew that the person had not attained the age of 18 years.' Consequently, the current statute's drafting is ambiguous as to whether 'recklessness' always suffices to prove liability (as appears to be stated in subsection (a)) or whether a knowing culpable mental state always is required for liability except where there is a reasonable opportunity to view the complainant (as appears to be stated in subsection (b)). There is no case law on point, however legislative history indicates that the latter interpretation of the statute is correct, and recklessness as to the complainant's age is insufficient for liability except when the actor has a reasonable opportunity to observe the complainant." (internal citations omitted).

⁴⁴⁴ USAO lists several examples of "evidence that is known to the defendant" that it states would be admissible to prove that the defendant was not reckless as to the age of the complainant, but would not be allowed by the current rape shield statute: "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." USAO, App. C at 314. However, under the current and RCC rape shield statutes, it appears that this evidence would largely be excluded. To the extent that this evidence is evidence of the complainant's "past sexual behavior" and is not reputation or opinion evidence, it is not admissible unless certain procedural requirements are met and the evidence is "constitutionally required to be admitted" D.C. Code § 22-1839. In addition, even if evidence is constitutionally required to be admitted, the evidence may only be admitted in accordance with the procedures specified in D.C. Code § 22-3022(b). It is unclear whether the hypothetical evidence offered by the USAO in its comments would be constitutionally required to be admitted. Current D.C. Code § 22-1839 does not define "past sexual behavior." However, the

RCC does not substantively change in any manner, or “extremely prejudicial, and otherwise inadmissible, evidence not specially covered by the Rape Shield Act.”⁴⁴⁵ Of particular note, the current D.C. Code § 22-1834 Sex trafficking of Children statute *already* combines a recklessness standard with a robust Rape Shield law in § 22-1839.

- Second, the USAO proposal may lead to disproportionate penalties insofar as the recommendation would provide enhanced penalties for conduct involving minors when the actor either could not have reasonably known that the complainant was a minor (in the case of strict liability) or should have known (but didn’t) that the complainant was a minor. Human trafficking offenses are among the most serious in the RCC (and current D.C. Code), with age-based enhancements providing a substantial increase in liability of about 5-15 years.
- (5) *USAO, at App. C. 339, recommends adding a comma in paragraph (c)(2) after the words “provide services.” USAO recommends adding the comma to clarify that the enhancement will apply if the actor holds the complainant, or causes the person to provide labor, for more than 180 days.*
- The RCC incorporates this recommendation by adding commas as suggested. This change improves the clarity of the revised statute.
- (6) *The CCRC recommends revising the phrasing of the penalty enhancement provision in paragraph (c)(1) to state, “In addition to the general penalty enhancements under this title, the penalty classification for this offense is increased by one class when...” instead of “In addition to any general penalty enhancements in RCC §§ 22E-605 – 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 the following is proven.” Broadening the reference to RCC §§ 22E-605 - 608 to include any general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification “is increased,” instead of “may be increased” clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase “one or more of the following is proven” is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.*
- This revision improves the clarity of the revised statute.

current rape shield statutes under Chapter 30 and the RCC define “past sexual behavior” as “sexual behavior other than the sexual behavior with respect to which” certain sex offenses is alleged. D.C. Code § 22-3021(b); RCC § 22E-1311.

⁴⁴⁵ USAO lists several examples of “extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act” that it states would be admissible under the RCC sexual assault penalty enhancements: “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.”

Forced Commercial Sex. RCC § 22E-1602.

- (1) *USAO, at App. C. 339-340 recommends adding a comma after the words “provide commercial sex acts” to clarify that the enhancement will apply if the actor holds the complainant, or causes the person to provide commercial sex acts, for more than 180 days.*
 - The RCC incorporates this recommendation. This change improves the clarity of the revised statute.
- (2) *CCRC recommends replacing the words “with another person” with “other than with the actor.” This change is not intended to substantively change the offense. The words “with another person” were intended to clarify that the offense does not include intent to cause the complainant to engage in a commercial sex act with the actor. However, that language could be interpreted to exclude masturbation. The words “other than with the actor” clarify that the offense includes masturbation.*
 - This change improves the clarity of the revised statute.
- (3) *The CCRC recommends re-drafting paragraph (a)(2) to clarify that the coercive threat may be either explicit or implicit.*
 - This does not substantively change the scope of the exclusions. The prior definition of “coercive threat” included explicit or implicit threats. The definition has been revised to omit reference to explicit or implicit threats, and instead the revised statute specifies that explicit and implicit threats are included. This change improves the clarity of the revised code.
- (4) *The CCRC recommends revising the phrasing of the penalty enhancement provision in paragraph (b)(1) to state, “In addition to the general penalty enhancements under this title, the penalty classification for this offense is increased by one class when...” instead of “In addition to any general penalty enhancements in RCC §§ 22E-605 – 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 the following is proven.” Broadening the reference to RCC §§ 22E-605 - 608 to include any general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification “is increased,” instead of “may be increased” clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase “one or more of the following is proven” is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.*
 - This revision improves the clarity of the revised statute.

RCC § 22E-1603. Trafficking in Labor or Services.

- (1) *USAO, at App. C. 340, recommends adding the words “advertises, patronizes, or solicits” to subsection (a)(1). USAO says that “[t]hese changes track federal human trafficking law, as codified in 18 U.S.C. § 1591(a)(1).*
 - The RCC does not incorporate this recommendation because it would change current law in a way that is inconsistent with the organization of current and RCC offenses, appears to be unnecessary, and may make the revised statute less clear. Although USAO’s comment says that, “[t]hese additions would include, for example, a job posting or similar situations that would arguably not be encompassed in the statute otherwise,” the plain language of the RCC (and present D.C. Code statute) already covers such conduct in a more direct and clear manner. First, it is unclear what it means to “advertise . . . a person.” If the word “advertise” is intended to cover cases in which a person advertises human beings for sale for the purposes of forced labor, that person would be liable under the other statutory language for “recruit[ing],” “provid[ing],” “obtain[ing],” or “maintain[ing]” a person. Alternatively, accomplice or conspiracy liability may apply to a person who advertises on behalf of another party who actually recruits, obtains, transports, etc. persons, knowing they will be caused to provide labor or services by means of coercive threat or debt bondage. Second, it is also unclear what conduct constitutes “patronizing” a person, with intent that as a result the person will be caused to provide labor or services by means of a coercive threat or debt bondage. The term could include receiving the labor or services of a person. But, if the person who performed labor or services did so due to coercive threats or debt bondage, then the patron may be prosecuted under the forced labor or benefitting from human trafficking statutes, depending on the specific facts of the case. Lastly, as described in the Appendix D1 entry regarding RCC § 22E-302, Solicitation, the RCC general solicitation statute has been revised to apply to all offenses against persons, including human trafficking offenses. Consequently, adding the word “solicits” is unnecessary.
- (2) *The CCRC recommends re-drafting paragraph (a)(2) to clarify that the coercive threat may be either explicit or implicit.*
 - This does not substantively change the scope of the exclusions. The prior definition of “coercive threat” included explicit or implicit threats. The definition has been revised to omit reference to explicit or implicit threats, and instead the revised statute specifies that explicit and implicit threats are included. This change improves the clarity of the revised code.
- (3) *USAO, at App. C. 340 recommends that the penalty enhancement based on the age of the complainant should be re-drafted to require only strict liability instead of recklessness as to the complainant’s age. USAO says, by way of explanation, that it “relies on the rationale set forth above in the General Comments to Chapter 13.”*

- The RCC does not incorporate this recommendation for the reasons stated above regarding the USAO identical recommendation regarding Trafficking in Labor or Services, RCC § 22E-1603 and Forced Commercial Sex, RCC § 22E-1602.
- (4) *The CCRC recommends revising the phrasing of the penalty enhancement provision in paragraph (b)(1) to state, “In addition to the general penalty enhancements under this title, the penalty classification for this offense is increased by one class when...” instead of “In addition to any general penalty enhancements in RCC §§ 22E-605 – 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 the following is proven.” Broadening the reference to RCC §§ 22E-605 - 608 to include any general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification “is increased,” instead of “may be increased” clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase “one or more of the following is proven” is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.*
- This revision improves the clarity of the revised statute.

RCC § 22E-1604. Trafficking in Commercial Sex.

- (1) *USAO, at App. C. 340, recommends adding the words “advertises, patronizes, or solicits” to subsection (a)(1).*
 - The RCC does not incorporate this recommendation for the reasons stated above regarding the USAO identical recommendation regarding Trafficking in Labor or Services, RCC § 22E-1603 and Forced Commercial Sex, RCC § 22E-1602.
- (2) *USAO, at App. C. 340-341 recommends that subsection (c) should be re-drafted to require only strict liability instead of recklessness as to the complainant status as a protected person. USAO says, by way of explanation, that it “relies on the rationale set forth above in the General Comments to Chapter 13.”*
 - The RCC does not incorporate this recommendation for the reasons stated above regarding the USAO identical recommendation regarding Trafficking in Labor or Services, RCC § 22E-1603 and Forced Commercial Sex, RCC § 22E-1602.
- (3) *USAO, at App. 341, in subsection (c), recommends changing the words “before applying to” to “in addition to” which USAO says is non-substantive and intended to conform with the language of other penalty enhancements in Chapter 16.*
 - The RCC incorporates this recommendation by using the “in addition to” language suggested. This change clarifies and improves the consistency of the revised statutes.
- (4) *CCRC recommends replacing the words “with another person” with “other than with the actor.” This change is not intended to substantively change the offense. The words “with another person” were intended to clarify that the offense does not include intent to cause the complainant to engage in a commercial sex act with the actor. However, that language could be interpreted to exclude masturbation. The words “other than with the actor” clarify that the offense includes masturbation.*
 - This change improves the clarity of the revised statute.
- (5) *The CCRC recommends re-drafting paragraph (a)(2) to clarify that the coercive threat may be either explicit or implicit.*
 - This does not substantively change the scope of the exclusions. The prior definition of “coercive threat” included explicit or implicit threats. The definition has been revised to omit reference to explicit or implicit threats, and instead the revised statute specifies that explicit and implicit threats are included. This change improves the clarity of the revised code.
- (6) *The CCRC recommends revising the phrasing of the penalty enhancement provision in paragraph (b)(1) to state, “In addition to the general penalty enhancements under this title, the penalty classification for this offense is increased by one class when...” instead of “In addition to any general penalty enhancements in RCC §§ 22E-605 – 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 the following is proven.” Broadening the reference to RCC §§ 22E-605 - 608 to include any*

general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification “is increased,” instead of “may be increased” clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase “one or more of the following is proven” is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.

- This revision improves the clarity of the revised statute.

RCC § 22E-1605. Sex Trafficking of a Minor.

- (1) *USAO, at App. C. 341, recommends changing the name of the offense “sex trafficking of minors” to “sex trafficking of a minor.” USAO also suggests that language in subsection (a) of the statute be updated to refer to state “An actor commits the offense of sex trafficking of a minor when that actor[.]” USAO notes that this recommendation is not intended to substantively change the offense.*
 - The RCC incorporates this recommendation. This change makes the label of the offense consistent with other RCC offenses involving minors.
- (2) *USAO, at App. C. 340, recommends adding the words “advertises, patronizes, or solicits” to subsection (a)(1).*
 - The RCC does not incorporate this recommendation for the reasons stated above regarding the USAO identical recommendation regarding Trafficking in Labor or Services, RCC § 22E-1603 and Forced Commercial Sex, RCC § 22E-1602.
- (3) *USAO, at App. C. 341-342 recommends that subsection (c) should be re-drafted to require only strict liability instead of recklessness as to the complainant status as a protected person. USAO says, by way of explanation, that it “relies on the rationale set forth above in the General Comments to Chapter 13.”*
 - The RCC does not incorporate this recommendation for the reasons stated above regarding the USAO identical recommendation regarding Trafficking in Labor or Services, RCC § 22E-1603 and Forced Commercial Sex, RCC § 22E-1602.
- (4) *USAO, at App. C. 342, recommends deleting the words “with another person” from paragraph (a)(2). USAO, at App. C. 342, recommends including “masturbation” in the definition of “commercial sex act.”*
 - The RCC partially incorporates this recommendation by amending the phrase “with another person” to “other than with the actor.” The words “other than with the actor” clarify that the offense includes masturbation. The term “commercial sex act” is defined as “any sexual act or sexual contact on account of which or for which anything of value is given to, promised to, or received, by any person.” Masturbation, insofar as it involves penetration of the anus or vulva, or touching clothed or unclothed genitalia, with desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person, constitutes a “commercial sex act” if performed in exchange for anything of value. The requirement that the commercial sex act be “with another person” is intended to exclude cases in which the actor has intent that the complainant engage in a commercial sex act *with the actor*. An actor who acts with intent that the minor will engage in a commercial sex act with the actor may be liable under separate sex offenses codified in Chapter 13.
- (5) *The CCRC recommends revising the phrasing of the penalty enhancement provision in paragraph (b)(1) to state, “In addition to the general penalty enhancements under this title, the penalty classification for this offense is increased by one class when...” instead of “In addition to any general penalty enhancements in RCC §§ 22E-605 – 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 the following is proven.” Broadening the reference to RCC §§ 22E-605 - 608 to include any general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification “is increased,” instead of “may be increased” clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase “one or more of the following is proven” is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.

- This revision improves the clarity of the revised statute.

RCC § 22E-1606. Benefitting from Human Trafficking.

- (1) *OAG at App. C. 255-256, recommends changing the statutory language to codify language in the RCC commentary that a person's participation in a group must in some way be related to the group's violation of a human trafficking statute.*
 - The RCC incorporates this recommendation by adding as an element to the first and second degrees of the statute a subparagraph (4) that states: "In fact, the actor's participation in the group furthers, in any manner, the conduct that constitutes a human trafficking offense." This change clarifies the revised statute.

RCC § 22E-1607. Misuse of Documents.

- (1) *OAG, at App. C. 256, recommends that the commentary should clarify that the words “in order to” do not introduce a new mental state.*
 - The RCC incorporates this recommendation by stating in the commentary that the words “in order to” do not introduce a new mental state. This change clarifies the RCC commentary.
- (2) *OAG, at App. C. 406, recommends that the misuse of documents offense be divided into two penalty gradations, with the first degree version requiring intent to maintain the performance of a commercial sex act, and second degree version requiring intent to maintain labor or services. OAG also recommends that the penalties for misuse of documents should be the same as for benefitting from human trafficking.*
 - The RCC partially incorporates this recommendation by dividing the misuse of documents offense into two penalty grades, based on whether the actor had intent to cause a person to engage in commercial sex acts, or labor or services. This change improves the proportionality of the revised criminal code.
 - However, the RCC does not incorporate OAG’s recommendation that the two grades of misuse of documents be the same as for the corresponding penalties for benefitting from human trafficking because doing so may authorize disproportionate penalties. Misuse of documents is a semi-inchoate offense, and does not require that any person actually provided labor or services, or engaged in a commercial sex act. In contrast, the higher penalty classification for benefitting from human trafficking requires that a person was actually coerced into providing labor or services, or engaging in a commercial sex act. Notably, under the RCC, a person may be liable for both benefitting from human trafficking and misuse of documents and sentenced consecutively for these crimes.

RCC § 22E-1608. Commercial Sex with a Trafficked Person.

- (1) *USAO, at App. C. 342 recommends that subsection (c) should be re-drafted to require only strict liability instead of recklessness as to the complainant status as a protected person. USAO says, by way of explanation, that it “relies on the rationale set forth above in the General Comments to Chapter 13.”*
 - The RCC does not incorporate this recommendation for the reasons stated above regarding the USAO identical recommendation regarding Trafficking in Labor or Services, RCC § 22E-1603 and Forced Commercial Sex, RCC § 22E-1602.
- (2) *The CCRC recommends re-drafting paragraphs (a)(2) and (b)(2) to clarify that the coercive threat may be either explicit or implicit.*
 - This does not substantively change the scope of the exclusions. The prior definition of “coercive threat” included explicit or implicit threats. The definition has been revised to omit reference to explicit or implicit threats, and instead the revised statute specifies that explicit and implicit threats are included. This change improves the clarity of the revised code.

RCC § 22E-1611. Civil Action.

- (1) *The CRCC recommends replacing the word “and” with “or” in subsection (a). This change clarifies that an individual who was the victim of any of the statutes listed in subsection (a) may bring a civil action. This change clarifies the revised statute.*

RCC § 22E-1612. Limitation on Liabilities and Sentencing for RCC Chapter 16 Offenses

(1) *OAG, at App. C. 257, recommends amending the limitation on liabilities and sentencing statute only to bar convictions for conduct that occurs while the person is being trafficked. USAO, at App. C. 342, recommends deleting RCC § 22E-1612.*

- The RCC partially incorporates the OAG recommendation by requiring the person to have been subjected to human trafficking by the principal “within the past 3 years prior to either the conduct constituting the offense by the principal, or the formation of the conspiracy. However, the RCC does not incorporate the USAO recommendation because it may authorize disproportionate penalties. Victims of human trafficking offenses may still have diminished culpability even after the initial trafficking offense has been completed due to the principal’s ongoing influence over the victim. However, recognizing that such influence may diminish over time when the victim is no longer being trafficked, the revised statute has a three year time limitation. Notably, a prior victim of human trafficking remains liable as: 1) a principal engaged in human trafficking; 2) as an accomplice or co-conspirator when the principal was not the perpetrator of the original trafficking offense; or 3) as a principal, accomplice, or co-conspirator for another offense against persons in the RCC.

RCC § 22E-1801. Stalking.

(1) *OAG, App. C at 249 n. 7, recommends either striking the exclusion from liability for protected speech or providing a specific example of a stalking fact pattern that involves protected speech. USAO, App. C at 311, states, “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.”*

- The RCC incorporates this recommendation by striking the exclusion from liability language as potentially confusing. This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

(2) *USAO, App. C at 310, recommends requiring knowledge instead of purpose, stating, “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.”*

- The RCC does not incorporate this recommendation because reducing the culpable mental state to knowingly would criminalize new behavior in a new way that may authorize disproportionate penalties. The USAO comment does not provide a rationale for why knowledge is more appropriate than purpose. A purposeful culpable mental state appears to be the requirement under the current stalking statute in D.C. Code § 22-3133 which states: “It is unlawful for a person to purposefully engage in a course of conduct directed at a specific individual...” A key rationale for providing stalking liability for the negligent infliction of emotional harm—a uniquely low standard in the D.C. Code—is that punishment for such a result is warranted because the actor “purposely” engaged in targeted conduct against the victim.⁴⁴⁶
- Requiring mere knowledge may criminalize behavior that is innocent, constitutionally protected under the First Amendment, or both:
 - Consider, for example, a person who communicates to a large audience via television broadcast or an upload to YouTube. That person may be practically certain that the complainant will watch the broadcast, and negligent as to the fact that the complainant will be distressed by the content, but not consciously desire that the complainant watch.
 - Consider also a divorced couple attending a family event, such as a wedding or a funeral. One former spouse may be practically

⁴⁴⁶ See the National Center for Victims of Crime, *Model Stalking Statute Revisited* (2007) at 34.

certain that they are maintaining close proximity to the other as they move from the church to the reception hall, and negligent as to the fact that their very presence is distressing, but not consciously desire to physically follow them.⁴⁴⁷

(3) *USAO, App. C at 310-311, recommends eliminating the requirement that communications occur after receiving notice that the contact is unwelcome. USAO notes that: “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.”*

- The RCC partially incorporates this recommendation by eliminating the phrase “after knowingly receiving notice from the complainant, directly or indirectly, to stop such communication” and instead requiring that the person is negligent as to the fact that the contact is without the complainant’s effective consent. The USAO comment appears to assume, without objection, that an actor should have known their actions are unwelcome and requiring negligence as to the fact that the contact is without the complainant’s effective consent codifies this point. This change eliminates an unnecessary gap in liability.

(4) *USAO, App. C at 311, recommends providing liability for “using another individual’s personal identifying information” in the stalking statute.*⁴⁴⁸

- The RCC partially incorporates this recommendation by amending the statute to include “falsely personating” the complainant as a predicate for stalking liability and adding a statutory reference to conduct that constitutes “identity theft” in the reordered subparagraph (a)(1)(D). The revised stalking statute makes it unlawful to assume a victim’s likeness and communicate to other people on the victim’s behalf (e.g., falsely posing as the complainant in an online forum and making statements that intentionally or negligently inflict fear or emotional stress on the complainant). RCC § 22E-2205 (Identity Theft) makes it unlawful to use personal identifying information not only to obtain property or to avoid payment, but to transfer the information to a third person to facilitate their fraudulent use of the information to obtain property (e.g. posting another’s credit card or social security number online). However, identity theft liability does not require intentional or negligent infliction of fear or emotional distress.⁴⁴⁹ The revised stalking statute does not provide liability for mere use of “personal identifying information” because, as defined in the RCC (and current D.C. Code), that term broadly includes information not only such as account numbers, credit cards, credit ratings,

⁴⁴⁷ “Physically following” is defined in RCC § 22E-701.

⁴⁴⁸ See D.C. Code § 22-3132(8)(C).

⁴⁴⁹ To the extent that the actor commits identity theft as part of stalking those convictions would merge per RCC § 22E-214, consistent with the Council’s prior statement that it did not intend for there to be multiple punishments for identity theft and stalking based on the same conduct. See Report on Bill 18-151, the “Omnibus Public Safety and Justice Amendment Act of 2009,” Council of the District of Columbia Committee on Public Safety and the Judiciary (June 29, 2009) at Page 46.

and passwords, but readily available information such as a person’s name and home address.⁴⁵⁰ Many common uses of a person’s name or address (e.g. publication of the name or home address of a person who wishes to remain anonymous) and constitutionally protected speech (e.g. stating in a public place that a named person is immoral or blameworthy) would appear to fall within the scope of stalking if mere use of identifying information is predicate conduct. This change eliminates an unnecessary gap in liability.

(5) *USAO, App. C at 311, recommends removing the exclusion from liability for speech concerning political matters and other matters of public concern to a complainant engaged in their official duties when the complainant is a government official, candidate for elected office, or employee of a business.*⁴⁵¹ *USAO states that the exclusion from liability should not permit a government official to be stalked or harassed in their personal space (e.g., a work call while at home). USAO also notes that “government official” is undefined and “employee of a business that serves the public” could include virtually all businesses, and therefore virtually all employees.*

- The RCC partially incorporates the recommendation regarding government officials and candidates for elected office by limiting the exception for “a government official” to a “District official,” a defined term, when the District official is engaged in their official duties and the communication alleged to constitute stalking concerns a political or public matter. The location of such a public official—at an office, on the street, or at home—is irrelevant so long as the limitations of the exclusion are met. Harassing calls to District official’s personal cell phone or home when the official is not on duty would not be subject to the exclusion under its plain terms. Moreover, while the USAO comment refers to physically following or physically monitoring,⁴⁵² the statutory language makes clear that the exception applies only to “a communication.”
- The RCC partially incorporates the recommendation to narrow the scope of the exclusion for businesses and employees when those complainants are engaged in their official duties and the communication alleged to constitute stalking concerns a political or public matter.

(6) *USAO, App. C at 311, recommends removing the exclusion from liability for a journalist, law enforcement officer, professional investigator, attorney, process server, pro se litigant, or compliance investigator.*⁴⁵³ *USAO says that the exclusion is unnecessary because the exclusion from liability for protected activity “encompasses the constitutional concerns that could otherwise be implicated by this statute, and is an appropriate catch-all...”*

- The RCC does not incorporate this recommendation because it would make the revised statute less clear. As the commentary explains, “Even if

⁴⁵⁰ RCC § 22E-701.

⁴⁵¹ RCC § 22E-1801(b)(2). [Previously numbered RCC § 22E-1206(b)(2).]

⁴⁵² “Physically following” and “physically monitoring” are defined in RCC § 22E-701.

⁴⁵³ RCC § 22E-1801(b)(3). [Previously numbered RCC § 22E-1206(b)(3).]

the current and RCC stalking statutes' general statements regarding the protection of constitutional activities provide adequate notice that certain activities do not constitute stalking, such statements do not obviously extend to activities beyond the First Amendment.⁴⁵⁴ Without a clear exclusion, such legitimate activities may be deemed stalking."⁴⁵⁵ It is not inconceivable that a person would otherwise be accused of stalking for conduct that is within the scope of their professional duties or legal obligations.⁴⁵⁶

- The RCC strikes the prior language in favor of the exclusion articulated in paragraph (b)(2) for conduct that is “[a]uthorized...by a court order or District statute, regulation, rule, or license; or carrying out a specific, lawful commercial purpose or employment duty, when acting within the reasonable scope of that purpose or duty.”
- (7) *USAO, App. C at 311-312, 415-419, and 426, recommends eliminating the right to a jury trial for attempted stalking. USAO states that it is appropriate to do so, explaining, “There is no particular interest in attempted stalking being jury demandable, as jury trials involve considerable resources that non-jury trials do not.”*
- The RCC does not incorporate this recommendation, which predates the RCC’s updated jury demandability recommendation. In the First Draft of Report #41 (October 3, 2019), the CCRC recommended that the RCC classify enhanced stalking as a Class 9 felony and unenhanced stalking as a Class A misdemeanor. In the Second Draft of Report #41, the CCRC recommends that the RCC classify all completed and inchoate Class A misdemeanors as jury demandable offenses, improving the consistency of the revised statutes.
 - As the DCCA recently explained in *Coleman v. United States*,⁴⁵⁷ the Council “found it ‘highly appropriate that a jury of [the defendant’s] peers...judge whether the behavior is acceptable or outside the norm and indicative of escalating problems.’”⁴⁵⁸ The court went on to explain, “The

⁴⁵⁴ Many of the professional activities excepted in the RCC stalking statute, e.g. a private investigator, are not constitutionally protected activities. Notably, the District’s current voyeurism statute contains an exception for monitoring by law enforcement. D.C. Code § 22-3531(e)(1).

⁴⁵⁵ The intent requirements in the current and revised stalking statutes do not necessarily exempt persons engaged in bona fide, legitimate occupational activities. For example, a process server may need to repeatedly lie in wait near someone’s home and workplace to hand-serve that person with a distressing pleading. Similarly, a business owner monitoring an employee’s compliance with worker safety laws may cause the person some degree of emotional unrest.

⁴⁵⁶ See, e.g., Eugene Volokh, *How I Was a Criminal Defendant in a N.J. Harassment Case*, REASON (August 22, 2019).

⁴⁵⁷ *Coleman v. United States*, 202 A.3d 1127 (D.C. 2019).

⁴⁵⁸ *Id.* at 1134 (citing D.C. Council, Comm. on Pub. Safety & Judiciary, Rep. on Bill 18-151, at 33 (June 26, 2009), <http://lims.dccouncil.us/Download/22306/B18-0151-CommitteeReport1.pdf> (Committee Report)).

The current version of the stalking statute was enacted as part of the Omnibus Public Safety and Justice Amendment Act of 2009, D.C. Law 18-88, 56 D.C. Reg. 7413 (Dec.

Council expressly set the maximum penalty for stalking at a level that guaranteed the defendant’s right to a jury trial...(explaining that the penalty of twelve months for first-time stalking offenders was established ‘so that a defendant will have a right to a jury of [his] peers’).⁴⁵⁹ In fact, the Council has long recognized a heightened need to provide jury when “the elements of the crime are somewhat subjective. In such cases the defendant should be able to present his or her case to representatives of the community (i.e., a jury) to answer the question whether there is guilt beyond a reasonable doubt.”⁴⁶⁰ Additionally, in another recent opinion, the DCCA noted, “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.”⁴⁶¹

(7) *OAG, App. C at 250, and USAO, App. C at 312, recommend that the penalty enhancement for violation of a court order be broadened to include a court order or condition of release that either restricts or prohibits contact with the complainant. OAG and USAO explain that a person may be subject to a court order or condition of release that permits limited contact with the complainant under specified circumstances and does not prohibit contact categorically.*

- The RCC partially incorporates this recommendation by specifying that the enhancement applies when the person’s conduct violates a court order or condition of release prohibiting or restricting contact with the complainant. This change eliminates an unnecessary gap in liability.⁴⁶²

(8) *USAO, App. C at 312, recommends that the repeat offender enhancement clarify that it applies to a person with “one or more” convictions for stalking within 10 years. (Emphasis added.)*

- The RCC incorporates this recommendation by adopting USAO’s proposed language. This change clarifies the revised statute and does not further change District law.

(9) *USAO, App. C at 312, recommends that the “requirement that the defendant ‘recklessly disregarded’ the complainant’s age be removed.” USAO cites its general comments for all offenses on such penalty enhancements, but does not specify the general comments to which it is referring.*

- The RCC does not incorporate this recommendation because the USAO recommendation may authorize disproportionate penalties.

10, 2009). Citing the ‘subjective nature’ of stalking, the Council’s Committee on Public Safety and the Judiciary deemed it an offense for which ‘the community, not a single judge, should sit in judgment...’

⁴⁵⁹ *Id.* (Internal citations omitted.)

⁴⁶⁰ See Report on Bill 16-247, the “Omnibus Public Safety Amendment Act of 2006,” Council of the District of Columbia Committee on the Judiciary (April 28, 2006) at Page 7.

⁴⁶¹ *Bado v. United States*, 186 A.3d 1243, 1264 (D.C. 2018) (Washington, J., *concurring*).

⁴⁶² Violation of a court order or condition of release is separately punishable as contempt. See, e.g., D.C. Code §§ 16-1005(f); 23-1329(c).

- First, the intended scope of the USAO comment is unclear. The USAO statutory language proposed in App. C at 312 strikes the revised statute’s minimum age *and* age differential requirements but does not discuss these changes and instead refers to the USAO general comments. However, the USAO general comments in App. C at 282 do not appear to say anything about a minimum age and, regarding age differential, appear to take a position the opposite of the language recommended for stalking at App. C at 312. The USAO general comments in App. C at 282 state: “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).” In fact, current District law provides for an age differential requirement for the stalking of a minor complainant enhancement.⁴⁶³ The CCRC does not here address an age-gap requirement on the assumption that USAO did not intend to recommend striking the age-gap requirement from the enhancement for the complainant’s status as a minor. The USAO general comments in App. C at 273, however, recommend that there be a new affirmative defense applying a negligence standard as to the defendant’s age.
 - Second, assuming the USAO intends to recommend a “negligence” standard as to the victim’s status as a protected person, the CCRC does not incorporate the recommendation for the reasons stated in the response to the same comment in the RCC murder statute.⁴⁶⁴
- (10) *OAG, App. C at 250, recommends revising the sentence in the commentary (p. 130) that states, “The term ‘court order’ includes any judicial directive, oral or written, that clearly restricts contact with the stalking victim.” OAG explains the word “clearly” does not appear in the statutory language and is unclear.*
- The RCC incorporates this recommendation by revising relevant sentence to state, “The term ‘court order’ includes any judicial directive, oral or written, that restricts contact with the stalking victim.” This change clarifies the revised commentary.
- (11) *OAG, App. C at 250, recommends revising the repeat offender penalty enhancement to clarify that the prior stalking conviction could be in any jurisdiction.*
- The RCC incorporates this recommendation by specifying that enhancement applies to any person who “Has one or more prior convictions within 10 years before the offense for: (i) Stalking under RCC § 22E-1801 or a comparable offense; or (ii) Electronic Stalking under RCC § 22E-1802 or a comparable offense.” This change clarifies the revised statute and does not further change District law.

⁴⁶³ D.C. Code § 22-3134(b) (“A person who violates § 22-3133 shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 5 years, or both, if the person: ... (3) At the time, was at least 4 years older than the specific individual and the specific individual was less than 18 years of age;).

⁴⁶⁴ RCC § 22E-1101.

- (12) *OAG, App. C at 250, recommends specifying that a defendant is strictly liable for causing more than \$2,500 in financial injury.*⁴⁶⁵ *OAG notes that the other penalty enhancements include the defined term “in fact”⁴⁶⁶ to indicate that no culpable mental state applies.*
- The RCC incorporates this recommendation by revising the relevant subparagraph to state, “The person, in fact, caused more than \$5,000 in financial injury.” (The threshold amount has been increased from \$2,500 to \$5,000 as noted below.) This change clarifies the revised offense.
- (13) *USAO, App. C at 426, recommends reclassifying enhanced stalking as a Class 8 felony. USAO states, “Stalking is serious behavior that can be linked to lethal behavior.”*
- The RCC does not incorporate this recommendation because it would result in a disproportionate penalty.
- (14) *The CCRC recommends increasing the value threshold for the financial injury penalty enhancement from \$2,500 to \$5,000, consistent with the thresholds for the revised property offenses.*⁴⁶⁷ *This change is made for the reasons described in the identical CCRC recommendation regarding the RCC fraud statute.*⁴⁶⁸
- This change improves the consistency of the revised offenses.
- (15) *The CCRC recommends adding the phrase “the complainant” to subparagraphs (a)(1)(A) and (a)(1)(B),⁴⁶⁹ to improve the grammar in the offense definition.*
- This change clarifies, but does not substantively change, the revised offense.
- (16) *The CCRC recommends revising the phrase “Purposely, on 2 or more separate occasions, engages in a course of conduct directed at a complainant...” to instead read: “Purposely engages in a course of conduct directed at a complainant that consists of 2 or more occasions...,” so that it is clear the person does not have to engage in two separate courses of conduct.*
- This change clarifies the revised statute and does not further change District law.
- (17) *The CCRC recommends replacing the reference to “a criminal harm involving a trespass, threat, taking of property, or damage to property” with a specific list of predicate offenses to clarify that the statute requires a categorical approach and not a conduct-specific approach.*
- This change clarifies the revised statute and does not further change District law.
- (18) *The CCRC recommends amending the penalty enhancement provision to include an enhancement for a prior conviction for electronic stalking. The RCC electronic stalking offense,⁴⁷⁰ which was recently issued in the First Draft of*

⁴⁶⁵ RCC § 22E-1801(e)(2)(D).

⁴⁶⁶ RCC § 22E-207.

⁴⁶⁷ See, e.g., RCC §§ 22E-2101 (Theft); 22E-2202 (Fraud); 22E-2205 (Identity Theft).

⁴⁶⁸ RCC § 22E-2201.

⁴⁶⁹ [Previously numbered (a)(1)(C).]

⁴⁷⁰ See RCC § 22E-1802.

Report #42 (November 20, 2019), replaces certain components of the current stalking offense and related provisions in D.C. Code §§ 22-3131 - 3135.

- This change eliminates an unnecessary gap in liability.
- (19) *The CCRC recommends revising the phrasing of the penalty enhancement provision to state, “In addition to the general penalty enhancements under this title, the classification for this offense is increased by one class when...” Broadening the reference to RCC §§ 22E-605 - 608 to include any general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification “is increased,” instead of “may be increased” clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase “one or more of the following is proven” is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.*
- This change clarifies the revised statute and does not further change District law.

RCC § 22E-1802. Electronic Stalking.

- (1) *PDS, App. C at 446, recommends creating two degrees of electronic stalking, differentiating between harm that is intentionally caused and harm that is negligently caused. PDS states, “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.*
- The RCC does not incorporate this recommendation because it may result in inconsistency with the revised stalking offense⁴⁷¹ and disproportionate penalties. The revised statute follows current District law in providing liability for persons who may be acting with beneficent intentions, but nonetheless actually cause emotional harm to another by their behavior. While it is highly unusual in American jurisprudence to provide criminal liability for unintentional wrongdoing, modern stalking statutes in several jurisdictions besides the District provide liability based on negligence. The District’s decision in 2009 to provide a low culpable mental state requirement for stalking may be necessary to address some unique fact patterns involved in stalking-type behavior—e.g., involving a person who is unreasonably mistaken about the complainant’s love for him or her, following the complainant without knowing that such behavior causes the complainant harm. In the revised statute, negligent and intentional conduct are not treated equally. The lower culpable mental state requirement in subparagraph (a)(2)(B) is paired with a requirement of actual harm, while the higher culpability requirement of subparagraph (a)(2)(A) is inchoate. Consequently, the two means of committing electronic stalking are relatively balanced in the overall seriousness of the conduct.
- (2) *PDS, App. C at 446, recommends defining the term “derivative image” in the statutory text. PDS does not propose a particular definition but notes the examples given in the commentary.*
- The RCC partially incorporates this recommendation by amending the commentary to note that the word “derivative” has its common meaning. When used as an adjective, the word “derivative” is commonly understood to mean “having parts that originate from another source.”⁴⁷² Accordingly, the phrase “derivative image” means an image derived from another source, such as a photograph of a photograph or a screenshot. This change clarifies the revised commentary.
- (3) *USAO, App. C at 454, recommends defining the term “course of conduct” to mean “actions taken on two or more occasions,” so that it is clear the person does not have to engage in two separate courses of conduct.*
- The RCC partially incorporates this recommendation by revising the phrase “Purposely, on 2 or more separate occasions, engages in a course of

⁴⁷¹ RCC § 22E-1801.

⁴⁷² Merriam-Webster.com, “derivative”, 2020, available at <https://www.merriam-webster.com/dictionary/derivative>.

conduct directed at a complainant...” to “Purposely engages in a course of conduct directed at a complainant that consists of 2 or more occasions...”

This change clarifies the revised statute and does not further change District law.

- (4) *USAO, App. C at 454, requests that the RCC clarify the exclusion from liability in subparagraph (b)(2)(A) for persons who are a party to the communication that is being recorded. USAO states, “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 mean that the defendant was not liable for stalking.”*
- The RCC incorporates this recommendation by clarifying in the statutory text that the exclusion from liability applies to audio recordings only. This change clarifies the revised statute.
- (5) *USAO, App. C at 454-455, recommends revising the commentary to refer to “engaging in” a pattern of misconduct instead of “causing” a pattern of misconduct. USAO also recommends striking the word “uninterrupted,” stating, “Stalking behavior may be interrupted, as a defendant engaging in stalking will engage in activities other than stalking during the course of the stalking.”*
- The RCC partially incorporates this recommendation by substituting the phrase “engage in” for “cause” and revising the footnote that accompanies the phrase “uninterrupted purpose.” The footnote now explains that it is the purpose, not the conduct, that must be uninterrupted. This change clarifies the revised commentary.
- (6) *USAO, App. C at 455, recommends eliminating the right to a jury trial for attempted electronic stalking, consistent with its recommendation for the revised stalking offense.⁴⁷³*
- The RCC does not incorporate this recommendation, which predates the RCC’s updated jury demandability recommendations. In the First Draft of Report #41 (October 3, 2019), the CCRC recommended that the RCC classify enhanced electronic stalking as a Class 9 felony and unenhanced electronic stalking as a Class A misdemeanor. In the Second Draft of Report #41, the CCRC recommends that the RCC classify all completed and inchoate Class A misdemeanors as jury demandable offenses, improving the consistency of the revised statutes.
- (7) *USAO, App. C at 455, recommends that the penalty enhancement for violation of a court order be broadened to include a court order or condition of release that either restricts or prohibits contact with the complainant, consistent with its recommendation for the revised stalking offense.⁴⁷⁴*
- The RCC incorporates this recommendation by amending the penalty enhancement provision to state, “The person, in fact, was subject to a court order or condition of release prohibiting or restricting contact with

⁴⁷³ RCC § 22E-1801.

⁴⁷⁴ RCC § 22E-1801.

- the complainant.” This change eliminates an unnecessary gap in liability.⁴⁷⁵
- (8) USAO, *App. C at 455*, recommends that the repeat offender enhancement clarify that it applies to a person with “one or more” convictions for electronic stalking within 10 years. (*Emphasis added.*)
- The RCC incorporates this recommendation by adopting USAO’s proposed language. This change clarifies the revised statute and does not further change District law.
- (9) USAO, *App. C at 455*, recommends that the “requirement that the defendant ‘recklessly disregarded’ the complainant’s age be removed,” consistent with its recommendation for the revised stalking offense.⁴⁷⁶
- The RCC does not incorporate this recommendation for the reasons stated in the response to the same comment in the RCC stalking statute.⁴⁷⁷
- (10) USAO, *App. C at 455*, recommends stating 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.”
- The RCC does not incorporate this recommendation because it may render the statute unconstitutional. Generally, a state has jurisdiction over crimes if the conduct takes place or the result happens within its territorial limits.⁴⁷⁸ The conduct element of this offense is satisfied as soon as the recording or monitoring occurs. The result element of an offense under subparagraph (a)(2)(B) of this offense is satisfied as soon as the fear or emotional distress occurs and, if the complainant is in the District at that time, there would be jurisdiction. In sum, under existing law the District may exercise jurisdiction only if the recording, monitoring, fear, or distress occurs here. However, the USAO recommendation goes further in recommending a statement that “any harm...stemming from the defendant’s actions” is sufficient for jurisdiction. Consider, for example, a person who is a victim of stalking conduct in California who travels to the District of Columbia months later, while still experiencing significant emotional distress. Such an attenuated connection to the District would not be a sufficient or constitutionally sound basis for jurisdiction.
- (11) The CCRC recommends striking the exclusion from liability for protected speech as potentially confusing.
- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

⁴⁷⁵ Violation of a court order or condition of release also is separately punishable as contempt. *See, e.g.*, D.C. Code §§ 16-1005(f); 23-1329(c).

⁴⁷⁶ RCC § 22E-1801.

⁴⁷⁷ RCC § 22E-1801.

⁴⁷⁸ *See* WAYNE R. LAFAYE, 1 SUBST. CRIM. L. § 4.4(a) Common law view of territorial jurisdiction, 1 Subst. Crim. L. § 4.4(a) (3d ed.).

- (12) *The CCRC recommends broadening the penalty enhancement for violation of a court order to include a court order or condition of release that either restricts or prohibits contact with the complainant, consistent with the revision to the stalking offense.*⁴⁷⁹
- This change eliminates an unnecessary gap in liability.
- (13) *The CCRC recommends increasing the value threshold for the financial injury penalty enhancement from \$2,500 to \$5,000, consistent with the thresholds for the revised property offenses.*⁴⁸⁰ *This change is made for the reasons described in the identical CCRC recommendation regarding the RCC fraud statute.*⁴⁸¹
- This change improves the consistency of the revised offenses.
- (14) *The CCRC recommends specifying that a defendant is strictly liable for causing more than \$5,000 in financial injury, consistent with the revision to the stalking offense.*⁴⁸²
- This change clarifies the revised offense and does not further change District law.
- (15) *The CCRC recommends striking the exclusion from liability for certain types of employment activity in favor of an exclusion for conduct that is “[a]uthorized...by a court order or District statute, regulation, rule, or license; or carrying out a specific, lawful commercial purpose or employment duty, when acting within the reasonable scope of that purpose or duty,” consistent with the revision to the stalking offense.*⁴⁸³
- This change improves the clarity and consistency of the revised statutes and does not further change District law.
- (16) *The CCRC recommends revising the phrasing of the penalty enhancement provision to state, “In addition to the general penalty enhancements under this title, the classification for this offense is increased by one class when...” Broadening the reference to RCC §§ 22E-605 - 608 to include any general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification “is increased,” instead of “may be increased” clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase “one or more of the following is proven” is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.*
- This change clarifies the revised statute and does not further change District law.
- (17) *The CCRC recommends striking the jury trial provision as unnecessary. As of the Second Draft of Report #41, the CCRC recommends classifying electronic stalking as a Class A misdemeanor and recommends classifying all Class A misdemeanors, and inchoate versions of those offenses, as jury demandable offenses.*

⁴⁷⁹ RCC § 22E-1801.

⁴⁸⁰ *See, e.g.,* RCC §§ 22E-2101 (Theft); 22E-2202 (Fraud); 22E-2205 (Identity Theft).

⁴⁸¹ RCC § 22E-2201.

⁴⁸² RCC § 22E-1801.

⁴⁸³ RCC § 22E-1801.

- This change improves the consistency of the revised statutes.
- (18) *The CCRC recommends striking the phrase “The person engages in the course of conduct,” consistent with the stalking offense.*⁴⁸⁴
- This change improves the consistency of the revised statutes and does not further change District law.

⁴⁸⁴ RCC § 22E-1801.

RCC § 22E-1803. Voyeurism.

- (1) *OAG, App. C at 430-431, recommends that subparagraph (a)(2) be redrafted to state, “Without the complainant’s effective consent to being observed and for the creation of an image.”⁴⁸⁵ OAG explains that it is unclear in the current draft whether “without the complainant’s effective consent” refers to the creation of the image or to the viewing of the nude complainant.*
 - The RCC partially incorporates this recommendation by revising the explanatory note to clarify that “effective consent” in subsection (a) refers to the creation of the image and “effective consent” in subsection (b) refers to the observation. The proposed statutory language is not incorporated because it may make the statute more confusing. This change clarifies the revised commentary.
- (2) *OAG, App. C at 431, and USAO, App. C at 456, recommend amending the penalty enhancement to include actors who are reckless as to the age of the complainant instead of only those who know the age of the complainant. OAG notes that other RCC provisions require mere negligence as to the complainant’s age.⁴⁸⁶*
 - The RCC incorporates this recommendation by revising the penalty enhancement to require that “the actor is reckless as to the fact that a complainant is under 18 years of age.” This change improves the consistency of the revised statutes.
- (3) *PDS, App. C at 446, recommends defining the term “derivative image” in the statutory text.*
 - The RCC partially incorporates this recommendation by amending the commentary to note that the word “derivative” has its common meaning. When used as an adjective, the word “derivative” is commonly understood to mean “having parts that originate from another source.”⁴⁸⁷ Accordingly, the phrase “derivative image” means an image derived from another source, such as a photograph of a photograph or a screenshot. This change clarifies the revised commentary.
- (4) *USAO, App. C at 455 recommends criminalizing the observation or recording of any “female breast,” as opposed to a “developed female breast.” USAO states, “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.’”*

⁴⁸⁵ 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.”

⁴⁸⁶ 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.

⁴⁸⁷ Merriam-Webster.com, “derivative”, 2020, available at <https://www.merriam-webster.com/dictionary/derivative>.

- The RCC incorporates this recommendation by deleting the modifier “developed” and clarifying in commentary that the statute would include a woman who is transfeminine or has had a mastectomy. The revised statute’s requirement that there be a reasonable expectation of privacy will continue to bar liability for observing or recording an undeveloped female chest (such as a child wearing only a diaper) in many situations. This change clarifies the revised commentary and may eliminate a gap in liability.
- (5) *USAO, App. C at 455-456, recommends criminalizing the observation or recording of a person “using a toilet or a urinal.” USAO says that using the bathroom is “a very intimate and private experience.”*
- The RCC partially incorporates this recommendation by amending the statute to provide liability for observation or recording of a person “urinating or defecating”. While it may be rare that a person will observe or record someone urinating or defecating without also observing or recording (or come dangerously close to observing or recording⁴⁸⁸) the person’s nude or undergarment-clad genitals,⁴⁸⁹ such conduct may occur. To clarify the scope of the statute the revision is limited to the acts of urinating and defecating instead of using more ambiguous language of “using the bathroom” or “using a toilet or a urinal” which may include other actions (e.g., vomiting, disposing of garbage). This change clarifies and eliminates a possible gap in liability in the revised statutes.
- (6) *USAO, App. C at 456, recommends criminalizing the observation or recording of a sexual contact. USAO says that sexual contact can be an intimate and private experience. USAO also says that it is strange that voyeurism liability attaches for a defendant creating an image of another person touching their own genitalia (masturbation), but no voyeurism liability attaches for a defendant creating an image of someone else touching that person’s genitalia (sexual contact).*
- The RCC does not incorporate this recommendation because it may authorize a disproportionate penalty. Under the revised statute, observing or recording a sexual contact (which would include, for example, someone playfully grabbing their spouse’s buttocks) does not amount to an offense unless there is an observation or recording of: nude or undergarment-clad private areas, sadomasochistic abuse, masturbation, a sexual act, urination, or defecation. Rather, the revised offense is limited to the types of exposure and conduct that commonly considered to be most private.
- (7) *USAO, App. C at 457, recommends the RCC expressly codify upskirting as a basis for voyeurism liability. USAO provides three examples in which a woman is sitting on the steps of the Lincoln Memorial, sitting with her legs slightly ajar on the Metrorail, or standing on an escalator. USAO does not propose any specific statutory language.*

⁴⁸⁸ See RCC § 22E-301, Criminal Attempt.

⁴⁸⁹ See also RCC § 22E-1802, Electronic Stalking, providing liability where a course of electronic monitoring is intended to cause or causes significant emotional distress.

- The RCC does not incorporate this recommendation because the current language provides liability for “upskirting”-type conduct and an additional, general reference to “upskirting” may render the statute unconstitutionally vague. The general term “upskirting” is undefined and may include behavior that is innocent, constitutionally-protected, or both. The revised statute punishes upskirting in all of the scenarios noted in USAO’s comment—the Lincoln Memorial, a Metrorail car, and an escalator—provided that the victim has a reasonable expectation of privacy under the circumstances.
- (8) *USAO, App. C at 457, notes that the commentary states, “[c]hasing a woman and lifting her skirt would also be punished as assault under RCC § 22E-1202.” However, because the RCC definition of “assault” requires bodily injury to the complainant, it is unclear how this could constitute an assault.*
- The RCC addresses this comment by revising the footnote to state, “Chasing a woman and lifting her skirt would also be punished as offensive physical contact under RCC § 22E-1205.” This change clarifies the revised commentary.
- (9) *The CCRC recommends adding the word “or” at the end of subparagraph (b)(1)(A) because it was omitted in error.*
- This change clarifies the revised statute and does not further change District law.
- (10) *The CCRC recommends revising the phrasing of the penalty enhancement provision to state, “In addition to the general penalty enhancements under this title, the classification for this offense is increased by one class when...” Broadening the reference to RCC §§ 22E-605 - 608 to include any general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification “is increased,” instead of “may be increased” clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase “one or more of the following is proven” is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.*
- This change clarifies the revised statute and does not further change District law.
- (11) *The CCRC recommends specifying in the statutory language that a person must “directly” observe a complainant to commit second degree voyeurism. This clarifies that a person does not commit second degree voyeurism by viewing an image or listening to an audio recording that was previously created.*
- This change clarifies the revised statute and does not further change District law.

RCC § 22E-1804. Unauthorized Disclosure of Sexual Recordings.

- (1) *OAG, App. C at 431, recommends clarifying that the defendant has the burden of production and the burden of persuasion for the affirmative defense.*
 - The RCC incorporates this recommendation by specifying the burden of proof for all defenses and exclusions in the RCC § 22E-201 in the General Part. This change improves the clarity and consistency of the revised statutes.
- (2) *PDS, App. C at 446-447, recommends expanding the affirmative defense to include distributions to a teacher, a counselor, or a person that the defendant reasonably believed had a special responsibility for someone depicted in the image or involved in its creation.*
 - The CCRC partially incorporates this recommendation by revising the affirmative defense to include distributions made to a person the actor reasonably believes to be a law enforcement officer, prosecutor, attorney, teacher, school counselor, school administrator, or person with a responsibility under civil law for the health, welfare, or supervision of someone who is depicted in the image or is involved in the creation of the image. The phrase “school counselor” is used instead of the word “counselor,” to avoid confusion with other kinds of counselors. This change improves the clarity and consistency of the revised statutes by specifying the mental state applicable to each element of the affirmative defense.
- (3) *USAO, App. C at 457, recommends renaming the offense, to clarify that there is no requirement that an actor disclose multiple sexual recordings to be liable for this offense.*
 - The RCC incorporates this recommendation by adopting USAO’s proposed title. This change clarifies and does not substantively change the revised offense.
- (4) *USAO, App. C at 457-458, recommends specifying in the statutory text that a person commits an offense who “causes to be distributed or displayed” or “causes to be made accessible” a sexual recording. USAO notes that current D.C. Code § 22-3531(f)(2) that provides liability for distributing images “directly or indirectly, by any means” and provides an example in which a defendant asks another person to distribute a sexual recording.*
 - The RCC does not incorporate this recommendation because it is not necessary to provide liability for the instances cited by USAO and would be inconsistent with the RCC’s general provisions on accomplice liability and causing crime by an innocent or irresponsible person. RCC § 22E-210 provides liability for someone who (1) Purposely assists another person with the planning or commission of conduct constituting [an] offense; or (2) Purposely encourages another person to engage in specific conduct constituting [an] offense. RCC § 22E-211 provides liability for the conduct of another when, acting with the culpability required by an offense, the person causes an innocent or irresponsible person to engage in conduct constituting an offense.

- (5) *USAO, App. C at 458, recommends removing the word “developed” from the phrase “developed female breast,” and clarifying that a “female breast” means the breast of both a cisgender and a transfeminine woman.*
- The RCC incorporates this recommendation by deleting the modifier “developed” and clarifying in commentary that the statute would include a woman who is transfeminine or has had a mastectomy. This change clarifies the revised commentary and may eliminate a gap in liability.
- (6) *USAO, App. C at 458, recommends expanding the revised statute to include recordings of a sexual contact, as defined in the RCC. USAO states, “a sexual contact can be an intimate, private experience...even if nude genitalia are not visible.”*
- The RCC does not incorporate this recommendation because it may authorize a disproportionate penalty. Under the revised statute, disclosing a recording of a sexual contact (which would include, for example, someone playfully grabbing their spouse’s buttocks) does not amount to an offense unless there is a recording of: nude or undergarment-clad private areas, masturbation, sadomasochistic abuse, a sexual act, urination, or defecation. Rather, the revised offense is limited to the types of exposure and conduct commonly considered to be most private.
- (7) *USAO, App. C at 458-459, recommends specifying in the statutory text that an agreement or understanding may be “explicit or implicit.” USAO states that a married couple that exchanges nude photos via text messages has an implicit understanding that they will not be shared.*
- The RCC incorporates this recommendation by substituting the phrase “explicit or implicit agreement” for the phrase “agreement or understanding.” This change is consistent with the RCC definition (and current D.C. Code definition) of consent. However, the CCRC also notes in the commentary that determination of whether there is or is not an understanding or agreement between the actor and complainant is an issue of fact that must be determined by the factfinder in the circumstances of a particular case. Unlike the USAO example, the existence of a marital relationship alone is not a sufficient basis for determining there to be an understanding or agreement not to share photos: “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.”
- (8) *USAO, App. C at 459, recommends striking the word “sexually” from the phrase “sexually abuse, humiliate, harass, or degrade the complainant.” USAO states, “there should be no requirement that the defendant have a sexual intent” and explains, “their intent is frequently to harass or humiliate the complainant, or to seek revenge.”*
- The RCC does not incorporate this recommendation it would create inconsistency with the general RCC approach to sexual offenses. The revised statute does not require that the defendant have a sexual intent.

One means of committing the revised offense is for the defendant to intend to “alarm” the complainant. “Alarm” is generally understood to broadly include “disturb,” “excite,” or “strike with fear.”⁴⁹⁰ This appears to cover the example raised by USAO regarding a person intends to “seek revenge.” A person who acts with a motive to avenge a past wrong appears to act with intent to alarm the complainant. Alternatively, a second means of committing the offense is to act with intent to “sexually abuse, humiliate, harass, or degrade” the complainant. The use of the modifier “sexually” in the revised statute is consistent with the use of that term throughout the RCC to modify the words “abuse, humiliate, harass, or degrade.” For further explanation of this change, see the Appendix D1 entry responding to the USAO comment, App. C at 453-454, recommending the elimination of the modifier “sexually” for the words “abuse, humiliate, harass, or degrade” in the revised definition of “sexual act” and “sexual contact.”

- (9) *USAO, App. C at 458, recommends that subparagraphs (c)(1)(A) and (c)(2)(B) be joined by the word “and.”*
- The RCC incorporates this recommendation by adopting USAO’s proposed language. This change clarifies the revised statute.
- (10) *USAO, App. C at 458, recommends clarifying 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.”*
- The RCC does not incorporate this recommendation because it may render the statute unconstitutional. Generally, a state has jurisdiction over crimes if the conduct takes place or the result happens within its territorial limits.⁴⁹¹ The result element of this offense is satisfied as soon as the disclosure occurs and, if the actor or complainant is in the District at that time, there would be jurisdiction. In sum, under existing law the District may exercise jurisdiction only if the disclosure occurs here. However, the USAO recommendation goes further in recommending a statement that “any harm...stemming from the defendant’s actions” is sufficient for jurisdiction. Consider, for example, a person who is a victim of unlawful disclosure conduct that occurs wholly in California who travels to the District of Columbia months later, while still experiencing significant emotional distress. Such an attenuated connection to the District would not be a sufficient or constitutionally sound basis for jurisdiction.
- (11) *The CCRC recommends striking the exclusion from liability for protected speech as potentially confusing.*
- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no

⁴⁹⁰ Merriam-Webster.com, “alarm”, 2020, available at <https://www.merriam-webster.com/dictionary/alarm>.

⁴⁹¹ See WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 4.4(a), Common law view of territorial jurisdiction, 1 Subst. Crim. L. § 4.4(a) (3d ed.)

bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

- (12) *The CCRC recommends striking the burden of proof paragraph in the affirmative defense provision and instead specifying the burden of proof for all affirmative defenses in RCC § 22E-201.*
- This change improves the consistency of the revised statutes and does not further change District law.
- (13) *The CCRC recommends revising the phrasing of the penalty enhancement provision to state, “In addition to the general penalty enhancements under this title, the classification for this offense is increased by one class when...” Broadening the reference to RCC §§ 22E-605 - 608 to include any general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification “is increased,” instead of “may be increased” clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase “one or more of the following is proven” is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.*
- This change clarifies the revised statute and does not further change District law.
- (14) *The CCRC recommends revising the phrase “by conduct that constitutes” to state, “by committing a District offense that is, in fact,” consistent with other revised statutes.*
- This change clarifies the revised statute and does not further change District law.
- (15) *The CCRC recommends replacing the phrase “law enforcement agency” with the term “law enforcement officer,” which is defined in RCC § 22E-701.*
- This change improves the clarity and consistency of the revised statute.
- (16) *The CCRC recommends replacing the phrase “District civil law” with the phrase “civil law,” consistent with other RCC offenses.*
- This change improves consistency of the revised statute and may eliminate confusion.

RCC § 22E-1805. Distribution of an Obscene Image.

- (1) *OAG, App. C at 432, recommends clarifying in the statutory language that the phrase “sexual or sexualized image” pertains to the image that is eventually distributed, not what the person who was filmed was actually doing. OAG explains, “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).” OAG does not recommend any specific statutory language.*
 - The RCC partially incorporates this recommendation by clarifying in a footnote in the commentary’s explanatory note that: “The word ‘sexualized’ in the phrase ‘sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering’ refers to a display that may not have been sexual to the person in the image, but due to the actor’s manipulation of the image a reasonable person would understand the display to be sexual.” This change clarifies the revised commentary.
- (2) *OAG, App. C at 432, recommends revising the commentary 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 where effective consent has not been given.”*
 - The RCC incorporates this recommendation by adopting OAG’s proposed change to the commentary. This change clarifies the revised commentary and does not further change District law.
- (3) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*
 - The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying distribution of an obscene image as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.
- (4) *The CCRC recommends striking the exclusion from liability for protected speech as potentially confusing.*
 - This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.
- (5) *The CCRC recommends striking the burden of proof paragraph in the affirmative defense provision and instead specifying the burden of proof for all affirmative defenses in RCC § 22E-201.*
 - This change improves the consistency of the revised statutes and does not further change District law.
- (6) *The CCRC recommends striking the reference to Parks v. United States, 294 A.2d 858, 859-60 (D.C. 1972) in the revised commentary as potentially confusing.*
 - This change clarifies the revised commentary.

RCC § 22E-1806. Distribution of an Obscene Image to a Minor.

- (1) *OAG, App. C at 432-433, recommends revising the offense element that requires the person to be over 18 years of age and four years older than the complainant to require only that the person is four years older than the complainant. OAG notes that it has “prosecuted teenagers aged 14 to 17 for child sexual assault of children between the ages of 4 and 8 in situations where prior to the sexual assaults the teenager showed the younger child pornography on numerous occasions.”*
- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. Other RCC offenses, such as sexual abuse of a minor,⁴⁹² punish older persons engaging in or attempting to engage in sexual acts and sexual contact with minors (including older minors engaging in or attempting to engage in sexual acts and sexual contact with minors). In contrast, this offense is focused on a separate social harm: traumatizing children by exposing them to materials that are shocking and unforgettable. Critically, a child who possesses (or distributes) obscene materials is a victim of the very trauma the statute aims to prevent. In addition, minors may be particularly unable to recognize and distinguish obscene depictions of sexual behavior (that are unlawful under this statute) from non-obscene depictions (which are lawful) because they are still learning community standards regarding such matters.
- (2) *OAG, App. C at 433, recommends broadening the affirmative defense for an employee of a school, museum, library, movie theater to include an employee of any “other venue.” OAG says, “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.”*
- The RCC incorporates this recommendation by adopting OAG’s proposed statutory language. This change improves the proportionality of the revised offense.
- (3) *The CCRC recommends striking the exclusion from liability for protected speech as potentially confusing.*
- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.
- (4) *The CCRC recommends striking the burden of proof paragraph in the affirmative defense provision and instead specifying the burden of proof for all affirmative defenses in RCC § 22E-201.*
- This change improves the consistency of the revised statutes and does not further change District law.

⁴⁹² RCC § 22E-1302.

(5) *The CCRC recommends striking the jury trial provision as unnecessary. As of the Second Draft of Report #41, the CCRC recommends classifying distribution of an obscene image as a Class B misdemeanor and recommends classifying all Class B misdemeanors as jury demandable offenses.*

- This change improves the consistency of the revised statutes and does not further change District law.

RCC § 22E-1807. Creating or Trafficking an Obscene Image of a Minor. [Previously Trafficking an Obscene Image of a Minor].

- (1) *USAO, App. C at 459, recommends changing the name of the offense (previously “Trafficking an Obscene Image of a Minor.”). USAO states that “not all conduct that falls within the offense constitutes ‘trafficking,’” because “‘trafficking’ implies some level of distribution.” USAO does not recommend an alternative name.*
 - The RCC incorporates this recommendation by changing the offense name to “creating or trafficking an obscene image of a minor.” This change improves the clarity of the revised statute.
- (2) *USAO, App. C at 459-450, recommends revising the gradations “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.” USAO states that this is “consistent with the gradations for child pornography under federal law pursuant to 18 U.S.C. §§ 2251 and 2252.” USAO states that a “defendant should be penalized more severely for creating an image than for distributing an image.” USAO states that it “does not oppose also creating gradations of this offense based on the type of sexual conduct depicted in the images.”*
 - The RCC does not incorporate this recommendation because it may authorize disproportionate penalties and lead to inconsistent liability. It is unclear that creating an image is categorically more severe conduct than distributing an image because distributing the image further violates the complainant’s privacy. For example, PDS, App. C at 447-448, states that the first category of conduct in the offense—creating an image—is “dissimilar and typically less severe than the other actions encompassed” by the offense because in these other categories of conduct “the minor complainant’s privacy is further violated.” Given the differences in determining which category of conduct is most severe, the RCC creating or trafficking an obscene image statute instead grades the offense solely based on the type of image at issue. A defendant that creates an image or gives effective consent for the creation of an image will likely have additional liability for the underlying sexual conduct in the RCC sex offenses, which reflects in a more proportionate and consistent way the sexual nature of this conduct.
- (3) *PDS, App. C at 447-448, recommends “separating the conduct defined in [subparagraphs (a)(1)(A) and (b)(1)(A); creating, producing, or directing a non-derivative image] into a lesser included offense.” PDS states that this “first category of action is dissimilar and typically less severe than the other actions encompassed” by the offense because in these other categories of conduct “the minor complainant’s privacy is further violated.”*
 - The RCC does not incorporate this recommendation because it may authorize disproportionate penalties and lead to inconsistent liability. It is unclear that creating an image is categorically less severe conduct than distributing an image because creating the image is a clear and direct form of harm to the complainant’s privacy (as compared to more speculative

harms that may arise from downstream distribution of an image that may or may not be viewed by others).⁴⁹³ For example, USAO, App. C at 447-448, states that “the most serious gradation be for creating an image (production), then for advertising an image, then for distributing an image.” Given the differences in determining which category of conduct is most severe, the RCC creating or trafficking an obscene image statute instead grades the offense solely based on the type of image at issue. A defendant that creates an image or gives effective consent for the creation of an image will likely have additional liability for the underlying sexual conduct in the RCC sex offenses, which reflects in a more proportionate and consistent way the sexual nature of this conduct.

(4) *USAO, App. C at 460, recommends replacing “obscene” with “sexually explicit” because “obscene” “can be a vague standard.” USAO states that the federal child pornography law uses “sexually explicit” instead of “obscene” and cites to 18 U.S.C. § 2251. USAO states that this change “would create an analogue with federal law for criminalization of child pornography [and] could draw on the case law regarding the definition of ‘sexually explicit’ that would help guide interpretations” of the RCC statute.*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties and could lead to inconsistent liability. “Obscene” is a defined term in RCC § 22E-701 that is based on longstanding Supreme Court case law. The USAO reference to “sexually explicit” and citation to 18 U.S.C. § 2251 is unclear as to whether and to what extent USAO wishes the RCC to track federal law. The federal pornography statute in 18 U.S.C. § 2251 and case law on the statute does refer to the noun “sexually explicit conduct,” but not a separate “sexually explicit” adjective. Moreover, the term “sexually explicit conduct” is defined in another federal statute⁴⁹⁴ in a manner that seems incompatible

⁴⁹³ See, e.g., *New York v. Ferber*, 458 U.S. 747, 758, (1982) (“The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.”).

⁴⁹⁴ 18 U.S.C. § 2256 (2)(A) (“Except as provided in subparagraph (B), “sexually explicit conduct” means actual or simulated-- (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the anus, genitals, or pubic area of any person; (B) For purposes of subsection 8(B)1 of this section, “sexually explicit conduct” means-- (i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited; (ii) graphic or lascivious simulated; (I) bestiality; (II) masturbation; or (III) sadistic or masochistic abuse; or (iii) graphic or simulated lascivious exhibition of the anus, genitals, or pubic area of any person;”); 18 U.S.C. § 2256 (8) (“‘child pornography’ means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where-- (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.”).

with a replacement of “obscene” for the types of sexual contact and display in the RCC. For example, the federal definition of “sexually explicit conduct” doesn’t reach “sexual contact” at all (at least in the way that is defined in the RCC to include clothed body parts). Replacing “obscene” with “sexually explicit” would potentially include within the RCC creating or trafficking an obscene image statute creating, displaying, distributing, selling, or advertising images that include a minor touching another minor’s covered buttocks—conduct that while perhaps not to be encouraged frequently occurs among teenagers in public places. In contrast, the reference to “obscene” in the RCC creating or trafficking an obscene image statute is limited to the conduct in second degree—an “obscene” sexual contact and an “obscene” sexual or sexualized display of the breast below the top of the areola, or the buttocks, when there is less than an opaque covering. The high threshold of “obscene” is appropriate to ensure that the revised statute prohibits exploitative images but does not criminalize broadly all images of nudity and common sexual contact.

- (5) *PDS, App. C at 446, recommends defining the term “derivative image” in the statutory text. PDS does not propose a particular definition but notes the examples given in the commentary.*
- The RCC partially incorporates this recommendation by amending the commentary to note that the word “derivative” has its common meaning. When used as an adjective, the word “derivative” is commonly understood to mean “having parts that originate from another source.”⁴⁹⁵ Accordingly, the phrase “derivative image” means an image derived from another source, such as a photograph of a photograph or a screenshot. This change clarifies the revised commentary.
- (6) *USAO, App. C at 460, recommends codifying a definition of “derivative image.” USAO states that a separate definition of “derivative image” would “limit potential future confusion.”*
- The RCC partially incorporates this recommendation by amending the commentary to note that the word “derivative” has its common meaning. When used as an adjective, the word “derivative” is commonly understood to mean “having parts that originate from another source.”⁴⁹⁶ Accordingly, the phrase “derivative image” means an image derived from another source, such as a photograph of a photograph or a screenshot. This change clarifies the revised commentary.
- (7) *USAO, App. C at 460, recommends replacing “manufactures” with “produces” in subparagraphs (a)(1)(C) and (b)(1)(C) so they prohibit “displays, distributes, or produces with intent to distribute an image.” USAO states that it is “unclear what the difference is between ‘manufacturing’ and ‘producing,’ and both terms*

⁴⁹⁵ Merriam-Webster.com, “derivative”, 2020, available at <https://www.merriam-webster.com/dictionary/derivative>.

⁴⁹⁶ Merriam-Webster.com, “derivative”, 2020, available at <https://www.merriam-webster.com/dictionary/derivative>.

are used” in the RCC statute (subparagraphs (a)(1)(A) and (b)(1)(A) prohibit producing an image, other than a derivative image). USAO says that, “Federal law, by contrast, uses the word ‘producing.’ 18 U.S.C. § 2251.” USAO states that replacing “manufactures” with “produces” “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 the RCC statute.

- The RCC does not incorporate this recommendation because it would create ambiguity in the statute. First, while USAO recommends eliminating “manufacturing” in favor of “producing” and cites to federal pornography statute in 18 U.S.C. § 2251, the term “producing” in that statute is a defined term that actually includes “manufactures.”⁴⁹⁷ Second, assuming that USAO was not recommending defining “producing” to include “manufacturing,” CCRC notes that replacing “manufactures” with “produces” would result in “produces” being used in the RCC statute in two different contexts—producing the creation of a non-derivative image in subparagraphs (a)(1)(A) and (b)(1)(A) and displaying, distributing, or producing with intent to distribute an image in subparagraphs (a)(1)(C) and (b)(1)(C). The RCC commentary to the statute has been updated to reflect that “producing” is intended to include giving financial backing, making background arrangements for a performance such as buying or leasing equipment for a sexual performance or purchasing equipment to film or exhibit a sexual performance.
- (8) *USAO, App. C at 460, recommends in subparagraphs (a)(1)(E) and (b)(1)(E) replacing “sells or advertises an image” with “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.” USAO states that this wording is “consistent with federal child pornography law” in 18 U.S.C. § 2251(d)(1) and that, as stated in its earlier comments for the RCC creating or trafficking offense, “it is useful to track federal statutory language in this respect.”*
- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties and would create inconsistent liability. The scope of “makes . . . or causes to be made . . . a notice or advertisement” in the proposed language is unclear, and the proposed language appears limited to written, printed, or published advertisements. Under the RCC statute, an individual that stands on a street corner and discretely informs passerbys that the individual is selling prohibited images would clearly be liable for advertising, whereas it is unclear if this conduct constitutes making a notice or advertisement.
- (9) *The CCRC recommends making the exclusion for an actor that is under the age of 18 years (previously in paragraph (c)(4)) an affirmative defense. This is*

⁴⁹⁷ 18 U.S.C. § 2256 (3) (“‘producing’ means producing, directing, manufacturing, issuing, publishing, or advertising;”).

consistent with the other affirmative defenses that are based on the actor's conduct, as opposed to the exclusions for licensee or interactive computer service.

- This change improves the clarity, consistency, and proportionality of the revised statute.

(10) *OAG, App. C at 433-434, recommends that what was previously subparagraph (c)(4)(B) add a sentence that states: "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." With this change, an actor that is under the age of 18 years may be prosecuted for creating or trafficking a prohibited image if: 1) the actor is at least 4 years older than the minor complainant who is, or who will be, depicted in the image; or 2) the complainant is 8 years of age or younger. OAG refers to its earlier comments concerning the decriminalization in the RCC of distribution of an obscene image to a minor, App. C at 432-433. OAG states that, in addition, OAG "does not believe that young children are capable of giving effective consent to the distribution of their sexual images." As a hypothetical, OAG states 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 [sic] platform. The 17 year old would not be guilty of this offense if the 8 year old gave effective consent." OAG states that "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.'"*

- The RCC does not incorporate this recommendations because it may authorize disproportionate penalties and lead to inconsistent liability.
- First, as a threshold matter, the RCC provides criminal liability for a 17 year old who engages in a sexual act with an 8 year old or causes an 8 year old to engage in or submit to a sexual act—whether or not an image is created of the act—as first degree sex abuse of a minor, one of the most severely punished offenses in the RCC. Effective consent is not a defense or consideration for this offense. In the OAG hypothetical, if the 17 year old caused the 8 year old to engage in the sex act due to grooming (or otherwise), such conduct would be criminal under the RCC, and subject to severe penalties.
- Second, while the RCC does not adopt the OAG recommendation to categorically establish liability for creating or trafficking images for certain complainants under the age of 18 based solely upon the age of the parties, the RCC may provide liability depending on the facts of the case. As is explained further in the commentary, the RCC statute expands the exceptions to liability for persons under 18 years of age that are in the current statute. This expansion is warranted because legal scholarship has noted the inconsistencies and possible constitutional issues in statutes that criminalize minors producing images of otherwise legal sexual encounters.⁴⁹⁸ However, establishing per se categories of liability based

⁴⁹⁸ See, e.g., Sarah Wastler, *The Harm in "Sexting"?: Analyzing the Constitutionality of Child Pornography Statutes That Prohibit the Voluntary Production, Possession, and Dissemination of Sexually Explicit Images by Teenagers*, 33 HARV. J. L. & GENDER 687, 688 (2010) ("These cases not only give rise to a

solely on age may make the revised statute both over-inclusive—making individuals liable even if their conduct is not blameworthy—and under-inclusive—excluding individuals from liability when their conduct is blameworthy. Age is only one factor in evaluating sexual maturity (physical and psychological) and in evaluating ability to give effective consent to sexual conduct. Instead of per se categories of liability, the RCC creating or trafficking an obscene image statute relies on the RCC definitions of “effective consent” and “consent.” As OAG notes, the definition of “effective consent” may not adequately account for the youth of a complainant, particularly a complainant that has been groomed. However, the RCC definition of “effective consent” incorporates the RCC definition of “consent,” which requires that the consent “not [be] given by a person who . . . [b]ecause of youth . . . is known to the actor to be unable to make a reasonable judgment as to the nature of harmfulness of the conduct to constitute the offense or to the result thereof.” The requirements of the RCC definition of “consent” ensure that complainants under the age of 18 years have liability for creating or trafficking images of other minors only if the minor that is depicted, or will be depicted, is unable to give meaningful consent, and that the defendant knows this.

(11) *USAO, App. C at 460, recommends removing the affirmative defense in paragraph (d)(1) for an image that has, or will have, serious literary, artistic, political, or scientific value, when considered as a whole. USAO states that the defense “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.”*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties, lead to inconsistent liability, and unconstitutionally criminalize conduct in some instances. The affirmative defense requires that the “image has, or will have, serious literary, artistic, political, or scientific value, when considered *as a whole*” (emphasis added). Without such a defense, the statute could criminalize the creation,

contentious debate regarding the appropriate methods of prevention and response to adolescents who voluntarily produce and disseminate sexually explicit images of themselves, but also raise serious questions regarding the constitutionality of prosecuting such juveniles under existing child pornography frameworks.”); Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 Va. J. Soc. Pol’y & L. 505, 544 (2008) (“To funnel into the criminal or juvenile justice systems cases of self-produced child pornography--material that, at its root, steps from the undeniable fact that today's teenagers are sexually active well before they turn eighteen--is unjustified. To do so would expose minors to the severe stigma and penalties afforded by child pornography laws. It would also cause minors to be branded as registered sex offenders and to incur the onerous legal disabilities and restrictions that were passed with sexual predators in mind, not minors engaged in consensual sex with their peers.”); Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMM.LAW CONSPECTUS 1, 6 (2009) (“Sexting constitutes a technologically-driven social phenomenon among minors that tests the boundaries of minors' First Amendment speech rights, as well as long-standing laws and judicial opinions that prohibit the manufacture, distribution, and possession of child pornography as a category of speech that, like obscenity, is not protected by the First Amendment.”).

sale, or promotion of materials like medical textbooks, pictures or videos of newsworthy events, or artistic films that display real minors engaging in the prohibited sexual conduct. The defense is based in Supreme Court case law⁴⁹⁹ and ensures the constitutionality, consistency, and proportionality of the revised statute. In addition, as is noted in the RCC commentary, notwithstanding the defense, there may still be liability under the RCC sex offenses for causing or attempting to cause a minor to engage in the prohibited sexual conduct.⁵⁰⁰

(12) *PDS, App. C at 448, recommends expanding the affirmative defense in paragraph (d)(2). PDS states that, 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” 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.” PDS states that “the current code [D.C. Code § 22-3001] and the RCC [D.C. Code § 22-1301(e)] 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.” PDS states that 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.” PDS does not recommend any specific revised language.*

- The RCC partially incorporates this recommendation by requiring: 1) in subparagraph (d)(3)(A) that the actor is, in fact, at least 18 years of age; and 2) in sub-subparagraphs (d)(3)(A)(ii)(a) and (d)(3)(A)(ii)(b) that the

⁴⁹⁹ In *Ferber*, the Court acknowledged that some applications of the statute at issue would be unconstitutional:

We consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications. . . . While the reach of the statute is directed at the hard core of child pornography, the Court of Appeals was understandably concerned that some protected expression, ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute. How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of [the statute] in order to produce educational, medical, or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach.

Ferber, 458 U.S. at 773. The Court found that the statute was not substantially overbroad and any overbreadth that exists could be addressed through as-applied constitutional challenges. *Id.* at 773-74. The material at issue in *Ferber* was two films that “almost entirely” depicted prohibited sexual activity and the Court determined the statute was not overbroad as applied to the respondent. *Id.* at 752, 774 & n 28.

⁵⁰⁰ Depending on the ages of the minors, causing them to engage in sexual intercourse may lead to liability for sexual abuse of a minor (RCC § 22-1302), or, independent of the ages of the minors, if there was force, threats, or involuntary intoxication involved, there may be liability for sexual assault (RCC § 22E-1301). If the sexual activity doesn't actually occur, there may still be liability under enticing a minor into sexual conduct (RCC § 22E-1305) or solicitation (RCC § 22E-302) of sexual abuse of a minor or sexual assault of a minor.

actor is in a romantic, dating, or sexual relationship with the complainant, and is not at least 4 years older than a complainant who is under 16 years of age, or is not in a position of trust with or authority over a complainant under the age of 18 years, and at least 4 years older than the complainant. An actor that is under the age of 18 years, regardless of the actor's relationship to the complainant, does not need this defense because the broader affirmative defense for any actor under the age of 18 years in paragraph (d)(2) applies. The changes in sub-subparagraphs (d)(3)(A)(ii)(a) and (d)(3)(A)(ii)(b) provide an affirmative defense for an actor that is at least 18 years of age and in a romantic relationship with a complainant under the age of 18 years unless there would be liability under the RCC sexual abuse of a minor statute—either because the complainant is under the age of 16 years and the actor is at least four years older than the complainant, or the complainant is under the age of 18 years and the actor is at least four years older and in a position of trust with or authority over the complainant. Under PDS's hypothetical, of 25 year old that is in a consensual relationship with a complainant under the age of 17 years, there would be no liability because the actor is not in a position of trust with or authority over the complainant.

- It is unclear whether PDS recommends expanding the affirmative defense to include instances where an actor that is over the age of 18 years shares images of a complainant that is under the age of 18 years with the complainant's effective consent. To the extent that PDS makes this recommendation, the RCC does not incorporate it, because an actor that is at least 18 years of age that shares images of a complainant under the age of 18 years, even with that complainant's effective consent, is contributing to the demand for sexually explicit and obscene images of minors.

(13) *PDS recommends expanding the affirmative defense in paragraph (d)(5) to include "or other cultural institution." PDS states that, as currently drafted, the affirmative defense includes a narrow list of civic institutions and commercial establishments that may come in contact with artistic images."*

- The RCC incorporates this recommendation by including "or other venue" as recommended by OAG, discussed below. "Cultural institution" may be unnecessarily narrow and inconsistent with the references to a "school" or "movie theater" in the current defense.

(14) *OAG, App. C at 433, recommends broadening the affirmative defense in paragraph (d)(5) for an employee of a school, museum, library, movie theater to include an employee of any "other venue." OAG says, "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."*

- The RCC incorporates this recommendation by adopting OAG's proposed statutory language. This change improves the proportionality of the revised offense.

(15) *USAO, App. C at 460-461, recommends in the affirmative defense in subsection (d)(3) limiting the number of images that would qualify for the defense. USAO states that under current law there is a limit of 6 still photographs or 1 motion*

picture that allow a defendant to invoke this defense. USAO recommends that “there be some limit on the amount of images that a person may have to invoke this defense,” but does not recommend a specific number.

- The RCC does not incorporate this recommendation because it would reduce the clarity and proportionality of the defense. The defense is meant to facilitate individuals reporting possible illegal conduct or seeking legal counsel from any attorney. The defense has an expanded scope compared to current law, and limiting the number of images or motion pictures would undermine the expanded scope. As the RCC commentary notes, the number of images or motion pictures that a person has may be used by a fact finder to assess whether the defendant had the required intent “exclusively and in good faith” to report possible illegal conduct or to seek legal counsel from any attorney.” However, a person who seeks to report possible illegal conduct or legal counsel and forwards two video clips should not be rendered criminally liable because there are “two” versus “one” such clip.

(16) *PDS, App. C at 446-447, recommends expanding the affirmative defense in paragraph (d)(4) to include distributions to a teacher, a counselor, or a person that the defendant reasonably believed had a special responsibility for someone depicted in the image or involved in its creation.*

- The CCRC partially incorporates this recommendation by revising the affirmative defense to include distributions made to a person the actor reasonably believes to be a law enforcement officer, prosecutor, attorney, teacher, school counselor, school administrator, or person with a responsibility under civil law for the health, welfare, or supervision of someone who is depicted in the image or is involved in the creation of the image. The phrase “school counselor” is used instead of the word “counselor,” to avoid confusion with other kinds of counselors. This change improves the clarity and consistency of the revised statutes by specifying the mental state applicable to each element of the affirmative defense.

(17) *The CCRC recommends striking the exclusion from liability for protected speech as potentially confusing.*

- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

(18) *The CCRC recommends striking the burden of proof paragraph in the affirmative defense provision and instead specifying the burden of proof for all affirmative defenses in RCC § 22E-201.*

- This change improves the consistency of the revised statutes and does not further change District law.

(19) *The CCRC recommends replacing the phrase “law enforcement agency” with the term “law enforcement officer,” which is a defined in RCC § 22E-701.*

- This change improves the clarity and consistency of the revised statute.

(20) *The CCRC recommends replacing the phrase “District civil law” with the phrase “civil law,” consistent with other RCC offenses.*

- This change improves consistency of the revised statute and may eliminate confusion.

RCC § 22E-1808. Possession of an Obscene Image of a Minor.

- (1) *USAO, App. C at 460, recommends replacing “obscene” with “sexually explicit” for the reasons stated above for the RCC creating or trafficking an obscene image of a minor statute.*
 - The RCC does not incorporate this recommendation for the reasons stated in this entry for the RCC creating or trafficking an obscene image of a minor statute.
- (2) *The CCRC recommends making the exclusion for an actor that is under the age of 18 years (previously in paragraph (c)(4)) an affirmative defense. This is consistent with the other affirmative defenses that are based on the actor’s conduct, as opposed to the exclusions for licensee or interactive computer service.*
 - This change improves the clarity, consistency, and proportionality of the revised statute.
- (3) *OAG, App. C at 433-434, recommends that what was previously subparagraph (c)(4)(B) add a sentence that states: “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.” OAG relies on the reasons stated above for the RCC creating or trafficking an obscene image of a minor statute.*
 - The RCC does not incorporate this recommendation for the reasons stated in this entry for the RCC creating or trafficking an obscene image of a minor statute.
- (4) *USAO, App. C at 460, recommends removing the affirmative defense in paragraph (d)(1) for an image that has, or will have, serious literary, artistic, political, or scientific value, when considered as a whole, for the reasons stated above for the RCC creating or trafficking an obscene image of a minor statute.*
 - The RCC does not incorporate this recommendation for the reasons stated in this entry for the RCC creating or trafficking an obscene image of a minor statute.
- (5) *USAO, App. C at 460-461, recommends in the affirmative defense in subsection (d)(4) limiting the number of images that would qualify for the defense, for the reasons stated above for the RCC creating or trafficking an obscene image of a minor statute.*
 - The RCC does not incorporate this recommendation for the reasons stated in this entry for the RCC creating or trafficking an obscene image of a minor statute.
- (6) *PDS, App. C at 448, recommends expanding the affirmative defense in paragraph (d)(2) in the manner recommended for this affirmative defense in the RCC creating or trafficking an obscene image of a minor statute.*
 - The RCC incorporates this recommendation for the reasons stated above in this entry for the RCC creating or trafficking an obscene image of a minor statute.
- (7) *PDS, App. C at 447, recommends expanding the affirmative defense in paragraph (d)(4) in the manner recommended for this affirmative defense in the RCC creating or trafficking an obscene image of a minor statute.*

- The RCC partially incorporates this recommendation for the reasons stated above in this entry for the RCC creating or trafficking an obscene image of a minor statute.
- (8) *PDS recommends expanding the affirmative defense in paragraph (d)(5) to include “or other cultural institution” for the reasons stated for the RCC creating or trafficking an obscene image of a minor statute.*
- The RCC incorporates this recommendation by including “or other venue” for the reasons stated above in this entry for the RCC creating or trafficking an obscene image of a minor statute.
- (9) *OAG, App. C at 433, recommends broadening the affirmative defense in paragraph (d)(5) for an employee of a school, museum, library, movie theater to include an employee of any “other venue” for the reasons stated for the RCC creating or trafficking an obscene image of a minor statute.*
- The RCC incorporates this recommendation for the reasons stated above in this entry for the RCC creating or trafficking an obscene image of a minor statute.
- (10) *The CCRC recommends striking the exclusion from liability for protected speech as potentially confusing.*
- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.
- (11) *The CCRC recommends striking the burden of proof paragraph in the affirmative defense provision and instead specifying the burden of proof for all affirmative defenses in RCC § 22E-201.*
- This change improves the consistency of the revised statutes and does not further change District law.
- (12) *The CCRC recommends replacing the phrase “law enforcement agency” with the term “law enforcement officer,” which is defined in RCC § 22E-701.*
- This change improves the clarity and consistency of the revised statute.
- (13) *The CCRC recommends replacing the phrase “District civil law” with the phrase “civil law,” consistent with other RCC offenses.*
- This change improves consistency of the revised statute and may eliminate confusion.

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

- (1) *USAO, App. C at 461, recommends replacing “obscene” with “sexually explicit” for the reasons stated above for the RCC creating or trafficking an obscene image of a minor statute.*
 - The RCC does not incorporate this recommendation for the reasons stated in this entry for the RCC creating or trafficking an obscene image of a minor statute.
- (2) *USAO, App. C at 461, recommends in subparagraphs (a)(1)(A) and (b)(1)(A) including a “live broadcast” in addition to a “live performance.” USAO states that it is “equally culpable for a person to arrange a live performance as to arrange a live broadcast.” USAO gives as a hypothetical “[i]f . . . 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 RCC does not incorporate this recommendation because it creates unnecessary overlap with the RCC creating or trafficking an obscene image of a minor statute. A “live broadcast” is included in the scope of the RCC definition of “image” and arranging a live broadcast falls under the creating or trafficking an obscene image of a minor statute. Under USAO’s hypothetical, a defendant that creates a chatroom and livestreams a video of a child engaging in a sexual act, is distributing an obscene image to a minor.
- (3) *USAO, App. C at 461, recommends removing the affirmative defense in paragraph (d)(1) for a live performance that has, or will have, serious literary, artistic, political, or scientific value, when considered as a whole, for the reasons stated above for the RCC creating or trafficking an obscene image of a minor statute.*
 - The RCC does not incorporate this recommendation for the reasons stated in this entry for the RCC creating or trafficking an obscene image of a minor statute.
- (4) *The CCRC recommends making the exclusion for an actor that is under the age of 18 years an affirmative defense. This is consistent with the other affirmative defenses that are based on the actor’s conduct, as opposed to the exclusions for licensee or interactive computer service.*
 - This change improves the clarity, consistency, and proportionality of the revised statute.
- (5) *The CCRC recommends adding subparagraphs (a)(1)(B) and (b)(1)(B) to the affirmative defense in paragraph (c)(2), which applies to any actor under the age of 18 years. The previous version of this provision (as an exclusion for liability) erroneously omitted this conduct (a person responsible under civil law for the complainant giving effective consent for the complainant to engage in or submit to the creation of a live performance). This matches the scope of the affirmative defense in the RCC creating or trafficking an obscene image statute.*
 - This change improves the clarity, consistency, and proportionality of the revised statute.

- (6) *OAG, App. C at 433-434, recommends that what was previously subparagraph (c)(2)(B) add a sentence that states: “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.” OAG relies on the reasons stated above for the RCC creating or trafficking an obscene image of a minor statute.*
- The RCC does not incorporate this recommendation for the reasons stated in this entry for the RCC creating or trafficking an obscene image of a minor statute.
- (7) *OAG, App. C at 435, comments on the affirmative defense in what is now paragraph (c)(4). OAG states that a person who “creates, produces, or directs” a live performance “must have some level of ‘control’ over its creation” and that “either the employee will never be able to meet the requirements of (d)(4)(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 [defense]. 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.” OAG does not make any specific recommendations for revised language.*
- The RCC incorporates this recommendation by limiting this affirmative defense to subparagraphs (a)(1)(C) and (b)(1)(C). A producer or a director will not always have some level of control over the creation of a live performance, and it is possible that a live performance will occur outside the presence of an actor, especially when that actor is a producer or director. However, this change is consistent with the scope of the affirmative defense in the RCC creating or trafficking an obscene image of a minor statute which does not apply to creating a prohibited image.
- (8) *The CCRC recommends expanding the defense for marriage, domestic partnership, and a romantic relationship in the manner PDS recommended for this affirmative defense in the RCC creating or trafficking an obscene image of a minor statute. This change is discussed in detail in this appendix for the RCC creating or trafficking an obscene image of a minor statute.*
- This change improves the clarity, consistency, and proportionality of the revised statute.
- (9) *OAG, App. C at 433, recommends broadening the affirmative defense in paragraph (c)(4) for an employee of a school, museum, library, movie theater to include an employee of any “other venue” for the reasons stated for the RCC creating or trafficking an obscene image of a minor statute.*
- The RCC incorporates this recommendation for the reasons stated above in this entry for the RCC creating or trafficking an obscene image of a minor statute.
- (10) *The CCRC recommends striking the exclusion from liability for protected speech as potentially confusing.*
- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

- (11) *The CCRC recommends striking the burden of proof paragraph in the affirmative defense provision and instead specifying the burden of proof for all affirmative defenses in RCC § 22E-201.*
- This change improves the consistency of the revised statutes and does not further change District law.
 - This change improves the clarity and consistency of the revised statute.
- (12) *The CCRC recommends replacing the phrase “District civil law” with the phrase “civil law,” consistent with other RCC offenses.*
- This change improves consistency of the revised statute and may eliminate confusion.

RCC § 22E-1810. Attending or Viewing a Live Sexual Performance of a Minor.

- (1) *OAG, App. C. 434, states that it is unclear in the commentary to this offense “what is meant by the terms ‘unnatural’ and ‘unusual’” in the sentence “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 the sexual activity or the effect on the viewer” (OAG’s emphasis). OAG asks: “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”? OAG recommends that the commentary “explain or give examples of what a ‘natural’ or ‘unnatural,’ ‘usual’ or ‘unusual’ focus on the relevant minor’s body parts would be.*
 - The RCC does not incorporate this recommendation because it may lead to inconsistency in the revised statutes. The commentary entry cited by OAG appears multiple times in the RCC commentary for a variety of offenses, including: § 22E-1807, Trafficking an Obscene Image of a Minor and 22E-1808, Possession of an Obscene Image of a Minor. In each instance the RCC commentary, paraphrased in OAG’s comment, is quoting DCCA case law in *Green v. United States*, 948 A.2d 554, 562 (D.C. 2008) which in turn cites to federal case law providing an extensive list of factors that are relevant to the analysis of whether an image has an “unnatural” focus on genitalia. The CCRC declines to specify further what may constitute an “unusual” or “unnatural” focus for the RCC § 22E-1810 offense that OAG comments on, or other offenses. Instead, the RCC relies on District and federal case law cited in the commentary to provide further analysis of the relevant standards.
- (2) *The CCRC recommends expanding the defense for marriage, domestic partnership, and a romantic relationship in the manner PDS recommended for this affirmative defense in the RCC creating or trafficking an obscene image of a minor statute. This change is discussed in detail in this appendix for the RCC creating or trafficking an obscene image of a minor statute.*
 - This change improves the clarity, consistency, and proportionality of the revised statute.
- (3) *OAG, App. C at 433, recommends broadening the affirmative defense in paragraph (c)(4) for an employee of a school, museum, library, movie theater to include an employee of any “other venue” for the reasons stated for the RCC creating or trafficking an obscene image of a minor statute.*
 - The RCC incorporates this recommendation for the reasons stated above in this entry for the RCC creating or trafficking an obscene image of a minor statute.
- (4) *The CCRC recommends making the exclusion for an actor that is under the age of 18 years (previously in paragraph (c)(2)) an affirmative defense. This is consistent with the other affirmative defenses that are based on the actor’s conduct, as opposed to the exclusions for licensee or interactive computer service.*

- This change improves the clarity, consistency, and proportionality of the revised statute.
- (5) *The CCRC recommends striking the exclusion from liability for protected speech as potentially confusing.*
- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.
- (6) *The CCRC recommends striking the burden of proof paragraph in the affirmative defense provision and instead specifying the burden of proof for all affirmative defenses in RCC § 22E-201.*
- This change improves the consistency of the revised statutes and does not further change District law.
 - This change improves the clarity and consistency of the revised statute.

RCC § 22E-1811. Limitations on Liability for RCC Chapter 18 Offenses.

(1) *PDS, App. C at 449, recommends raising the age for this exemption to age 14. With this change, a person under the age of 14, as opposed to under the age of 12, would not be subject to prosecution for offenses in chapter 18. PDS states “[b]y 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.”*

- The RCC does not incorporate this recommendation because it may create a gap in liability and is inconsistent with other RCC and D.C. Code provisions recognizing the age of 12 as a critical age between culpable and non-culpable or enhanced and unenhanced sexual conduct. Different children may reach sexual maturity at different ages and the revised provision merely establishes 12 years old as a floor. The provision does not suggest that prosecution is appropriate in every case or most cases of children ages 12 and 13. Rather, the provision assumes that these cases will be reviewed individually and that charging decisions will be guided by applicable rules and standards.⁵⁰¹ RCC § 22E-1308, “Limitations on Liability for RCC Chapter 13 Offenses,” categorically precludes liability for sex offenses (other than first degree and third degree sexual assault) for persons under 12 years of age, in accord with ALI Model Penal Code Sex Assault draft recommendations, and other provisions in current D.C. Code⁵⁰² and RCC offenses⁵⁰³ that recognize the age of 12 as the critical age between enhanced and unenhanced sexual conduct.

⁵⁰¹ E.g., ABA Model Rule of Professional Conduct 3.8, ABA Model Code of Professional Responsibility Canon 7 (Ethical Consideration 7-13), ABA Criminal Justice Standards (Prosecution Function), the U.S. Attorneys’ Manual.

⁵⁰² See, e.g., D.C. Code § 22-3020(a)(1) (“The victim was under the age of 12 years at the time of the offense;”).

⁵⁰³ See, e.g., RCC § 22E-1302(a), First Degree Sexual Abuse of a Minor (“In fact: The complainant is under 12 years of age;”).

RCC § 22E-2002. Definition of “Person” for Property Offenses.

- (1) *OAG, App. C at 257, comments that, while it “has no comments concerning the text of the definition,” it is “concerned about its placement in subtitle III.” First, OAG states that “people who are unfamiliar with the RCC with 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,” particularly given that neither Subtitle II nor Subtitle IV of the RCC have a definition as the first statute. Second, “if people are interpreting offenses that occur in [Subtitle II or Subtitle IV], they will need to know that they should be looking to D.C. Code § 45-605 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.”*
- The RCC incorporates these comments by moving the definition of “person” for property offenses from Subtitle III to the general definitions statute in RCC § 22E-701 and removing the phrase “Notwithstanding the definition of “person” in D.C. Code § 45-604”. This change improves the clarity of the revised statutes.

RCC § 22E-2101. Theft.

(1) *OAG, App. C at 257-258, recommends changing the value requirements for a motor vehicle in second degree theft so that the motor vehicle must have a value of \$15,000 or more, but less than \$25,000. As previously drafted, second degree theft required either that the property has a value of \$25,000 or more, or that the property is a motor vehicle with a value of \$25,000 or more. Third degree theft for a motor vehicle merely required that the property be a motor vehicle. OAG states that “there is too wide a gap between a vehicle that is worth \$25,000 and [a] vehicle that has almost no value.” OAG states that “the value of a car to a theft victim is worth more than its fair market value” and “[c]onsidering 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 valued at \$25,000.” In the alternative, OAG recommends removing the reference to a motor vehicle in second degree theft because it is superfluous.*

- The RCC incorporates this recommendation by deleting the reference to a motor vehicle in second degree theft. With this revision, second degree of the RCC theft statute requires that the value of any property be \$50,000 or more. Third degree theft requires either that the property has a value of \$5,000 or more, or be a “motor vehicle” of any value. All motor vehicles, except luxury motor vehicles with a value of \$50,000 or more, are included in third degree of the RCC theft statute. This provides greater punishment for lower-value motor vehicles and recognizes that the loss of such a motor effects the complainant beyond the loss of the fair market value.

(2) *The CCRC recommends changing the value thresholds for fourth, third, second, and first degree theft to \$500; \$5,000; \$50,000; and \$500,000, respectively.*

- The RCC changes the property value thresholds to align the harm caused by each grade of the offense with maximum penalties. Most notably, the value threshold for third degree theft has been increased from \$2,500 to \$5,000. Third degree theft is a felony offense, subject to the same penalties as fifth degree robbery, first degree menacing, or enhanced stalking. A higher minimum value threshold is justified given the severity of penalties. This threshold is consistent with the CCRC public opinion surveys of District voters for grading the penalty for theft of \$5,000.⁵⁰⁴ Research by the Pew Charitable Trusts evaluating changes to felony theft thresholds across the country in recent decades concluded that: 1) Raising the felony theft threshold has no impact on overall property crime or larceny rates; 2) States that increased their thresholds reported roughly the

⁵⁰⁴ See Advisory Group Memo #27 Appendix A - Survey Responses. Question 1.01 provided the scenario: “Stealing property worth \$5,000..”. Question 1.01 had a mean response of 5.2, above the 4 milestone corresponding to simple assault involving a minor injury (currently a 6 month offense in the D.C. Code), and the 6 milestone corresponding to significant bodily injury assault (currently a 3 year offense in the D.C. Code). In another survey, Question provided the scenario “Stealing property (other than a car) worth \$5,000” which received a mean response of 6.2.

same average decrease in crime as the 20 states that did not change their theft laws; and 3) The amount of a state’s felony theft threshold—whether it is \$500, \$1,000, \$2,000, or more—is not correlated with its property crime and larceny rates.⁵⁰⁵ This change improves the proportionality of the revised criminal code.

(3) *USAO, App. C at 343, recommends decreasing the number of gradations for theft because “too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing.”*

- The RCC does not incorporate this recommendation because it is inconsistent with the RCC penalty gradations across most property offenses and may authorize disproportionate penalties. Under current law, the same 10 year maximum penalty applies if a person commits theft and obtains property worth \$1,000, or \$1,000,000. Dividing the offense into five penalty grades better aligns the maximum penalties with the degree of loss caused by the offense, and limits the risk of disproportionate or unequal sentences.

(4) *USAO, App. C at 427, recommends decreasing the monetary thresholds in each gradation of theft. USAO states that it does not oppose the highest gradation of theft 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.” Specifically, USAO “proposes eliminating the top gradation of \$500,000, and creating only four gradations” and that “car theft be punished more severely than currently proposed.” With these changes, USAO states that first degree theft would have a threshold of \$50,000 and remain a class 7 felony, second degree theft would be \$5,000 or any motor vehicle and remain a class 8 felony, third degree theft would be \$1,000 and remain a class 9 felony, and 4th degree would require “any value” and be a misdemeanor.*

- The RCC does not incorporate these recommendations because they may authorize disproportionate penalties. USAO is likely correct that the top gradation of theft will very rarely be used. However, the penalties authorized for first degree theft, including imprisonment of up to 10 years, should also be very rarely used as this is a non-violent property offense. This is consistent with current practice in the District. From 2009-2018, the 97.5th percentile sentence for first degree theft under current law was 3 years.⁵⁰⁶ Setting the \$5,000 threshold at a class 9 felony, in addition, is consistent with the CCRC public opinion surveys of District voters for grading the penalty for theft of \$5,000.⁵⁰⁷

⁵⁰⁵ Pew Charitable Trusts, *The Effects of Changing Felony Theft Thresholds* (April 2017) at 1.

⁵⁰⁶ See, Appendix D to Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions.

⁵⁰⁷ See Advisory Group Memo #27 Appendix A - Survey Responses. Question 1.01 provided the scenario: “Stealing property worth \$5,000..”. Question 1.01 had a mean response of 5.2, above the 4 milestone corresponding to simple assault involving a minor injury (currently a 6 month offense in the D.C. Code), and the 6 milestone corresponding to significant bodily injury assault (currently a 3 year offense in the D.C. Code). In another survey, Question provided the scenario “Stealing property (other than a car) worth \$5,000” which received a mean response of 6.2.

- (5) *USAO, App. C at 343, recommends deleting subparagraph (b)(4)(B), which establishes that for second degree theft, the property, if it is a motor vehicle, must have a value of \$50,000 or more.*⁵⁰⁸ *USAO states that this is a “superfluous provision” because subparagraph (b)(4)(A) provides that any property for second degree theft must have a value of \$50,000 or more, and any property includes motor vehicles.*
- The RCC incorporates this recommendation by deleting subparagraph (b)(4)(B). This change improves the clarity, consistency and proportionality of the revised statute.
- (6) *USAO, App. C at 343-344, recommends that, if the CCRC accepts “USAO’s recommendations in the Robbery statute,” the CCRC should delete subparagraph (c)(4)(C) and sub-subparagraphs (c)(4)(C)(i) and (c)(4)(C)(ii) of the revised theft statute, which contain a gradation for theft from a person or from a person’s immediate physical control. USAO, App. C at 300-301, recommends that the RCC robbery statute retains the provision for a sudden or stealthy seizure or snatching that is in the current D.C. Code robbery statute. USAO states that this conduct is “akin to robbery” and should be included in the RCC robbery statute instead of theft. USAO states that the RCC robbery commentary “acknowledges that so-called ‘pick-pocketing’ can morph into robbery in at least some circumstances.”*
- The RCC does not incorporate this recommendation for the reasons described as to why the RCC does not incorporate USAO’s recommendation for robbery. The RCC robbery statute does not retain the provision for a sudden or stealthy seizure that is in the current robbery statute and instead includes this conduct as third degree theft. Under the RCC robbery does not include non-violent takings from a person which, instead, are liable as theft. This is discussed further in the entries on the RCC robbery statute in this appendix.
- (7) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*
- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying fifth degree theft as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

⁵⁰⁸ USAO’s comment uses \$25,000 as the value requirement for the motor vehicle provision in second degree theft. That number has since been increased to \$50,000, but subparagraph (b)(4)(B) is otherwise unchanged.

RCC § 22E-2102. Unauthorized Use of Property.

(1) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying unauthorized use of property as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

RCC § 22E-2103. Unauthorized Use of a Motor Vehicle.

- (1) *USAO, App. C at 344, recommends replacing “operates a motor vehicle” in paragraph (a)(1) with “operates or uses a motor vehicle.” USAO states that, consistent with the current UUV statute in D.C. Code § 22-3215(b), the revised UUV statute should include “use” in addition to “operate,” noting that “use” is included in the title of the revised statute.*
- The RCC does not incorporate this recommendation because it creates ambiguity in the revised statute and may authorize disproportionate penalties. It is unclear exactly what conduct constitutes “use” of a motor vehicle but does not constitute “operating” it. Possible examples of “use”—but not operation—might include passively sitting in or on a motor vehicle, but it appears that, to the extent a person can “use” a motor vehicle without also operating it, that conduct is more proportionally penalized as third degree trespass involving a motor vehicle (RCC § 22E-2601). The revised statute maintains “use” in the title of the offense as a more plain language and familiar terminology. The commentary to the RCC UUV statute has been updated to reflect that the RCC UUV statute deletes “uses” from the current UUV statute and that it is intended to be a clarificatory change.
- (2) *USAO, App. C at 344, recommends adding to paragraph (a)(1) “causes a motor vehicle to be operated or used.” USAO states that, consistent with the current UUV statute in D.C. Code § 22-3215(b), “it is appropriate to retain liability for someone who ‘causes’ a motor vehicle to be used or operated.”*
- The RCC does not incorporate this recommendation because it creates ambiguity in the revised statute. As the commentary to the revised UUV statute states, it is unclear what the “causes” language in the current UUV statute could mean other than codifying liability for aiding and abetting. The RCC addresses accomplice liability for all offenses in RCC § 22E-210. The commentary to the revised UUV statute also notes that “Deleting the language is not intended to change the scope of the revised offense.” For the reasons discussed in the commentary, the revised statute eliminates the separate offense of “UUV passenger” recognized in current case law and relies on accomplice liability to cover passengers’ misconduct, where appropriate. Against this backdrop, to ensure clarity about the need to establish accomplice liability for a passenger, the revised UUV statute is not drafted to state “causes.”
- (3) *USAO, App. C at 344, recommends including “a provision penalizing the use of a stolen vehicle in the commission of a crime of violence” that is consistent with the provision in the current UUV statute in D.C. Code § 22-3215(d)(2)(A). USAO states that the RCC other jurisdiction research in Appendix J “recognizes that at least some states prohibit the use of a motor vehicle during the commission of a felony.” USAO states 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.”*⁵⁰⁹

- The RCC does not incorporate this recommendation because it is inconsistent with other offenses’ penalties and may authorize disproportionate penalties. Under current law and the USAO recommendation, an individual that commits theft of a motor vehicle is not subject to such an enhancement (D.C. Code § 22-3211), but an individual that commits unauthorized use of a motor vehicle or a “joy ride” is (D.C. Code § 22-3215). In contrast, the RCC reserves theft of a motor vehicle for the RCC theft statute and limits the RCC UUV statute to true “joy rides.” If an individual uses the motor vehicle during a crime of violence or to facilitate a crime of violence, the defendant will be liable for either theft or UUV, as well as the crime of violence, ensuring that there is added liability for theft of a motor vehicle in conjunction with a crime of violence. To the extent that an actor’s UUV in the course of a crime of violence harms a person or comes dangerously close to harming someone, the actor is subject to additional liability for such conduct as an assault or homicide or attempted version of such crime. Notably, while there have been, on average, 3-4 adult convictions annually under the District’s current statute for UUV during a crime of violence, nearly all of the sentences for this crime, 89%, have been set to run concurrent with the predicate crime of violence.⁵¹⁰ While data is not currently available as to the facts or other available charges in the three or four instances in the past decade when UUV crime of violence convictions have had an appreciable effect on an actor’s imprisonment, these statistics suggest that elimination of the separate UUV crime of violence enhancement will have little or no⁵¹¹ practical effect on imprisonment outcomes.
- (4) *USAO, App. C at 427-428, recommends increasing the punishment for the RCC UUV offense. USAO states that under current law UUV is a felony subject to a five year statutory maximum penalty and a 10 year statutory maximum penalty if the defendant caused the motor vehicle to be taken, used, or operated during the course of or to facilitate a crime of violence. USAO states that UUV should be a Class 8 felony, which will have either a five year or a four year maximum term of imprisonment. USAO states that this ranking is consistent with the place of UUV as a Group 8 offense in the D.C. Sentencing Guidelines. USAO states that making UUV a misdemeanor will “substantially decrease deterrence for auto theft.” USAO states that despite the separate punishment for auto theft under the RCC theft statute, “it can be difficult in practice to prove that a person stole a car, even when the person did, in fact, steal a car” and that “when a person, in*

⁵⁰⁹ USAO, App. C at 344.

⁵¹⁰ For a full description of relevant statistics, see Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions. Notably, most or all of these non-concurrent sentences appear to have occurred in the 2009-2010 years.

⁵¹¹ In those instances where sentences were not concurrent, it is unclear if other charges were available but dropped (per a plea agreement or otherwise) that would have provided similar or greater liability.

fact, commits carjacking, it may be difficult to prove that the person committed the carjacking.” USAO states that “UUV may be the only offense available for prosecution of a person who either carjacked or stole a car.”

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC UUV offense does not require an intent to deprive the motor vehicle or the use of force against a person, in contrast to the RCC theft offense (which requires an intent to deprive and has a gradation specifically for motor vehicles) or the RCC robbery statute (which requires the use of physical force, threats, or infliction of bodily injury in taking property from another). Correspondingly, the RCC UUV offense carries substantially lower penalties than these other crimes. A misdemeanor penalty is proportionate when the defendant does not have an intent to deprive the motor vehicle or the intent to deprive cannot be proven, or the motor vehicle is not taken by the use of physical force, threats, or infliction of bodily injury.
- Classifying the RCC UUV offense as a class A misdemeanor, in addition, is consistent with the CCRC public opinion surveys of District voters for the penalty for a person driving a vehicle knowing it is stolen, but not being part of the theft,⁵¹² which voters marked as significantly different from being the person to steal the car, which they rated a significantly more serious offense.⁵¹³
- The RCC’s penalty recommendations for UUV reflects a significant decrease from the current D.C. Code statutory penalties of 5 years imprisonment, and current court practice, which issues punishments in line with what the public opinion surveys would indicate is proper for *stealing* a car (even though UUV requires only use without authorization). For all UUV sentences in the Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions, the median sentence (50% of sentences were greater) for UUV was 12 months, including enhancements other than use in a crime of violence or multiple prior convictions. The 75th percentile (25% of sentences were greater) for these UUV offenses was 18 months, the 90th percentile 24 months, the 95th percentile 28 months and the 97.5 percentile was 32 months. What percentage of these convictions could have been charged and convicted as felony under the RCC theft of a motor vehicle is unclear.

⁵¹² See Advisory Group Memo #27 Appendix A - Survey Responses. Question 2.02 provided the scenario: “Driving a car knowing it was stolen, but not being part of the theft.” Question 2.02 had a mean response of 4.3, just above the 4 milestone corresponding to simple assault involving a minor injury (currently a 6 month offense in the D.C. Code), and far below the 6 milestone corresponding to significant bodily injury assault (currently a 3 year offense in the D.C. Code). For comparison to a carjacking-type scenario, survey Question 1.14 provided the scenario “Pulling the only person in a car out, causing them minor injury, then stealing it.” which received a mean response of 6.2.

⁵¹³ See Advisory Group Memo #27 Appendix A - Survey Responses. Question 4.25 provided the scenario: “Stealing a car worth \$5,000”. Question 4.25 had a mean response of 6.2, just above the 6 milestone corresponding to significant bodily injury assault (currently a 3 year offense in the D.C. Code).

RCC § 22E-2104. Shoplifting.

- (1) *OAG, App. C at 258, recommends removing the phrase “from one’s person” in subparagraph (a)(1)(A), which currently reads “Conceals or holds or carries on one’s person.” OAG states that, as currently drafted, it is unclear whether “on one’s person” only modifies “carries,” or whether it also modifies “conceals” and “holds.” OAG states that if “on one’s person” modifies “conceals,” then concealing merchandise in other ways, such as in a shopping cart, would not be covered by the statute. In the alternative, OAG recommends reordering subparagraph (a)(1)(A) so that it reads “carries on one’s person, conceals, or holds,” although OAG notes that it remains unclear how a person can “carry” something that is not on his or her person.*
- The RCC partially incorporates this recommendation by reordering subparagraph (a)(1)(A) to read “Holds or carries on one’s person, or conceals.” The RCC retains the qualifier “on one’s person” because the current shoplifting statute prohibits “possession”⁵¹⁴ and RCC § 22E-701 defines actual possession as to “hold or carry on one’s person.” This change improves the clarity of the revised statute.
- (2) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*
- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying shoplifting as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

⁵¹⁴ D.C. Code § 22-3213(a)(1) (“(a) A person commits the offense of shoplifting if, with intent to appropriate without complete payment any personal property of another that is offered for sale or with intent to defraud the owner of the value of the property, that person: (1) Knowingly conceals or takes possession of any such property.”).

RCC § 22E-2105. Unlawful Creation or Possession of a Recording.

- (1) *OAG, App. C at 258, recommends deleting the word “unlawful” from paragraphs (a)(4) and (b)(4), which state the required number of “unlawful” recordings. OAG states that the word “unlawful” is “virtually self-referential” because “it is both an element of the offense and describes conduct in violation of the offense.” In the alternative, OAG recommends using the word “unauthorized” instead of “unlawful” to match the current statute (D.C. Code § 22-3214(b)).*

 - The RCC incorporates this recommendation by deleting the word “unlawful from paragraphs (a)(4) and (b)(4). This change improves the clarity of the revised statute.
- (2) *OAG, at App. C, 407, recommends that unlawful creation or possession of a recording be classified as a Class C misdemeanor instead of a Class B misdemeanor. (Although not explicit in the OAG comment, the CCRC presumes that OAG’s recommendation was with respect to first degree unlawful creation or possession of a recording.)*

 - The RCC incorporates this recommendation by changing the penalty classification. This change improves the proportionality of the revised criminal code.
- (3) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

 - The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying first degree unlawful creation or possession of a recording as a Class C misdemeanor and second degree unlawful creation or possession of a recording as a Class D misdemeanor, and generally recommends classifying Class C misdemeanors and Class D misdemeanors as non-jury demandable offenses.

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

(1) PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends unlawful operation of a recording device as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

RCC § 22E-2201. Fraud.

- (1) *USAO, at App. C. 345, recommends decreasing the number of gradations of fraud. USAO says that “too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing.”*
 - The RCC does not incorporate this recommendation because it is inconsistent with the RCC penalty gradations across most property offenses and may authorize disproportionate penalties. Under current law, the same 10 year maximum penalty applies if a person commits fraud and obtains property worth \$1,000, or \$1,000,000. Dividing the offense into five penalty grades better aligns the maximum penalties with the degree of loss caused by the offense, and limits the risk of disproportionate or unequal sentences.
- (2) *USAO, at App. C. 345 recommends replacing the words “that owner” with “an owner.” USAO states that the current language creates a gap in law, and may fail to criminalize taking jointly owned property by deception.*
 - The RCC incorporates this recommendation by replacing the words “that owner” with “an owner.” This change improves the proportionality of the revised criminal code, and closes a gap in law.
- (3) *The CCRC recommends changing the value thresholds for fourth, third, second, and first degree fraud to \$500; \$5,000; \$50,000; and \$500,000, respectively.*
 - The RCC changes the property value thresholds to align the harm caused by each grade of the offense with maximum penalties. Most notably, the value threshold for third degree fraud has been increased from \$2,500 to \$5,000. Third degree fraud is a felony offense, subject to the same penalties as fifth degree robbery, first degree menacing, or enhanced stalking. This threshold is consistent with the CCRC public opinion surveys of District voters for grading the penalty for theft of \$5,000.⁵¹⁵ A higher minimum value threshold is justified given the severity of penalties. Research by the Pew Charitable Trusts evaluating changes to felony theft thresholds across the country in recent decades concluded that: 1) Raising the felony theft threshold has no impact on overall property crime or larceny rates; 2) States that increased their thresholds reported roughly the same average decrease in crime as the 20 states that did not change their theft laws; and 3) The amount of a state’s felony theft threshold—whether it is \$500, \$1,000, \$2,000, or more—is not correlated with its property crime and larceny rates.⁵¹⁶ This change improves the proportionality of the revised criminal code.

⁵¹⁵ See Advisory Group Memo #27 Appendix A - Survey Responses. Question 1.01 provided the scenario: “Stealing property worth \$5,000..”. Question 1.01 had a mean response of 5.2, above the 4 milestone corresponding to simple assault involving a minor injury (currently a 6 month offense in the D.C. Code), and the 6 milestone corresponding to significant bodily injury assault (currently a 3 year offense in the D.C. Code). In another survey, Question provided the scenario “Stealing property (other than a car) worth \$5,000” which received a mean response of 6.2.

⁵¹⁶ Pew Charitable Trusts, *The Effects of Changing Felony Theft Thresholds* (April 2017) at 1.

(4) *USAO, at App. C at 427, recommends eliminating the highest penalty grade of fraud, and dividing fraud into 4 penalty grades. Under USAO's proposal, there would be no penalty grade for property valued at more than \$500,000, noting that the threshold is "so high that the top gradations will likely only be used very rarely, if ever." Instead, the highest penalty grade would cover all property valued at more than \$50,000. In addition, USAO recommends that first degree fraud be classified as a Class 7 felony, second degree fraud as a Class 8 felony, third degree fraud as a Class 9 felony, and fourth degree fraud as a misdemeanor. USAO's recommendation does not specify which class of misdemeanor, and the CCRC assumes that USAO recommends that fourth degree fraud be classified as a Class A misdemeanor. USAO also recommends that 2nd degree fraud should include taking a motor vehicle, regardless of value.*

- The RCC does not incorporate these recommendations because they may authorize disproportionate penalties. USAO is likely correct that the top gradation of fraud will very rarely be used. However, the penalties authorized for first degree fraud, including imprisonment of up to 10 years, should also be very rarely used as this is a non-violent property offense. This is consistent with current practice in the District. From 2009-2018, the 97.5th percentile sentence for first degree fraud under current law was less than 2 years.⁵¹⁷ Setting the \$5,000 threshold at a class 9 felony, in addition, is consistent with the CCRC public opinion surveys of District voters for grading the penalty for theft of \$5,000.⁵¹⁸
- The RCC also does not include obtaining a motor vehicle as a factor in grading the fraud offense because it may authorize disproportionate punishment. The RCC includes theft of a motor vehicle as a grading factor in the theft statute, due to the unique importance of motor vehicles in daily life. A person whose car is stolen may suddenly and unexpectedly be unable to commute to work, pick up children from school, or run important errands. However, when a person is *defrauded* out of a motor vehicle, the person *expects* to transfer the vehicle to another person and is likely to have planned for the event. The harm, consequently, is fundamentally different between obtaining a car by theft and fraud.

(5) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying fifth degree theft as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

⁵¹⁷ See, Appendix D to Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions.

⁵¹⁸ See Advisory Group Memo #27 Appendix A - Survey Responses. Question 1.01 provided the scenario: "Stealing property worth \$5,000..". Question 1.01 had a mean response of 5.2, above the 4 milestone corresponding to simple assault involving a minor injury (currently a 6 month offense in the D.C. Code), and the 6 milestone corresponding to significant bodily injury assault (currently a 3 year offense in the D.C. Code). In another survey, Question provided the scenario "Stealing property (other than a car) worth \$5,000" which received a mean response of 6.2.

RCC § 22E-2202. Payment Card Fraud.

- (1) *OAG at App. C. 259, recommends re-drafting the words “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” with “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.”*
 - The RCC incorporates this recommendation using the language suggested by OAG. This change improves the clarity of the revised criminal code.
- (2) *USAO, at App. C. 345, recommends reducing the number of penalty gradations of payment card fraud.*
 - The RCC does not incorporate this recommendation for the reasons described in the response to the identical USAO recommendation regarding the RCC fraud statute.
- (3) *The CCRC recommends changing the value thresholds for fourth, third, second, and first degree payment card fraud to \$500; \$5,000; \$50,000; and \$500,000, respectively.*
 - This change is made for the reasons described in the identical CCRC recommendation regarding the RCC fraud statute.
- (4) *The CCRC recommends deleting subsection (f), which establishes jurisdiction for payment card fraud if: 1) The person to whom a payment card was issued or in whose name the payment card was issued is a resident of, or located in, the District of Columbia; 2) The person who was the target of the offense is a resident of, or located in, the District of Columbia at the time of the fraud; 3) The loss occurred in the District of Columbia; or 4) Any part of the offense takes place in the District of Columbia. This subsection is redundant as general principles of jurisdiction would apply in most circumstances specified. To the extent that general principles of jurisdiction would not apply, extending jurisdiction is inappropriate and potentially unconstitutional.*
 - The DCCA has generally held that District courts have jurisdiction over alleged offenses if “one of several constituent elements to the complete offense” occurs within the District, “even though the remaining elements occurred outside of the District.”⁵¹⁹ If any part of the offense occurs in the District of Columbia, District courts would have jurisdiction under the general principles of jurisdiction. However, other provisions of the subsection establish jurisdiction even if the offense occurred entirely outside of the District.
 - Deleting this subsection prevents District courts from exercising extraterritorial jurisdiction in a manner that may be unconstitutional.⁵²⁰
- (5) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

⁵¹⁹ *United States v. Baish*, 460 A.2d 38, 40–41 (D.C. 1983), abrogated on other grounds by *Carrell v. United States*, 80 A.3d 163 (D.C. 2013).

⁵²⁰ See WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 4.4(a), Common law view of territorial jurisdiction, 1 Subst. Crim. L. § 4.4(a) (3d ed.)

Appendix D. Disposition of Advisory Group Comments & Other Changes From Draft Documents (D1)

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying fifth degree theft as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

RCC § 22E-2203. Check Fraud.

- (1) *USAO, at App. C. 346, recommends amending the check fraud statute to include “draw[ing]” or “deliver[ing]” a check. USAO notes that it is “concerned that eliminating clearly specified criminal liability for drawing or delivering checks will create a gap in the enforcement of financial crimes.”*
 - The RCC does not incorporate this recommendation because it is inconsistent with the RCC general approach to attempt liability and may authorize disproportionate penalties. Under the USAO’s proposal, attempting to use a fraudulent check would be subject to the same penalties as actually using the check, even though no financial harm has actually occurred.
 - USAO notes that forgery and identity theft only require that the actor had intent to obtain property. This distinction is justified due to the fact that both forgery and identity theft require separate wrongful acts. Forgery requires falsification or alteration of a written instrument, and identity theft requires creating, possessing, or using another person’s personal identifying information without that person’s effective consent. However, there is no separate wrongful act in the check fraud statute.
- (2) *USAO, at App. C. 346, recommends lowering the threshold for first degree check fraud from \$2,500 to \$1,000.*
 - The RCC does not incorporate this recommendation because it is inconsistent with the RCC general approach to grading property offenses and may authorize disproportionate penalties. The RCC generally adopts a \$5,000 threshold for property crimes to be subject to felony punishment. This threshold is consistent with the CCRC public opinion surveys of District voters for grading the penalty for theft of \$5,000.⁵²¹
- (3) *OAG, at App. C. 405, recommends that check fraud have the same five penalty grade structure as the RCC’s general fraud statute. OAG notes that check fraud that causes a loss of more than \$50,000 would be subject to a lower maximum penalty than a general fraud that causes loss of more than \$50,000.*
 - The RCC partially incorporates this recommendation by adding a gradation for loss of \$500 or more and classifying the offense gradations the same as theft. An ordinary (non-certified) check is highly unlikely to be offered or accepted as payment for property or services of \$50,000 or more, the next penalty gradation. However, should check fraud occurs on that scale, the RCC’s general fraud statute may still apply, provided that the actor obtained property by means of deception. The RCC check fraud statute overlaps substantially with the RCC fraud statute.

⁵²¹ See Advisory Group Memo #27 Appendix A - Survey Responses. Question 1.01 provided the scenario: “Stealing property worth \$5,000..”. Question 1.01 had a mean response of 5.2, above the 4 milestone corresponding to simple assault involving a minor injury (currently a 6 month offense in the D.C. Code), and the 6 milestone corresponding to significant bodily injury assault (currently a 3 year offense in the D.C. Code). In another survey, Question provided the scenario “Stealing property (other than a car) worth \$5,000” which received a mean response of 6.2.

(4) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying fifth degree theft as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

RCC § 22E-2204. Forgery.

(1) CCRC recommends changing the value threshold required for first degree and second degree forgery to \$50,000 and \$5,000 respectively.

- The RCC generally adopts a \$5,000 threshold for property crimes to be subject to felony punishment. This threshold is consistent with the CCRC public opinion surveys of District voters for grading the penalty for theft of \$5,000.⁵²²
- Adopting a \$50,000 value threshold for first degree forgery is consistent with the thresholds for other property offenses that are classified in the same penalty classification.

⁵²² See Advisory Group Memo #27 Appendix A - Survey Responses. Question 1.01 provided the scenario: “Stealing property worth \$5,000..”. Question 1.01 had a mean response of 5.2, above the 4 milestone corresponding to simple assault involving a minor injury (currently a 6 month offense in the D.C. Code), and the 6 milestone corresponding to significant bodily injury assault (currently a 3 year offense in the D.C. Code). In another survey, Question provided the scenario “Stealing property (other than a car) worth \$5,000” which received a mean response of 6.2.

RCC § 22E-2205. Identity Theft.

- (1) *OAG, at App C. 259, comments that the language under paragraph (g) which tolls the statute of limitations does not define the term “victim,” and that the term could refer either to the person whose identifying information was used, or the person who was defrauded using that information. OAG recommends redrafting paragraph (g) to clarify the term “victim”*
 - The RCC incorporates this recommendation by amending paragraph (g) to clarify that the statute of limitation tolls until the person whose identifying information was taken, possessed, or used, knows, or reasonably should have known, of the identity theft. This change improves the clarity of the revised statute.
- (2) *USAO, at App. C. 347 recommends decreasing the number of gradations of identity theft.*
 - The RCC does not incorporate this recommendation for the reasons described in the response to the identical USAO recommendation regarding the RCC fraud statute.
- (3) *USAO, at App. C., recommends re-drafting the identity theft offense to include using personal identifying information with intent to “Identify himself of herself at the time of his or her arrest;” “Facilitate or conceal his or her commission of a crime;” or “Avoid detection, apprehension, or prosecution for a crime.” USAO says that although using personal identifying information in this manner would constitute obstruction of justice or false statements, those offenses do not properly account for the harm to the person whose personal identifying information has been misappropriated.*
 - The RCC does not incorporate this recommendation at this time because it may authorize disproportionate penalties, but the CCRC will review this matter when recommending revisions to the District’s false statements and obstruction of justice offenses. As noted in the RCC commentary and in Advisory Group meetings, there are multiple statutes that address conduct described by USAO which revolve around misuse of another person’s identity in connection with another crime. Such misuses of identity appear to be addressed as crimes other than property crimes, with the maximum sentences sufficient to also account for the harm to the person whose identifying information is used.
- (4) *The CCRC recommends changing the value thresholds for fourth, third, second, and first degree identity theft to \$500; \$5,000; \$50,000; and \$500,000, respectively.*
 - This change is made for the reasons described in the identical CCRC recommendation regarding the RCC fraud statute.
- (5) *USAO, at App. C at 427, recommends eliminating the highest penalty grade of identity theft, and dividing identity theft into 4 penalty grades. Under USAO’s proposal, there would be no penalty grade for property valued at more than \$500,000, noting that the threshold is “so high that the top gradations will likely only be used very rarely, if ever.” Instead, the highest penalty grade would cover all property valued at more than \$50,000. In addition, USAO recommends that*

first degree identity theft be classified as a Class 7 felony, second degree identity theft as a Class 8 felony, third degree identity theft as a Class 9 felony, and fourth degree identity theft as a misdemeanor. USAO's recommendation does not specify which class of misdemeanor, and the CCRC assumes that USAO recommends that fourth degree identity theft be classified as a Class A misdemeanor.⁵²³ USAO also recommends that 2nd degree identity theft should include taking a motor vehicle, regardless of value.

- The RCC does not incorporate these recommendations because they may authorize disproportionate penalties. USAO is likely correct that the top gradation of fraud will very rarely be used. However, the penalties authorized for first degree fraud, including imprisonment of up to 10 years, should also be very rarely used as this is a non-violent property offense. This is consistent with current practice in the District. From 2009-2018, the 97.5th percentile sentence for first degree identity theft under current law was less than 2 years.⁵²⁴ Setting the \$5,000 threshold at a class 9 felony, in addition, is consistent with the CCRC public opinion surveys of District voters for grading the penalty for theft of \$5,000.⁵²⁵
- The RCC also does not include obtaining a motor vehicle as a factor in grading the identity theft offense because it may authorize disproportionate punishment. The RCC includes theft of a motor vehicle as a grading factor in the theft statute, due to the unique importance of motor vehicles in daily life. A person whose car is stolen may suddenly and unexpectedly be unable to commute to work, pick up children from school, or run important errands. However, when a person uses identifying information to defraud another person out of a motor vehicle, that person *expects* to transfer the vehicle to another person and is likely to have planned for the event. The harm, consequently, is fundamentally different between obtaining a car by theft and identity theft.

(6) *The CCRC recommends deleting subsection (f), which establishes jurisdiction for payment card fraud if: 1) The person whose personal identifying information is improperly obtained, created, possessed, or used is a resident of, or located in, the District of Columbia; or 2) Any part of the offense takes place in the District of Columbia. This subsection is redundant as general principles of jurisdiction would apply in most circumstances specified. To the extent that general*

⁵²³ USAO had recommended that “proposes that car theft be punished more severely than currently proposed” and that third degree theft should include theft of a motor vehicle, regardless of value. Identity theft requires use of personal identifying information, and it is unclear if USAO’s recommendation was for third degree *identity theft* should also include taking a motor vehicle. Even if it do

⁵²⁴ See, Appendix D to Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions.

⁵²⁵ See Advisory Group Memo #27 Appendix A - Survey Responses. Question 1.01 provided the scenario: “Stealing property worth \$5,000..”. Question 1.01 had a mean response of 5.2, above the 4 milestone corresponding to simple assault involving a minor injury (currently a 6 month offense in the D.C. Code), and the 6 milestone corresponding to significant bodily injury assault (currently a 3 year offense in the D.C. Code). In another survey, Question provided the scenario “Stealing property (other than a car) worth \$5,000” which received a mean response of 6.2.

principles of jurisdiction would not apply, extending jurisdiction is inappropriate and potentially unconstitutional.

- The DCCA has generally held that District courts have jurisdiction over alleged offenses if “one of several constituent elements to the complete offense” occurs within the District, “even though the remaining elements occurred outside of the District.”⁵²⁶ If any part of the offense occurs in the District of Columbia, District courts would have jurisdiction under the general principles of jurisdiction. However, subsection (f) establishes jurisdiction even if the offense occurred entirely outside of the District, if the person whose personal information was taken is a resident of, or located in, the District of Columbia.
 - Deleting this subsection prevents District courts from exercising extraterritorial jurisdiction in a manner that may be unconstitutional.⁵²⁷
- (7) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*
- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying fifth degree theft as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

⁵²⁶ *United States v. Baish*, 460 A.2d 38, 40–41 (D.C. 1983), abrogated on other grounds by *Carrell v. United States*, 80 A.3d 163 (D.C. 2013).

⁵²⁷ See WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 4.4(a), Common law view of territorial jurisdiction, 1 Subst. Crim. L. § 4.4(a) (3d ed.)

RCC § 22E-2206. Identity Theft Civil Provision.

(1) *USAO notes that RCC § 22E-2206 includes a typographical error, and reference to § 22E-2206 should be changed to § 22E-2205.*

- The RCC incorporates this recommendation, making the suggested change. This change clarifies the revised statutes.

RCC § 22E-2207. Unlawful Labeling of a Recording

- (1) *OAG, at App C. 260, recommends redrafting subsection (c) to clarify that certain “actions not people” are excluded from liability.*
 - The RCC incorporates this recommendation by adopting the specific language recommended by OAG. This change improves the proportionality of the revised criminal code.
- (2) *OAG, at App C. 260-261, recommends moving the unlawful labeling of a recording statute from the fraud chapter to theft chapter, alongside Unlawful Creation or Possession of a Recording and Unlawful Operation of a Recording Device in a Motion Picture Theater.*
 - The RCC does not incorporate this recommendation because it is contrary to the logical organization of the revised statutes. The revised statute is not a theft offense, but a fraud offense.
- (3) *OAG, at App. C, 407, recommends that unlawful labeling of a recording be classified as a Class C misdemeanor instead of a Class B misdemeanor. Although not explicit in the OAG comment, the CCRC presumes that OAG’s recommendation was with respect to first degree unlawful labeling of a recording.*
 - The RCC incorporates this recommendation. This change improves the proportionality of the revised criminal code.
- (4) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*
 - The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying fifth degree theft as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

RCC § 22E-2208. Financial Exploitation of a Vulnerable Adult

- (1) *OAG, at App C. 261, recommends codifying a definition for the term “undue influence” as used in the financial exploitation of a vulnerable adult (FEVA) statute.*
 - The RCC defines the term “undue influence” in RCC § 22E-2208. The term will be defined in RCC § 22E-701, and § 22E-2208 will include a cross reference.
- (2) *OAG, at App C. 261, recommends re-drafting the financial exploitation of a vulnerable adult offense to separately include taking property “without the effective consent of an owner.”*
 - The RCC does not incorporate this recommendation because it may make the revised statute less clear. The revised statute already specifically criminalizes committing any theft, forgery, extortion, fraud, or identity theft with recklessness that the complainant is a vulnerable adult, and these crimes already account for takings without effective consent of the owner.
- (3) *USAO, at App. C. 348, recommends reducing the number of penalty gradations for FEVA.*
 - The RCC does not incorporate this recommendation for the reasons described in the response to the identical USAO recommendation regarding the RCC fraud statute.
 - While USAO says that by grading the offense based on value, “the proposed statute penalizes defendants less severely when they take advantage of elderly or vulnerable adults who are not wealthy,” this is true of any property offense with penalty grades based on value. The USAO recommendation does not appear, however, to grade on harm other than value. Under current law, the same 10 year maximum penalty applies if a person commits FEVA and obtains property worth \$1,000, or \$1,000,000. Dividing the offense into five penalty grades better aligns the maximum penalties with the degree of loss caused by the offense, and limits the risk of disproportionate or unequal sentences.
- (4) *USAO recommends re-drafting paragraph (e)(2) to include committing arson, check fraud, criminal damage to property, criminal graffiti, payment card fraud, possession of stolen property, reckless burning, shoplifting, theft, trafficking of stolen property, unauthorized use of a motor vehicle, and unauthorized use of property to a vulnerable person.*
 - The RCC partially incorporates this revision by expanding the list of predicate offenses to include check fraud and payment card fraud. The revised statute does not include crimes such as shoplifting and graffiti recommended for inclusion by USAO. Neither the current D.C. Code FEVA statute, nor the revised statute, is intended to serve as general penalty enhancement for all property offenses committed against a vulnerable adult. Rather, FEVA recognizes that vulnerable adults are particularly vulnerable to certain types of theft and fraudulent behaviors.

RCC § 22E-2210. Trademark Counterfeiting.

- (1) *OAG, at App. C. 438-439, recommends replacing the words “commercial sale” with “sale.” OAG notes that it is unclear why the word “commercial” is included.*
 - The RCC incorporates this recommendation by deleting the word “commercial.” This change improves the clarity of the revised criminal code.
- (2) *OAG, at App. C. 439, recommends redrafting the exclusion to liability under subsection (c). OAG recommends replacing the words “Nothing in this section shall be construed to prohibit uses of trademarks that are legal under civil law” with “Nothing in this section shall be construed to prohibit the legal uses of trademarks.” OAG says that the term “civil law” is not defined in the statute, and it is unclear if the term includes anything other than criminal law, or if the meaning is narrower and only includes uses that are legal under trademark law.*
 - The RCC partially incorporates this recommendation by updating the commentary to clarify that “legal under civil law” includes not only uses that are non-infringing under trademark law, but that are legal under general civil law. The exclusion is intended to include uses that are legal under general civil law, and is not limited to uses that are legal under trademark law. For example, if a person obtains rights to use a trademark through contract, that use would still be excluded from the statute. However, using the words “legal uses of trademarks” would not be clearer than “legal under civil law.”
- (3) *OAG, at App. C. 439, recommends amending the commentary to clarify that when use of a wrapper, bottle, or packaging does constitute trademark counterfeiting, the value of the property contained within shall be used to determine the value for grading purposes.*
 - The RCC incorporates this recommendation by amending the commentary as recommended by OAG. This change improves the clarity of the revised commentary.
- (4) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*
 - The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying fifth degree theft as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

RCC § 22E-2301. Extortion.

- (1) *USAO, at App. C. 349, recommends reducing the number of penalty grades for extortion.*
 - The RCC does not incorporate this recommendation for the reasons described in the response to the identical USAO recommendation regarding the RCC fraud statute.
- (2) *USAO, at App. C. 349, recommends replacing the words “that owner” with “an owner.” USAO states that the current language creates a gap in law, and may fail to criminalize taking jointly owned property by deception.*
 - The RCC incorporates this recommendation by replacing the words “that owner” with “an owner.” This change improves the proportionality of the revised criminal code, and closes a gap in law.
- (3) *The CCRC recommends re-drafting paragraphs (a)(3), (b)(3), (c)(3), (d)(3), and (e)(3) to clarify that the coercive threat may be either explicit or implicit.*
 - This does not substantively change the scope of the exclusions. The prior definition of “coercive threat” included explicit or implicit threats. The definition has been revised to omit reference to explicit or implicit threats, and instead the revised statute specifies that explicit and implicit threats are included. This change improves the clarity of the revised code.
- (4) *The CCRC recommends changing the value thresholds for fourth, third, second, and first degree extortion to \$500; \$5,000; \$50,000; and \$500,000, respectively.*
 - This change is made for similar reasons described in the identical CCRC recommendation regarding the RCC fraud statute, and to make the penalty thresholds consistent with other property offenses.
 - Extortion is distinguishable from other property offenses in that fourth degree extortion is a felony. The fourth degree version of other property offense are misdemeanors. Raising the value threshold for fourth degree extortion from \$250 to \$500 helps prevent disproportionately severe penalties.
- (5) *USAO, at App. C at 427, recommends eliminating the highest penalty grade of extortion, and dividing extortion into 4 penalty grades. Under USAO’s proposal, there would be no penalty grade for property valued at more than \$500,000, noting that the threshold is “so high that the top gradations will likely only be used very rarely, if ever.” Instead, the highest penalty grade would cover all property valued at more than \$50,000. In addition, USAO recommends that first degree extortion be classified as a Class 7 felony, second degree extortion as a Class 8 felony, third degree extortion as a Class 9 felony, and fourth degree extortion as a misdemeanor. USAO’s recommendation does not specify which class of misdemeanor, and the CCRC assumes that USAO recommends that fourth degree extortion be classified as a Class A misdemeanor. USAO also recommends that 2nd degree extortion should include taking a motor vehicle, regardless of value.*
 - The RCC does not incorporate these recommendations because they may authorize disproportionate penalties. USAO is likely correct that the top gradation of extortion will very rarely be used. However, the penalties

authorized for first degree fraud, including imprisonment of up to 15 years, should also be very rarely used as this is a property offense.

- The RCC is already consistent with respect to USAO's recommendation as to penalty classifications for extortion in which property taken is \$50,000 or more, or \$5,000 or more. USAO recommends that extortion in which \$50,000 or more is taken should be classified as a Class 7 felony. Under the RCC, extortion in which \$50,000 or more is taken, constitutes second degree extortion which is classified as a Class 7 felony. USAO recommends that extortion in which \$5,000 or more is taken should constitute third degree extortion, which is classified as a Class 8 felony. Under the RCC, extortion in which \$5,000 or more is taken is classified as a Class 8 felony.
- The RCC also does not include obtaining a motor vehicle as a factor in grading the extortion offense because it may authorize disproportionate punishment. The RCC includes theft of a motor vehicle as a grading factor in the theft statute, due to the unique importance of motor vehicles in daily life. A person whose car is stolen may suddenly and unexpectedly be unable to commute to work, pick up children from school, or run important errands. However, when a person is *extorted* out of a motor vehicle, the person may expect to transfer the vehicle to another person and is more likely to have planned for the event. The harm, consequently, is different between obtaining a car by theft and fraud.

RCC § 22E-2401. Possession of Stolen Property.

- (1) *USAO, at App. C. 350, recommends reducing the number of penalty grades for possession of stolen property.*
 - The RCC does not incorporate this recommendation for the reasons described in the response to the identical USAO recommendation regarding the RCC fraud statute.
- (2) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*
 - The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying fifth degree theft as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

RCC § 22E-2402. Trafficking of Stolen Property.

- (1) *USAO, at App. C. 350, recommends reducing the number of penalty grades for trafficking of stolen property.*
 - The RCC does not incorporate this recommendation for the reasons described in the response to the identical USAO recommendation regarding the RCC fraud statute.
- (2) *USAO, at App. C. 350, recommends replacing the words “property” with the words “total property trafficked,” in paragraphs (a)(4), (b)(4), (c)(4), and (d)(4). USAO states that this will clarify that each penalty gradation is determined by the aggregate value of the property, as opposed to a requirement that each individual piece of stolen property trafficked must meet the value threshold.*
 - The RCC incorporates this recommendation by amending the statute to refer to “total property trafficked.” This change improves the clarity of the revised criminal code.
- (3) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*
 - The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying fifth degree theft as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

RCC § 22E-2403. Alteration of Motor Vehicle Identification Number.

(1) The CCRC recommends changing the value threshold for the motor vehicle or motor vehicle part from \$2,500 to \$5,000 for first degree alteration of a motor vehicle identification number.

- The RCC generally adopts a \$5,000 threshold for property crimes to be subject to felony punishment. This threshold is consistent with the CCRC public opinion surveys of District voters for grading the penalty for theft of \$5,000.⁵²⁸

⁵²⁸ See Advisory Group Memo #27 Appendix A - Survey Responses. Question 1.01 provided the scenario: “Stealing property worth \$5,000..”. Question 1.01 had a mean response of 5.2, above the 4 milestone corresponding to simple assault involving a minor injury (currently a 6 month offense in the D.C. Code), and the 6 milestone corresponding to significant bodily injury assault (currently a 3 year offense in the D.C. Code). In another survey, Question provided the scenario “Stealing property (other than a car) worth \$5,000” which received a mean response of 6.2.

RCC § 22E-2404. Alternation of Bicycle Identification Number.

- (1) OAG, at App. C. 407, *recommends that alteration of a bicycle identification number be classified as a Class D misdemeanor instead of a Class C misdemeanor.*
 - The RCC incorporates this recommendation by changing the penalty classification. This change improves the proportionality of the revised criminal code.
- (2) PDS, App. C at 412-414, *recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*
 - The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying fifth degree theft as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

RCC § 22E-2501. Arson.

(1) *OAG, App. C at 261, recommends adding two commas to paragraph (a)(1) in first degree arson⁵²⁹ so that it reads “Knowingly starts a fire, or causes an explosion, that damages or destroys a dwelling or building” as opposed to the current text without commas (“Knowingly starts a fire or causes an explosion that damages or destroys a dwelling or building.”) OAG states, that as currently drafted, it is unclear whether “damages or destroys” modifies both fire and explosion, or just explosion, and that if the Commission intended for “damages or destroys” to modify both, the commas would clarify it.*

- The RCC incorporates this recommendation by adding commas to paragraphs (a)(1) and (b)(1) and subsection (c) so that they require “knowingly starts a fire, or causes an explosion, that damages or destroys a dwelling or building.” This clarifies the revised statutes.

(2) *USAO, App. C at 351, recommends deleting from first degree arson and second degree arson the requirement that a victim of the fire or explosion “is not a participant in the crime.” With this revision, first degree arson and second degree arson would both require that the defendant is reckless as to the fact that any person is present in the dwelling or building, and first degree arson would have the additional element that the fire or explosion, in fact, causes death or serious bodily injury to any person. USAO quotes the CCRC’s other jurisdiction research 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.” USAO states that the commentary “provides no justification for this departure, which serves only to treat the loss of some human life as more important than others” and that “[a]bsent a much clearer justification, USAO urges the Commission” to delete the requirement that the victim be a “person who is not a participant in the crime is present.”*

- The RCC does not incorporate this recommendation because it would lead to inconsistent liability within the revised arson statute and with other RCC offenses. The current D.C. Code arson statute is limited to property damage,⁵³⁰ but District case law requires some endangerment of human life.⁵³¹ The revised arson statute is a property crime, but has three gradations that authorize increased penalties based on the seriousness of

⁵²⁹ OAG’s comment is specific to first degree arson, but also applies to second and third degree.

⁵³⁰ D.C. Code § 22-301 (“Whoever shall maliciously burn or attempt to burn any dwelling, or house, barn, or stable adjoining thereto, or any store, barn, or outhouse, or any shop, office, stable, store, warehouse, or any other building, or any steamboat, vessel, canal boat, or other watercraft, or any railroad car, the property, in whole or in part, of another person, or any church, meetinghouse, schoolhouse, or any of the public buildings in the District, belonging to the United States or to the District of Columbia, shall suffer imprisonment for not less than 1 year nor more than 10 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.”).

⁵³¹ *See, e.g., Phenix*, 909 A.2d at 164 (“With respect to arson, the government must prove that appellant acted intentionally, and not merely negligently or accidentally, while consciously disregarding the risk of endangering human life and offending the security of habitation or occupancy.”) (internal citations omitted).

the risk to others against their will. The revised arson statute excludes participants in the crime because such participants are similarly situated to the actor—their presence is unrelated to the risk the fire or explosion poses to the occupants or residents of the dwelling or building. Just as it would be illogical to increase the penalty on an actor for increasing a risk to the actor’s own self, it is illogical to increase the penalty on an actor for increasing a risk to an accomplice. While the USAO comment notes that the offense appears “to treat the loss of some human life as more important than others,”—a treatment that the USAO appears to endorse⁵³²—the more relevant question is whether the arson offense in particular should provide an additional penalty for risk assumed by a co-participant in a crime. The RCC already provides liability under the RCC assault and homicide statutes if a defendant starts a fire or causes an explosion that injures or kills a participant in the crime. Excluding participants from first degree arson and second degree arson is also consistent with the RCC burglary (RCC § 22E-2701), RCC murder (RCC § 22E-1101), and RCC manslaughter (RCC § 22E-1102) statutes. The commentary to the revised arson statute has been updated to reflect this discussion.

(3) *USAO, App. C at 351, recommends including a “vehicle” in first degree arson and second degree arson. With this revision, first degree arson and second degree arson would require that the fire or explosion damage or destroy a “dwelling, building, or vehicle” and that the defendant was reckless as to the presence of another person in the “dwelling, building, or vehicle.” USAO quotes the RCC commentary rationale that fires/explosions in or on property “that are not dwellings do not endanger human life the same way as fires in dwellings or buildings.” USAO states that 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 gives as a hypothetical “a person who sets explosives underneath a vehicle and lies in wait until the vehicle is occupied before detonating the device,” stating that this person would not be liable under the RCC arson statute.*

- The RCC does not incorporate this recommendation because it would change current law in a way that may authorize disproportionate penalties. The current D.C. Code arson statute does not categorically include motor vehicles. The RCC arson statute is limited to damaging or destroying a “dwelling” or a “building” because, given the RCC definitions of these terms,⁵³³ there is a significant likelihood of a person being present in these structures at the time of a fire or explosion, and such a person may be

⁵³² See, e.g., the USAO comment on arson recommending higher penalties for arson that results in the death of protected persons.

⁵³³ RCC § 22E-701 (defining “building” as a structure affixed to land that is designed to contain one or more natural persons” and “dwelling” as “a structure that is either designed for lodging or residing overnight at the time of the offense, or that is actually used for lodging or residing overnight. In multi-unit buildings, such as apartments or hotels, each individual unit is a dwelling.”).

unable to timely become aware of the fire and safely exit the structure. In contrast, it is highly unlikely that a person will be inside a vehicle that is not being used as a “dwelling” at the time of a fire or explosion and be unaware of the fire and unable to safely exit the vehicle. In the absence of such an increased risk, including damaging or destroying such vehicles in the revised arson statute would simply penalize mere property damage more severely than other types of property damage in the RCC criminal damage to property statute (RCC § 22E-2503). Under the RCC a person who engages in the type of conduct hypothesized by USAO—“a person who sets explosives underneath a vehicle and lies in wait until the vehicle is occupied before detonating the device”—would be liable for resulting harms (or attempts to cause such harms) under RCC offenses against persons such as assault (RCC § 22E-1202) or murder (RCC § 22E-1101) (in addition to liability for the property damage under the RCC criminal damage to property statute (RCC § 22E-2503)). Arson, a property offense, is not an appropriate or sufficient offense for such conduct.

(4) *USAO, App. C at 352, recommends including a protected person enhancement to “this provision” [presumably the first degree of the RCC arson statute which involves a physical harm to another]. USAO states that under D.C. Code § 22-1331(4), arson is a “crime of violence” and is a “serious crime” because it can cause “serious injury or death to a victim.” In addition, USAO notes that first degree of the RCC arson statute requires “death or serious bodily injury.” USAO proposes using the language suggested in its General Comments, App. C at 273, which applies strict liability to the fact that the complainant is a “protected person” with 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.”*

- The RCC does not incorporate this recommendation because it would lead to disproportionate penalties. The RCC arson offense recognizes the general risk to human life that a fire or explosion poses. For both first degree arson and second degree arson, recklessness that a person other than a participant in the crime is present in the dwelling or building is sufficient and although first degree requires death or serious bodily injury, strict liability is sufficient for this element. A defendant that is reckless that a protected person is present in the dwelling or building warrants greater penalties than the RCC arson statute allows. In addition to liability under the RCC arson statute, that defendant may have liability under other RCC offenses like assault (RCC § 22-1202) or murder (RCC § 22E-1101).

(5) *The CCRC recommends, by using the phrase “in fact,” specifying strict liability for the requirements in the affirmative defense that the actor “has a valid blasting permit issued by the District Of Columbia Fire and Emergency Medical Services Department, and complied with all the rules and regulations governing the use of such a permit.” As is discussed in the commentary to the RCC arson offense, this affirmative defense is new to District law. Strict liability is appropriate because the affirmative defense requires the existence of specific facts regarding compliance with a highly regulated, technical permitting process.*

- This change improves the clarity of the revised statute.
- (6) *The CCRC recommends deleting from the affirmative defense the requirement that the actor prove the affirmative defense by a preponderance of the evidence. The RCC has a general provision that addresses the burden of proof for all affirmative defenses in the RCC (RCC § 22E-XX).*
- This change improves the clarity, consistency, and proportionality of the revised statute.

RCC § 22E-2502. Reckless Burning.

- (1) *USAO, App. C at 352, recommends renumbering the paragraphs so that instead of starting with paragraph (3), the offense starts with paragraph (1). USAO states that this appears to be a typographical error.*
 - The RCC incorporates this recommendation by renumbering the paragraphs so the offense starts with paragraph (1). USAO correctly notes that this was a typographical error. This change improves the clarity of the revised statutes.
- (2) *OAG, App. C at 261-262, comments that, as currently drafted, paragraph (a)(2) is unclear (“With recklessness as to the fact that the fire or explosion damages or destroys a dwelling or building.”). OAG states it is unclear whether the offense is satisfied when a person knowingly starts a fire/causes an explosion reckless as to the fact that the fire would damage/destroy a dwelling/building), regardless of whether or not it does, or whether the offense requires that the dwelling/building must be damaged/destroyed. OAG states that 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’” and that if “the intent is the latter, then the Commentary should state that proposition and provide examples of both fact scenarios.”*
 - The RCC incorporates this recommendation by clarifying in the commentary that it must be proven both that the fire or explosion damaged or destroyed the building and that the actor had a reckless culpable mental state as to that result. The commentary also states in a footnote that it would only be an attempted reckless burning if the actor knowingly starts a fire or causes an explosion with recklessness that the fire or explosion would destroy or damage the building or dwelling, but there is no such damage or destruction. This change clarifies the revised commentary.
- (3) *OAG, App. C at 262, recommends the Commentary for the RCC property offenses be revised so that the phrase “regardless of its occupancy” is struck from a sentence that states 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.” OAG states that the reckless burning affirmative defense does not contain this exception. In addition, the phrasing “incorrectly implies that a permit allows someone to burn down a building even if there are people in it.”*
 - The RCC incorporates this recommendation by striking the phrase “regardless of its occupancy” from the commentary. This change clarifies the revised statutes.
- (4) *USAO, App. C at 352, recommends including a “vehicle” in reckless burning. With this revision, the reckless burning statute would require that the fire or explosion damage or destroy a “dwelling, building, or vehicle.” USAO quotes the RCC commentary rationale that fires/explosions in or on property “that are not dwellings do not endanger human life the same way as fires in dwellings or buildings.” USAO states that 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.”

- The RCC does not incorporate this recommendation for the reasons described for the identical USAO recommendation regarding arson.
- (5) *The CCRC recommends, by using the phrase “in fact,” specifying strict liability for the requirements in the affirmative defense that the actor “has a valid blasting permit issued by the District Of Columbia Fire and Emergency Medical Services Department, and complied with all the rules and regulations governing the use of such a permit.” As is discussed in the commentary to the RCC reckless burning offense, this affirmative defense is new to District law. Strict liability is appropriate because the affirmative defense requires the existence of specific facts regarding compliance with a highly regulated, technical permitting process.*
- This change improves the clarity of the revised statutes.
- (6) *The CCRC recommends deleting from the affirmative defense the requirement that the actor prove the affirmative defense by a preponderance of the evidence. The RCC has a general provision that addresses the burden of proof for all affirmative defenses in the RCC (RCC § 22E-XX).*
- This change improves the clarity, consistency, and proportionality of the revised statutes.

RCC § 22E-2503. Criminal Damage to Property.

- (1) *USAO, App. C at 352, recommends decreasing the number of gradations for criminal damage to property because “too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing.”*
 - The RCC does not incorporate this recommendation because it is inconsistent with the RCC penalty gradations across most property offenses and may authorize disproportionate penalties. Under current law, the same 10 year maximum penalty applies if a person commits malicious destruction of property and the “value” of the property is \$1,000, or \$1,000,000. Dividing the offense into five penalty grades better aligns the maximum penalties with the degree of loss caused by the offense, and limits the risk of disproportionate or unequal sentences.
- (2) *OAG, App. C at 262, comments that it is unclear in the text of the criminal damage to property statute that when the property is only partially damaged there are two ways that the amount of damage can be proven—either by the reasonable cost of repairs or proof of the change in the fair market value of the damaged property. OAG states that this is clear in the commentary, but not the text of the statute, which refers only to the “amount of damage.” OAG states that “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,’” which is a defined term in the RCC but is not used in the criminal damage to property offense.*
 - The RCC codifies “amount of damage” as a defined term in RCC § 22E-701: “‘Amount of damage’ means: (A) When property is completely destroyed, the property’s fair market value before it was destroyed; or (B) When the property is partially damaged, either: (i) If there are repairs, the reasonable cost of necessary repairs, or (ii) If there are no repairs, the change in the fair market value of the damaged property. (C) Notwithstanding subsection (B), if the reasonable cost of repairs has a greater value than the fair market value of the property before it was damaged, the amount of damage is the fair market value of the property before it was damaged.” The definition is generally consistent with DCCA case law for the current malicious destruction of property offense and is discussed in detail in the commentary to RCC § 22E-701. This change improves the clarity of the revised statutes.
- (3) *The CCRC recommends changing the value thresholds for fourth, third, second, and first degree criminal damage to property to \$500; \$5,000; \$50,000; and \$500,000, respectively.*
 - The RCC changes the property value thresholds to align the harm caused by each grade of the offense with maximum penalties. Most notably, the value threshold for third degree criminal damage to property has been increased from \$2,500 to \$5,000. Third degree criminal damage to property is a felony offense, subject to the same penalties as fifth degree robbery, first degree menacing, or enhanced stalking. A higher minimum value threshold is justified given the severity of penalties. This threshold

is consistent with the CCRC public opinion surveys of District voters for grading the penalty for theft of \$5,000, a crime that similarly entails loss of property.⁵³⁴ Also for the crime of theft, research by the Pew Charitable Trusts evaluating changes to felony theft thresholds across the country in recent decades concluded that: 1) Raising the felony theft threshold has no impact on overall property crime or larceny rates; 2) States that increased their thresholds reported roughly the same average decrease in crime as the 20 states that did not change their theft laws; and 3) The amount of a state's felony theft threshold—whether it is \$500, \$1,000, \$2,000, or more—is not correlated with its property crime and larceny rates.⁵³⁵ This change improves the proportionality of the revised criminal code.

(4) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends fifth degree criminal damage to property as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

(5) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends fifth degree criminal damage to property as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

⁵³⁴ See Advisory Group Memo #27 Appendix A - Survey Responses. Question 1.01 provided the scenario: “Stealing property worth \$5,000..”. Question 1.01 had a mean response of 5.2, above the 4 milestone corresponding to simple assault involving a minor injury (currently a 6 month offense in the D.C. Code), and the 6 milestone corresponding to significant bodily injury assault (currently a 3 year offense in the D.C. Code). In another survey, Question provided the scenario “Stealing property (other than a car) worth \$5,000” which received a mean response of 6.2.

⁵³⁵ Pew Charitable Trusts, *The Effects of Changing Felony Theft Thresholds* (April 2017) at 1.

RCC § 22E-2504. Criminal Graffiti.

(1) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends criminal graffiti as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

RCC § 22E-2601. Trespass.

(1) *USAO, App. C at 353, recommends striking the phrase “under civil law” from the offense definition. Alternatively, USAO recommends substituting language from current D.C. Code § 22-3302, which instead requires proof that a trespass was “against the will of the lawful occupant or of the person lawfully in charge thereof” or “without lawful authority.” USAO states that the reference to civil law may lead to confusion and inconsistent application of the law.*

- The RCC does not incorporate this recommendation because doing so would make the statute less clear. Even if the phrase “under civil law” were stricken, parties would be required to look to civil law to determine whether a person has a privilege or license or authority to enter or remain on the property. The cross-reference to civil law makes clear that civil law (not another criminal law) is the authoritative source for determining whether a privilege or license exists. Additionally, without the phrase “under civil law,” the statute might be misread to apply to any person who was not granted a privilege or license explicitly.
- As discussed in the RCC Commentary, the current D.C. Code phrase “against the will of the lawful occupant or of the person lawfully in charge thereof” that USAO recommends as an alternative broadly captures conduct that is innocent, protected, or both. There are many instances in which a person is allowed to enter or remain on a property over the objection of a lawful occupant or a person who is lawfully in charge. Consider the following examples:
 - Parent 1 (lawful occupant) demands Parent 2 leave the family home. Parent 2 remains.
 - Landlord (lawfully in charge of property) demands Tenant immediately vacate a property without an eviction order. Tenant remains.⁵³⁶
 - Special Police Officer bars Tenant from public housing, in violation of lease agreement and District municipal regulations. Tenant returns.⁵³⁷
 - Police Officer (lawfully in charge of property) closes a public building early to obstruct Protestor’s demonstration, in violation of the First Amendment. Protestor remains.⁵³⁸
 - Roommate A (lawful occupant) demands Roommate B’s guest leave the common area of an apartment. Roommate B and guest remain.⁵³⁹

(2) *USAO, App. C at 353-354 recommends “narrowing the category of offenses entitled to a jury trial to those offenses which impact an individual’s*

⁵³⁶ See D.C. Code § 42-3505.01(a).

⁵³⁷ See *Foster v. United States*, 17-CM-994, 2019 WL 5792498 (D.C. Nov. 7, 2019).

⁵³⁸ See *Wheelock v. United States*, 552 A.2d 503, 505 (D.C. 1988).

⁵³⁹ See, e.g., *Saidi v. United States*, 110 A.3d 606, 611-12 (D.C. 2015) (discussing the authority of one co-occupant to countermand the invitation of another co-occupant).

*constitutional rights.” USAO further says that, “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.” Specifically, 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 says it “recommends removing trespasses in violation of a DCHA barring notice from the category of offenses entitled to a jury trial.” At page 415, USAO also “recommends keeping jury demandability requirements for misdemeanors consistent with current law with current District law.” USAO recommends excluding three categories of cases in which constitutional rights are unlikely to be implicated: (1) private areas of public buildings; (2) public buildings after they are closed to the public; and (3) DCHA barring notice violations. USAO recommends superseding *United States v. Frey*,⁵⁴⁰ by imposing a new temporal and spatial limitation on the jury demandability provision.*

- Assuming USAO’s comment at 353-354 is not superseded by its comments at 415, the RCC partially incorporates this recommendation by making trespass of all non-dwellings non-jury demandable. The RCC recommends that first degree trespass (regarding a “dwelling”) be a jury demandable Class B misdemeanor, second degree trespass (regarding a “building”) be a non-jury demandable Class C misdemeanor, and third degree trespass (regarding “land, a watercraft, or a motor vehicle”) be a non-jury demandable Class D misdemeanor. This change clarifies the revised statute and is consistent with the CCRC general approach to jury demandability. See the Second Draft of Report #41, for more details on the CCRC general approach to recommending conferral a right to a jury trial.
 - Assuming USAO’s comment at 353-354 are superseded by its comments at 415, the RCC does not incorporate the USAO comment because it is inconsistent with the CCRC general approach to recommending conferral a right to a jury trial. The RCC would change District statutory and case law in *United States v. Frey*⁵⁴¹ by categorically making trespass of non-dwelling public buildings non-jury demandable. Notably, while the RCC makes trespasses on public grounds or buildings non-jury demandable, it also significantly decreases the penalties for such conduct from the six months imprisonment authorized under current law.
- (3) *OAG, App. C at 408, recommends that all Class A and B misdemeanors be jury demandable, but offenses with a Class C, D, and E penalty, including attempts to commit a Class B misdemeanor not be jury-demandable. With respect to the RCC trespass offenses, this would make attempts to commit first degree trespass non-jury demandable.*
- The RCC partially incorporates this recommendation by making first degree trespass jury demandable, but second and third degree trespass

⁵⁴⁰ 137 A.3d 1000, 1004 (D.C. 2016).

⁵⁴¹ 137 A.3d 1000, 1004 (D.C. 2016).

- non-jury demandable. The Second Draft of Report #41, confers a right to a jury for all completed or attempted Class A and Class B misdemeanors and any other misdemeanor in which the complainant is a law enforcement officer or a conviction for a sex offender registration offense. All other Class C, Class D, and Class E misdemeanors the RCC makes non-jury demandable. Consistent with this approach, attempt first degree trespass is jury demandable, unlike the OAG recommendation.
- (4) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*
- a. The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying second degree trespass as a Class C misdemeanor, third degree trespass as a Class D misdemeanor, and generally recommends classifying Class C and D misdemeanors as non-jury demandable offenses.
- (5) *OAG, App. C at 263, recommends revising the cross-reference to 14 DCMR § 9600, because the D.C. Municipal Regulations are frequently amended and renumbered.*
- a. The RCC incorporates this recommendation by adopting OAG’s proposed language: “unless the bar notice was lawfully issued pursuant to the District of Columbia Municipal Regulations on an objectively reasonable basis.” This change improves the clarity of the revised code.
- (6) *OAG, App. C at 263, recommends clarifying the following sentence in the commentary (p. 136): “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.” OAG explains that a person who surreptitiously remains in a location, knowing they have no privilege or license to be there at that time, commits a trespass offense, even if they are not afforded a reasonable opportunity to leave after being discovered.*
- a. The RCC incorporates this recommendation by clarifying in commentary that the “reasonable opportunity” requirement applies only to a person who commits a trespass by remaining after a demand to leave. It does not apply to a person who enters unlawfully or to a person who surreptitiously remains. This change clarifies the revised commentary.
- (7) *OAG, App. C at 263, recommends removing a reference to Dist. of Columbia v. Wesby,⁵⁴² in the commentary (p. 139, n. 23). OAG explains that the case discusses indicators of unlawful presence but not necessarily forced entry.*
- a. The RCC incorporates this recommendation by striking the citation to *Wesby* from the relevant footnote. This change clarifies the revised commentary.
- (8) *The CCRC recommends revising the commentary to note the DCCA’s recent opinions in Rahman v. United States⁵⁴³ and Foster v. United States⁵⁴⁴ which were issued after the most recent draft language was released.*

⁵⁴² 138 S. Ct. 577 (2018).

⁵⁴³ 208 A.3d 734 (D.C. 2019).

⁵⁴⁴ 17-CM-994, 2019 WL 5792498 (D.C. Nov. 7, 2019).

- a. This change clarifies the revised commentary.
- (9) *The CCRC recommends striking the exclusion from liability for protected activity as potentially confusing.*
 - a. This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.
- (10) *The CCRC recommends revising the permissive inference provision to begin with the phrase “In a trial determining a violation under this section.”*
 - a. This change clarifies the revised statute and does not further change District law.

RCC § 22E-2701. Burglary.

(1) *USAO, App. C at 354, recommends “adding a ‘while armed’ penalty enhancement, consistent with the language proposed in the General Comments, above.” In its General Comments, USAO, App. C at 272-273, recommends an enhancement providing additional imprisonment when the person is “armed with or having readily available what, in fact, is a dangerous weapon or imitation dangerous weapon.”⁵⁴⁵ USAO explains that the mere presence of a weapon creates a danger that someone will be frightened or injured, intentionally or inadvertently. USAO also notes that the inclusion of imitation firearms ensures that enhancement is available in cases in which the firearm was not recovered and could not be test-fired. USAO also says that it “believes that it is more clear to include this provision as an enhancement, rather than as an offense gradation.”*

- The RCC partially incorporates this recommendation, which predates the RCC’s weapon offense recommendations, by including in paragraph (d)(4) a penalty enhancement applicable to all grades of burglary when a person “[k]nowingly holds or carries on the actor’s person a dangerous weapon or imitation firearm while entering or surreptitiously remaining in the location.” The RCC burglary weapon enhancement is substantially similar to the language recommended by USAO (which in turn follows current D.C. Code § 22-4502(a)), except that the RCC burglary weapon enhancement requires actual possession of the dangerous weapon or imitation dangerous weapon. The narrowing of the RCC burglary weapon enhancement as compared to the “readily available” language in the USAO General Comments (referring to an area very near the actor but not on their person) is at most a slight change, given that, under current law and the RCC, a burglary is completed as soon as the illegal entry is made with the appropriate intent.⁵⁴⁶
- Addition of the burglary weapon enhancement may significantly increase burglary penalties in some cases. However, it should be noted that, contrary to the USAO assertion at App. C at 354 that “under the RCC, a defendant is equally culpable for an armed burglary and an unarmed burglary,” even absent the burglary weapon enhancement, committing a burglary with a dangerous weapon is subject to a higher penalty than committing such a crime without a dangerous weapon. In the First Draft of Report #39 (August 5, 2019), the RCC criminalizes carrying a weapon without a license,⁵⁴⁷ possessing a weapon with intent to commit burglary,⁵⁴⁸ and possessing a weapon in furtherance of a burglary.⁵⁴⁹

⁵⁴⁵ See D.C. Code § 22-4502(a); Crim. Jur. Instr. for D.C. 8.101 (2019).

⁵⁴⁶ It would be a rare fact pattern where a person is making such an entry without holding or carrying the dangerous weapon or imitation dangerous weapon, but having it “readily available” at the time of entry.

⁵⁴⁷ RCC § 22E-4102.

⁵⁴⁸ RCC § 22E-4103.

⁵⁴⁹ RCC § 22E-4104.

Collectively, these offenses punish behavior that creates a dangerous environment by making it easier to commit a crime or to cause an injury (intentionally or inadvertently). Additionally, the first degree menacing offense⁵⁵⁰ punishes using a weapon or imitation weapon to create apprehension of immediate harm and the first, second, third, and fifth degree assault offenses⁵⁵¹ punish using a weapon or imitation weapon to inflict a physical injury. In this way the RCC authorizes proportionate punishment for criminal behavior, including the most serious forms of that behavior, but the totality of punishment is not always reflected in one offense.

- This change clarifies and improves the proportionality of the revised statute.
- (2) *USAO, App. C at 354, recommends striking the phrase “under civil law” from the offense definition. USAO states that the reference to civil law may lead to confusion and inconsistent application of the law.*
- b. The RCC does not incorporate this recommendation because doing so would make the statute less clear. If the phrase “under civil law” was stricken, parties would be required to look to civil law to determine whether a person has a privilege or license or authority to enter or remain on the property. The cross-reference to civil law makes clear that civil law (not another criminal law) is the authoritative source for determining whether a privilege or license exists. Additionally, without the phrase “under civil law,” the statute might be misread to apply to any person who was not granted a privilege or license explicitly.
- (3) *OAG, App. C at 264, asks why the offense specifies that a building or business yard is “not open to the general public at the time of the offense” when it already requires that the person does not have a privilege or license to enter or remain.*
- The RCC revises the commentary to clarify why the relevant sections are not redundant. Namely, there are instances in which a person is unauthorized to enter a space that is open to the general public. In those cases, burglary liability will not attach. Consider, for example:
 - A person is barred from a grocery store for shoplifting. That person returns to the same grocery store, in violation of the bar notice, with intent to commit theft, during business hours. That person has committed a trespass,⁵⁵² but not a burglary.
 - A person is ordered to stay 100 yards away from a former intimate partner. The person sees the former partner at the grocery store, approaches her, and assaults her. That person has committed contempt,⁵⁵³ but not burglary.
 - The RCC revises the statutory language to strike the phrase “without a privilege or license to do so under civil law” in subparagraph (c)(1)(A)

⁵⁵⁰ RCC § 22E-1203.

⁵⁵¹ RCC § 22E-1202.

⁵⁵² RCC § 22E-2601.

⁵⁵³ D.C. Code § 16-1005(g).

because the same language is repeated verbatim in paragraph (c)(2). This revision does not substantively change the revised statute.

- (4) *OAG, App. C at 406-407, and USAO, App. C at 422-423, recommend that the penalties for Burglary be increased, on grounds that they understate the serious nature of the offense. Both agencies note the sharp decrease from the penalties under current law. OAG notes 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. USAO explains that a burglary with intent to commit a minor crime could be very traumatizing, warranting a penalty far above the penalty for the predicate offense if the predicate offense is a low felony or misdemeanor. USAO offered the following examples: “[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).” OAG does not make a specific recommendation as to how much the penalty for burglary should be increased. USAO “recommends ranking 1st, 2nd, and 3rd Degree Burglary as Class 4, Class 6, and Class 7 offenses, respectively.”*
- The RCC partially incorporates this recommendation by providing penalty enhancements where an actor “Knowingly holds or carries on the actor’s person a dangerous weapon or imitation firearm while entering or surreptitiously remaining in the location.” The enhanced versions of first, second, and third degree burglary are classified as Class 7, Class 8, and Class 9 offenses, respectively. The enhanced penalties have the net effect of substantially increasing authorized penalties for otherwise low-felony and misdemeanor offenses against persons when committed as part of a burglary, or carrying a dangerous weapon as part of a burglary. The enhanced penalties address the examples provided by USAO—in addition to any liability for attempted sexual assault (a major felony) and weapon possession crimes that appears to be within the scope of the USAO’s hypothetical fact pattern.
 - The RCC’s penalty recommendations for burglary reflect a sharp decrease from the current D.C. Code statutory penalties of 30 years imprisonment for unenhanced first degree burglary (60 years if while-armed) and 15 years imprisonment for unenhanced second degree burglary (45 years if while-armed) which are outdated and far more severe than is proportionate under modern national norms, D.C. judicial practice, or public opinion polling of D.C. voters.
 - Nationally, for burglary, 78.3% of prisoners served less than 3 years, 91.5% of prisoners served less than 5 years, and 98.1% of prisoners served less than 10 years before release, when the burglary was the most serious crime (so presumably not concurrent to another penalty).⁵⁵⁴ These statistics appear to

⁵⁵⁴ U.S. Department of Justice Bureau of Justice Statistics, Time Served in State Prison, 2016, November 2018 at 3.

- include all forms of burglary, including enhanced forms of burglary due to prior convictions or presence of a weapon.
- D.C. court data on burglary sentences pose analysis challenges because such a high percentage of the sentences—60% of first degree burglary and 24% of second degree burglary—run concurrent to another sentence for a more serious crime in the case.⁵⁵⁵ For all first degree burglary sentences in the Advisory Group Memorandum #28 (Statistics on District Adult Criminal Charges and Convictions), the median sentence (50% of sentences were greater) for first degree burglary, including enhancements, was 60 months, and the 75th quantile (25% of sentences were greater) for second degree burglary, including enhancements, was 30 months. Even the most severe (97.5%) Superior court sentences for first degree burglary (180 months, including enhancements) and second degree burglary (76.5 months, including enhancements) are a small fraction of the enhanced burglary penalties authorized by current statute (720 months and 540 months, respectively).
 - Polling of District voters also strongly suggests that while the commission of crimes in a dwelling or building merits an increased penalty, this increase is quite modest and is almost entirely washed out by the effect of the predicate offense committed inside for aggravated assault and worse felonies. See the responses to survey questions in Advisory Group Memo #27 (Public Opinion Surveys on Ordinal Ranking of Offenses).⁵⁵⁶ Critically, the polling questions asked for an assessment of a hypothetical individual's behavior as a whole, not "burglary" specifically, and there would be additional liability for other crimes under the RCC.
 - Critically important for assessing the proportionality of burglary penalties is the fact that the offense overlaps with attempts to commit, or successful completion of, a wide array of RCC crimes. These predicate crimes that a person attempts or commits in the course of a burglary carry their own

⁵⁵⁵ The CCRC will seek to conduct an analysis of non-concurrently sentenced burglary sentences in the future. The CCRC's analysis in Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions did not examine this.

⁵⁵⁶ Question 3.27 provided the scenario: "Entering an occupied home intending to steal property while armed with a gun. When confronted by an occupant, the person displays the gun, then flees without causing an injury or stealing anything." Question 3.27 had a mean response of 6.8, less than one class above the 6.0 milestone corresponding to felony assault, currently a 3 year offense in the D.C. Code. Question 1.07 provided the scenario: "Entering an occupied home intending to steal property, and causing minor injury to the occupant before fleeing. Nothing is stolen." Question 1.07 had a mean response of 6.1, just barely above the 6.0 milestone corresponding to felony assault, currently a 3 year offense in the D.C. Code. Question 1.08 "Entering an occupied home with intent to cause a serious injury to an occupant, and inflicting such an injury." Question 1.08 had a mean response of 8.5, just a half-class above the 8.0 milestone corresponding to aggravated assault (causing a serious injury), currently a 10-year offense in the D.C. Code.

penalties and must be considered in establishing proportionate penalties. The RCC authorizes proportionate punishment for criminal behavior, including the most serious forms of that behavior, but the totality of punishment is not always reflected in one offense. This change clarifies and improves the proportionality of the revised statute.

- (5) *The CCRC recommends specifying in first degree burglary that a complainant must either directly perceive the actor or enter with the actor, consistent with the similar provision in second degree burglary.*⁵⁵⁷
 - This change improves the consistency of the revised statute.
- (6) *The CCRC recommends replacing the reference to “a criminal harm involving a bodily injury, a sexual act, a sexual contact, confinement, loss of property, or damage to property” with a specific list of predicate offenses to clarify that the statute requires a categorical approach and not a conduct-specific approach.*
 - This change clarifies the revised statute and does not further change District law.
- (7) *The CCRC recommends adding voyeurism as a predicate for burglary.*⁵⁵⁸
 - This change eliminates an unnecessary gap in liability.
- (8) *The CCRC revises the definition of “dwelling” to include communal areas secured from the general public, in light of the DCCA’s recent opinion in Ruffin v. United States.*⁵⁵⁹
 - This revision does not substantively change current District law, and it improves the clarity and consistency of the revised statutes.

⁵⁵⁷ Consider, for example, a person who enters the lobby and mailroom of a large residential building, undetected by a resident on the fifth floor. That person commits a second degree burglary but not a first degree burglary.

⁵⁵⁸ The CCRC issued a recommendation for voyeurism in the First Draft of Report #42 (November 20, 2019).

⁵⁵⁹ 15-CF-1378, 2019 WL 6200245, at *3 (D.C. Nov. 21, 2019).

RCC § 22E-2702. Possession of Tools to Commit Property Crime.

- (1) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*
 - The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying possession of tools to commit property crime as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.
- (2) *The CCRC recommends replacing the reference to “a criminal harm involving the trespass, misuse, taking, or damage of property” with a specific list of predicate offenses to clarify that the statute requires a categorical approach and not a conduct-specific approach.*
 - This change clarifies the revised statute and does not further change District law.
- (3) *The CCRC recommends reclassifying this offense as a Class D misdemeanor, so that this inchoate conduct is not punished more severely than a completed third degree trespass under RCC § 22E-2601(c).*
 - This change improves the proportionality of the revised offenses.

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

- (1) *USAO, App. C at 279-280, recommends adding buildings operated by the U.S. Marshal's Service to the definition of "correctional facility," so that people who escape from the cell block at the Superior Court for the District of Columbia are punished as severely as people who escape from the Central Detention Facility and the Central Treatment Facility.*
 - The RCC partially incorporates this recommendation by revising the first degree escape from an institution or officer offense to include an escape from a cellblock operated by the U.S. Marshal's Service. The definition of "correctional facility" remains limited to facilities that are correctional in nature. This change reduces a gap in liability.
- (2) *USAO, App. C at 355 and 428, recommends classifying third degree escape from a correctional facility or officer (the failure to report or return to a halfway house) as a felony offense, particularly if the offense for which the person is detained at a halfway house is a felony.*
 - The RCC does not incorporate this recommendation because it would result in a disproportionate penalty, treating behavior of different seriousness the same. In the Second Draft of Report #41, the CCRC recommends classifying first degree escape as a Class 8 felony, second degree escape as a Class A misdemeanor, and third degree escape as a Class C misdemeanor offense. This classification improves the consistency and proportionality of the revised offense.⁵⁶⁰ The USAO recommendation would punish failing to report or return the same as a prison break or fleeing an arrest. However, these situations are much more likely to create physical danger to another person due to a hot pursuit than a failure to report to or return to a halfway house.
- (3) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*
 - The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying third degree escape from an institution or officer as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.
- (4) *The CCRC amends first degree escape from a correctional facility or officer to clarify that a person must be subject to an order and leave without permission, consistent with the commentary and the other degrees of the offense. The prior draft erroneously included the word "or" instead of "and."*
 - This change clarifies the revised statute.

⁵⁶⁰ See, e.g., D.C. Code §§ 24-241.05(b) (punishing a violation of work release as a misdemeanor, prosecutable by the Attorney General for the District of Columbia); 23-1329(c) (punishing a violation of a condition of release as a misdemeanor).

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

- (1) *USAO, App. C. at 356-357, recommends revising the statute to include people who are being supervised by PSA⁵⁶¹ and CSOSA⁵⁶² for offenses that occurred and were prosecuted in other jurisdictions. USAO explains that excluding out-of-state cases “would deprive the government of a means by which it can deter certain offenders from violating their terms of release” and “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.”*
 - The RCC does not incorporate this recommendation because it may result in overlap between criminal offenses. GPS monitoring is not limited to dangerous or high-risk offenders. Although the District’s pretrial release statute⁵⁶³ requires, in many cases, the least restrictive conditions that will reasonably assure the appearance of the person as required and the safety of any other person and the community, there is no such judicial finding required before GPS monitoring is ordered as a condition of probation or required as a sanction for a technical violation. Further, the District has no control over the underlying statutes and procedures that allow for the placement of a detection device in a case that originated out of state. Although a person who is being supervised in an out-of-state case may not be prosecuted in the District for tampering with a detection device, other deterrents exist. First, the person’s pretrial release, presentence release, probationary sentence, or supervised release may be revoked by the supervising jurisdiction. Second, the person may be charged in the District with criminal damage to property.⁵⁶⁴
- (2) *USAO, App. C at 357-358, recommends requiring an intent (instead of purpose) to tamper with the device. USAO offers hypotheticals in which a person allows a device to lose power or to be submerged in water, not because they desire to interfere with GPS monitoring, but because they want to go out and have fun. USAO notes that an intent requirement is more consistent with national legal trends than purpose.*
 - The RCC incorporates this recommendation by requiring only intent to interfere with the device. This change eliminates a possible gap in liability.
- (3) *USAO, App. C at 358, recommends codifying a definition of the phrase “interferes with the operation of the detection device,” for clarity. USAO proposes, “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*

⁵⁶¹ The Pretrial Services Agency for the District of Columbia does not supervise or monitor out-of-state cases.

⁵⁶² “Court Services and Offender Supervision Agency.”

⁵⁶³ D.C. Code § 23-1321(c)(1)(B).

⁵⁶⁴ RCC § 22E-2503.

signal and includes failing to charge the power for the device or allowing the device to lose the power required to operate.”

- The RCC partially incorporates this recommendation by including in the statute the phrase “emission or detection” instead of “operation.” This change clarifies the revised offense.
 - Further codification of a definition that refers to “failing to charge” or “allowing the device to lose the power required to operate” is potentially confusing and limits by statute the rules of administration of the device, a matter more properly left to the administering agency. The RCC commentary references failure to charge and loss of power as helpful examples of how the offense might be committed. However, given the likelihood of technology changing over time, the lack of any standard for measuring a partial “failure to charge,” differing charging responsibilities for different devices, and the need to defer to agency rules on specifics of how a monitoring device is to be used, the RCC does not codify further details.
- (4) *USAO, App. C at 358, recommends specifying that information collected by the Pretrial Services Agency for the District of Columbia is admissible on the issue of guilt notwithstanding the confidentiality provision in D.C. Code § 23-1303(d). USAO explains that the confidentiality statute was codified in 1966, long before GPS technology was commonplace. USAO proposes adding a subsection to the offense definition negating the application of the Title 23 statute to this offense.*
- The RCC incorporates this recommendation by amending the revised statute to include a subsection stating: “The restriction on divulging detection device information from the Pretrial Services Agency for the District of Columbia under D.C. Code § 23-1303(d) shall not apply to this offense.” This change improves the consistency of the revised statute.
- (5) *USAO, App. C at 359, recommends including an extraterritorial jurisdiction provision that extends to people who are under supervision in the District but tamper with the device outside of District lines. USAO explains that jurisdiction is appropriate because an element of the offense—the imposition of the monitoring requirement—has occurred in D.C. USAO also notes that, without this provision, “individuals intent on tampering with their detection devices may be incentivized to do so across jurisdictional lines in the hopes of evading criminal liability.” USAO notes that the current identity theft and credit card fraud statutes include similar language.⁵⁶⁵*
- The RCC incorporates this recommendation by amending the revised statute to include a subsection stating: “An offense under this section shall be deemed to be committed in the District of Columbia, regardless of whether the offender is physically present in the District of Columbia.” This change clarifies the revised offense and may eliminate a gap in liability.

⁵⁶⁵ D.C. Code §§ 22-3227.06; 22-3224.01.

(6) *OAG, App. C at 264, recommends revising the statutory language to include children who are on supervised release, probation, or parole, in a District of Columbia delinquency case. OAG notes that the other offense provisions apply to delinquency cases.*

- The RCC partially incorporates this recommendation by adopting language similar to OAG’s proposal: “...on supervised release, probation, or parole, in a District case.” This revision may change current District law, as described in the revised commentary. This change eliminates an unnecessary gap in liability.

RCC § 22E-3403. Correctional Facility Contraband.

(1) *USAO, App. C at 359, recommends retaining the consecutive sentencing provision that appears in current law.⁵⁶⁶ USAO says it “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.” USAO notes that the current Bail Reform Act statute⁵⁶⁷ the revised Escape statute⁵⁶⁸ require consecutive sentences.*

- The RCC does not incorporate this recommendation because it is inconsistent with other RCC and current D.C. Code offenses and judicial discretion at sentencing. As the RCC commentary explains, the consecutive sentencing provision in the current prison contraband statute has two notable features that distinguish it from any other sentencing provision in the D.C. Code or revised code. “First, it applies to persons who are pre-sentence in any jurisdiction at the time of the contraband offense.⁵⁶⁹ Second, it applies to persons who are pre-trial in any jurisdiction at the time of the contraband offense.⁵⁷⁰ Legislative history does not clarify why such an infringement on the court’s discretion is applied to contraband offenses and not to other correctional facility offenses such as escape.” The revised statute does not prohibit a sentencing judge from running a sentence for correctional facility contraband consecutive to another sentence.

(2) *OAG, App. C at 264, recommends classifying civilian clothing as Class B contraband. OAG notes, civilian clothing may be possessed to aid in someone’s escape.*

- The RCC not incorporate this recommendation because it may authorize a disproportionate penalty. In the RCC, possession of “a law enforcement officer’s uniform, medical staff clothing, or any other uniform” is punished as first degree correctional facility contraband.⁵⁷¹ And, wearing civilian clothing to impersonate a visitor may constitute an attempted escape.⁵⁷² However, it would be disproportionate to hold a person criminally liable for possession of a civilian clothing item under circumstances that are unlikely to facilitate an escape. Consider, for example, a person who possesses a single article of clothing—e.g., undergarments, tennis shoes, or a headband. This conduct may subject a

⁵⁶⁶ D.C. Code § 22-2603.03(d).

⁵⁶⁷ D.C. Code § 23-1327(d).

⁵⁶⁸ RCC § 22E-3401(e)(4).

⁵⁶⁹ By contrast, the District’s escape statute only requires the sentence be consecutive to an original sentence that is being served at the time of the escape. D.C. Code § 22-2601(b).

⁵⁷⁰ The United States Supreme Court held that a federal judge did not violate the federal Sentencing Reform Act by running a federal sentence consecutive to an anticipated state sentence after a finding of guilt by the state court. *Setser v. United States*, 566 U.S. 231 (2012).

⁵⁷¹ RCC § 22E-701 (“Class A contraband”).

⁵⁷² RCC § 22E-301.

person to disciplinary action⁵⁷³ but it does amount to a criminal offense under the RCC.

(3) *The CCRC recommends striking the exclusion from liability for protected activity as potentially confusing.*

- c. This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

⁵⁷³ See Department of Corrections, *Inmate Handbook 2015-2016* at Page 22 (available at https://doc.dc.gov/sites/default/files/dc/sites/doc/publication/attachments/DOC%20PS%204020.1C%20Inmate%20HandBook%202015_0.pdf).

RCC § 22E-4101. Possession of a Prohibited Weapon or Accessory.

- (1) *OAG, App. C at 383, recommends revising the exclusion from liability for voluntary surrender to specify that the object must be surrendered “pursuant to District or federal law,” consistent with the commentary.*
 - The RCC incorporates this recommendation by adding the specific language recommended by OAG. This change clarifies the revised offense.
- (2) *USAO, App. C at 394-395, generally recommends for offenses in Report #39 and #40 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. Specifically, with respect to the voluntary surrender exclusions, USAO recommends reclassifying the exclusion as an affirmative defense, with the defense bearing the burden of proof, and including that standard in the revised offense.⁵⁷⁴*
 - The RCC partially incorporates this recommendation by redrafting the exclusion from liability for voluntary surrender as an affirmative defense. RCC § 22E-201 in the General Part specifies the burden of production and proof for affirmative defenses throughout the RCC. This change clarifies the revised offense.
- (3) *USAO, App. C at 398, recommends changing the culpable mental state in paragraph (a)(2) from recklessness to strict liability. USAO says: “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 [sic] 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.”*
 - The RCC does not incorporate this recommendation because it would be inconsistent with the RCC culpable mental state requirements and current District law, and it may authorize disproportionate penalties. With respect to “explosives”—an undefined term whose ordinary meaning includes household and industrial chemicals—there are many legitimate reasons for a person to possess the items. With respect to firearms, there are many persons legitimately able to possess the items under some legal authority, however that authority does not necessarily extend to assault weapons and firearms specifically described in RCC § 22E-4101, Possession of a Prohibited Weapon or Accessory. The USAO recommendation would eliminate a reasonable mistake of fact defense as to the specific nature of a firearm or explosive, contrary to current District law, potentially

⁵⁷⁴ See Crim. Jur. Instr. for D.C. 6.501(C) (2019).

subjecting persons otherwise authorized to possess ordinary firearms and explosives to felony liability for possession of the item which the person reasonably did not think was a prohibited weapon.⁵⁷⁵ In contrast, the RCC requires recklessness (disregard of a substantial and unjustifiable risk) as to the nature of the firearm or explosive being a machine gun. Proof of the defendant's culpable mental state would rely on the same evidence as used throughout the RCC and current D.C. Criminal Code to prove a culpable mental state—e.g. circumstantial evidence that the person had viewed the object and it appeared to be a machine gun, etc.

- (4) *USAO, App. C at 398, recommends clarifying prosecutorial authority by revising the commentary (p. 59) to strike the following misstatement of law: “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.”*
- The RCC incorporates this recommendation by striking the relevant paragraph from the commentary. This change clarifies the revised commentary.
- (5) *The CCRC recommends relocating the merger provision in subsection (d) to a paragraph in the penalties subsection.*
- This change improves the logical organization of the statute and does not substantively change its meaning.

⁵⁷⁵ In some instances, the unlawful attribute is not apparent on visual inspection. For example, a semiautomatic weapon may be converted, either by internal modification or simply by wear and tear, into a machine gun within the meaning of the statute. *Staples v. United States*, 511 U.S. 600, 614-15 (1994). The revised statute requires that a person consciously disregard a substantial risk that the item has the characteristics of a prohibited weapon or accessory.

RCC § 22E-4102. Carrying a Dangerous Weapon.

- (1) *OAG, App. C at 383, recommends revising the statutory language to clarify that the radius of the gun-free zone is calculated from the property line and not the perimeter of a building. OAG proposes, “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.”*
 - The RCC incorporates this recommendation by adding the specific language recommended by OAG. This change clarifies the revised offense.
- (2) *OAG, App. C at 383-384, recommends revising the exclusion from liability for voluntary surrender to specify that the object must be surrendered “pursuant to District or federal law,” consistent with the commentary.*
 - The RCC incorporates this recommendation by adding the specific language recommended by OAG. This change clarifies the revised offense.
- (3) *USAO, App. C at 394-195, generally recommends for offenses in Report #39 and #40 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. Specifically, with respect to the voluntary surrender exclusions, USAO recommends reclassifying the exclusion as an affirmative defense, with the defense bearing the burden of proof, and including that standard in the revised offense.⁵⁷⁶*
 - The RCC partially incorporates this recommendation by redrafting the exclusion from liability for voluntary surrender as an affirmative defense. RCC § 22E-201 in the General Part specifies the burden of production and proof for affirmative defenses throughout the RCC. This change clarifies the revised offense.
- (4) *PDS, App. C at 412-414, recommends that all Class B misdemeanors be jury-demandable.*
 - b. The RCC incorporates this recommendation consistent with the CCRC general approach to jury demandability. As of the Second Draft of Report #41, the CCRC recommends classifying all Class B misdemeanors as jury demandable offenses.
- (5) *USAO, App. C at 423-424, recommends classifying first degree carrying a dangerous weapon as a Class 7 felony and second degree carrying a dangerous weapon as a Class 8 felony. USAO compares the penalties for the revised offense to the penalties and sentencing guidelines for the offense in current D.C. Code § 22-4504(a).*
 - The RCC does not incorporate this recommendation because it may authorize disproportionate penalties.
 - D.C. court data on these sentences poses challenges to analysis because such a high percentage of the sentences—about half—run concurrent to

⁵⁷⁶ See Crim. Jur. Instr. for D.C. 6.501(C) (2019).

another sentence for a more serious crime in the case.⁵⁷⁷ However, for all CDW sentences in the Advisory Group Memorandum #28 (Statistics on District Adult Criminal Charges and Convictions), the 75th quantile (25% of sentences were greater) of all imposed sentences (including enhancements) was 24 months or less. Actual time-to-serve was considerably less.

- Polling of District voters also strongly suggests that while carrying a firearm in a public place may warrant felony punishment, without more (e.g. display or use of the weapon), such conduct should be subject to the lowest felony class. See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.⁵⁷⁸ Critically, the polling questions asked for an assessment of a hypothetical individual’s behavior as a whole, not “burglary” specifically, and there would be additional liability for other crimes.
 - Notably, under the RCC, a person who possesses a firearm and has a prior conviction for a crime of violence commits first degree RCC § 22E-4105. Possession of a Firearm by an Unauthorized Person, a Class 8 felony.
- (6) *The CCRC recommends reordering the offense elements to clarify that the weapon must be conveniently accessible and within reach and the actor must be in a prohibited location.*
- This change clarifies, but does not substantively change, the revised offense.

⁵⁷⁷ The CCRC will seek to conduct an analysis of non-concurrently sentenced burglary sentences in the future. The CCRC’s analysis in Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions did not examine this

⁵⁷⁸ Question 4.11 provided the scenario: “Carrying a concealed pistol while walking down the street without a license to carry a pistol as required by law. The gun is not involved in any crime.” Question 4.11 had a mean response of 5.6, below the 6.0 milestone corresponding to felony assault, currently a 3-year offense in the D.C. Code. Question 4.15 provided the scenario: “Carrying a concealed, realistic but fake gun while walking down the street. The fake gun is not involved in any crime.” Question 4.15 had a mean response of 4.0, the same as the 4.0 milestone corresponding to simple assault, currently a 180-day offense in the D.C. Code. Question 4.14 provided the scenario: “Carrying a concealed pistol without a license to carry a pistol as required by law while in a school or on a playground. The gun is not involved in any crime.” Question 4.14 had a mean response of 6.4, above the 6.0 milestone corresponding to felony assault, currently a 3-year offense in the D.C. Code. Question 4.12 provided the scenario: “Carrying a concealed pistol without a license as required by law while walking within 1000 feet (about 3 football fields) of a school or playground. The gun is not involved in any crime.” Question 4.13 provided the scenario: “Carrying a concealed pistol without a license to carry a pistol as required by law while walking within 300 feet (about 1 football field) of a school or playground. The gun is not involved in any crime.” Questions 4.12 and 4.13 had mean responses of 5.9, just under the 6.0 milestone corresponding to felony assault, currently a 3 year offense in the D.C. Code.

RCC § 22E-4103. Possession of a Dangerous Weapon with Intent to Commit Crime.

- (1) *USAO, App. C at 399, recommends eliminating the provision that excludes liability for an attempt to commit an offense under this section. USAO offers a hypothetical in which a person “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.”*
 - The RCC incorporates this recommendation by striking the exclusion for attempts. This change improves the clarity and reduces a possible gap in liability in the revised statutes.
- (2) *The CCRC recommends substituting the noun “item” for “object,” consistent with other RCC provisions.*
 - This change improves the consistency of the revised statutes and does not further change District law.

RCC § 22E-4104. Possession of a Dangerous Weapon During a Crime.

(1) *USAO, App. C at 399, recommends grading possession of a firearm and possession of an imitation firearm the same. USAO says that, “If a firearm is not recovered, it is impossible to tell if it is a real firearm or an imitation firearm.” USAO raises the hypothetical, that “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” and says 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.”*

- The RCC does not incorporate this recommendation because it would be inconsistent with the general RCC approach to structuring penalties for weapon-related crimes and may authorize disproportionate penalties.
- First, where a dangerous weapon or imitation dangerous weapon is used against or displayed to a person (as in the USAO hypothetical), the RCC provides additional punishment for that conduct in its offenses against persons in Subtitle II, regardless of whether it was a real or imitation weapon. For example, the RCC raises the penalty otherwise applicable to an assault causing significant bodily injury from fourth degree to third degree.⁵⁷⁹ The separate crime of merely possessing—but not using or displaying—a dangerous weapon in RCC § 22E-4104 is thus primarily intended to capture conduct that is unknown and unseen by the complainant but found on the actor at time of arrest or otherwise subsequently linked to the crime. And, it is precisely in those instances where a weapon is apprehended (though never displayed or used in the crime) that the distinction between an imitation and a real dangerous weapon is a fact available to the prosecution.
- Second, where a weapon is possessed but not used or displayed (and so makes no impression on the complainant), the difference in actual dangerousness between a real and fake dangerous weapon should be reflected in the RCC penalty. The presence of an actual firearm creates a danger that someone will be fatally injured, intentionally or inadvertently. Polling of District voters also suggests that carrying a fake, concealed firearm in a public place is substantially lower level conduct as compared to a real firearm.⁵⁸⁰

⁵⁷⁹ Such a person could certainly be charged with both committing an assault using a dangerous or imitation dangerous weapon and possessing a dangerous weapon during a crime, but at sentencing a conviction would not be entered for more than 1 of these overlapping offenses per RCC § 22E-4119, Limitation on Convictions for Multiple Related Weapon Offenses.

⁵⁸⁰ See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses. Compare the following. Question 4.11 provided the scenario: “Carrying a concealed pistol while walking down the street without a license to carry a pistol as required by law. The gun is not involved in any crime.” Question 4.11 had a mean response of 5.6, below the 6.0 milestone corresponding to felony assault, currently a 3-year offense in the D.C. Code. Question 4.15 provided the scenario: “Carrying a concealed, realistic but fake gun while walking down the street. The fake gun is not

- (2) *USAO, App. C at 399-400, supports the RCC’s expansion of the revised offense to include as predicates all offenses against persons, but recommends retaining all of the predicate offenses in the current definition of “dangerous crime,”*⁵⁸¹ *including drug offenses, arson, and theft. USAO states, “Arson is a very serious offense that can often result in substantial injury to a person or to property” and that certain types of conduct currently penalized as robbery are punished as theft under the RCC. USAO also says that, because in the RCC “certain types of conduct currently penalized as Robbery would not be included in Subtitle II of the Title 22 of the RCC,” USAO “recommends including Theft as an additional offense listed in subsections (a)(2) and (b)(2).”*
- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. RCC § 22E-4104, Possession of a Dangerous Weapon During a Crime provides additional liability for some crimes where the mere presence of an unused, un-displayed dangerous weapon raises the risk to a complainant. Such increased risk occurs when there is a reasonable likelihood that the actor will confront a complainant in a violent encounter. Arson is not included as a predicate crime to RCC § 22E-4104 because, unlike current law, the RCC arson statute generally does not require as an element endangerment of human life or any confrontation with another person and is merely a property crime. If a person is attacking another person by means of fire, there would be liability for assault, homicide, or other offenses against persons which are predicates for RCC § 22E-4104. Regarding the USAO recommendation that the predicate crimes include all thefts, under current law and the RCC, thefts do not require as an element any bad intent or confrontation with another person. Forms of robbery under current law that do not involve a violent confrontation between the actor and complainant have been reorganized as forms of theft in the RCC, but it is consistent with limiting RCC § 22E-4104 to conduct involving a violent encounter that theft not be a predicate offense.
 - Regarding drug offenses, while RCC § 22E-4104 does not include such offenses as predicates, the RCC separately includes a penalty enhancement for possessing a dangerous weapon during a drug crime.⁵⁸²
- (3) *USAO, App. C at 400, recommends eliminating the requirement that the defendant possess the weapon “in furtherance” of the underlying crime and instead only require that the defendant possess the weapon “while” committing the underlying crime. USAO states, “A defendant creates an increased risk of danger by introducing a weapon to an offense.” (Emphasis added.) USAO also explains, “there is an additional level of risk created when a defendant has a weapon readily available” and notes that a firearm could cause someone to be injured, intentionally or inadvertently. (Emphasis added.)*

involved in any crime.” Question 4.15 had a mean response of 4.0, the same as the 4.0 milestone corresponding to simple assault, currently a 180-day offense in the D.C. Code.

⁵⁸¹ D.C. Code § 23-1331.

⁵⁸² RCC § 22E-48-904.01b(g)(6)(B).

- The RCC does not incorporate this recommendation because it would introduce an unclear, expansive scope of liability into the revised statutes, and may authorize disproportionate penalties. USAO’s proposed language, “while committing” an offense, is unclear and appears to include constructive possession of a weapon far away from the offense. For example, a person who commits a simple assault in one part of the city could be convicted of first degree possession of a weapon during a crime by virtue of having a lawfully registered handgun in their home miles away, even if their possession of the handgun has no connection to the crime and poses not additional threat to the complainant. Even if the dangerous weapon is located near where the crime occurs, the USAO’s proposed language also is not restricted to deliberately “introducing” a dangerous weapon into a situation. For example, any assault occurring in or near a location where knives are stored, such as a kitchen, may be subject to liability under the USAO language, given that there is no necessary connection between the weapon and the crime. In contrast, RCC § 22E-4104 requires a link between the possession of the weapon and the crime in some manner. Other RCC crimes provide liability for conduct where an actor brings a dangerous weapon to a location where a crime is committed (e.g. RCC § 22E-4102, Carrying a Dangerous Weapon) or displays or uses a dangerous weapon (see RCC offenses against persons under Subtitle II with gradations that authorize higher penalties for use or display of a weapon).
- (4) *USAO, App. C at 400, recommends eliminating the provision that excludes liability for an attempt to commit an offense under this section. USAO offers a hypothetical in which a person “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.”*
- The RCC incorporates this recommendation by striking the exclusion for attempts. This change improves the clarity and reduces a possible gap in liability in the revised statutes.
- (5) *USAO, App. C at 423-425, recommends classifying first degree possession of a dangerous weapon during a crime as a Class 6 felony and second degree possession of a dangerous weapon during a crime as a Class 7 felony. If the CCRC does not accept USAO’s recommendation to include imitation firearms in the first degree of the offense,⁵⁸³ USAO recommends ranking both first and second degree as Class 6 felonies. USAO compares the penalties for the revised offense to the penalties for the offense in current D.C. Code § 22-4504(b). USAO says it “opposes reducing maximum penalties for firearms offenses at a time when firearms violence is a threat to the public safety of the community.” USAO also says the ranking “does not adequately deter possession of firearms or the use of firearms during the commission of offenses against others.”*

⁵⁸³ App. C at 399.

- The RCC does not incorporate this recommendation because it may authorize a disproportionate penalty. As a threshold matter the CCRC recognizes that firearm violence has been a threat to the public safety of the community not only recently but throughout the past century and recent decades. In this timespan, the laws and penalties and crime rates associated with gun violence have varied widely. The CCRC also notes that, while stating the CCRC's recommendation would not adequately deter commission of the offense, USAO also does not assert that either its proposed penalty rankings for the revised offense or the current mandatory minimum and statutory maximum penalty in the D.C. Code adequately deter either the possession of firearms or the use of firearms during the commission of offenses against others. Unfortunately, neither the current penalties nor prior penalties have, in fact, stopped gun violence. The CCRC wholeheartedly agrees that gun violence is serious and serious efforts to deter⁵⁸⁴ gun violence must be taken. However, the relevant question is what the specific penalty should be for this particular offense of possessing a firearm or other dangerous weapon during a crime of violence as compared to other offenses, including the assault, robbery, rape, or homicide itself.
- As described in prior responses (see, e.g., response to USAO comments on § 22E-2701 (Burglary), the RCC authorizes proportionate punishment for criminal behavior, including the most serious forms of that behavior, but the totality of punishment is not always reflected in one offense. With respect to dangerous weapon involvement in an offense, the RCC punishes the actual use or display of a weapon by providing gradations with higher penalties for such conduct (or attempted, solicited, or other inchoate conduct) directly in offenses. Other RCC crimes, such as this one, provide liability when a person only possesses (but does not use or display) a dangerous weapon during a predicate crime or possesses a dangerous weapon with intent at some later time to commit a crime. These many overlapping offenses in the RCC are necessary to ensure liability for involvement of a weapon with a crime, whether far removed or directly involved in a crime. However, these many overlapping offenses aim at the same social harm of involving a dangerous weapon with a crime, and so multiple convictions and multiple punishments for such overlapping crimes would be disproportionate.
- With regard to the possession of a dangerous weapon during a crime, the CCRC recommendation recognizes that the degree of additional punishment due to the mere possession of a dangerous weapon during a

⁵⁸⁴ See U.S. Department of Justice, National Institute of Justice, *Five Things About Deterrence*, NCJ 247350 (May 2016) at 1 (“1. The *certainty* of being caught is a vastly more powerful deterrent than the punishment... 2. Sending an individual convicted of a crime to prison isn't a very effective way to deter crime... 3. Police deter crime by increasing the perception that criminals will be caught and punished... 4. Increasing the severity of punishment does little to deter crime... 5. There is no proof that the death penalty deters criminals.”).

crime should be less than the display or use of the weapon during the crime. (Indeed, to the extent that penalty differences are a factor in deterring commission of criminal acts, there is a strong social interest in incentivizing those committing crimes to not pull out a gun or knife.) The mere possession crime in RCC § 22E-4104 (and its penalty classification) is not intended to account for the actual use or brandishing of a dangerous weapon, let alone to account for the whole harm done during the crime. At least in the case of serious felonies, the physical injury or sexual intrusion experienced by the complainant almost always far outweighs the means (a dangerous weapon) by which the crime was committed.

- The RCC’s penalty recommendations for RCC § 22E-4104 reflect a sharp decrease from the current D.C. Code § 22-4504(b) statutory penalties of 5 (mandatory) to 15 years imprisonment cited by USAO, however that offense is limited to possessing a firearm during a crime of violence. In contrast, RCC § 22E-4104 applies much more broadly and includes minor assaults and other offenses against persons. Yet, even as applied to the possession of firearms during crimes of violence, the statutorily-authorized penalties for D.C. Code § 22-4504(b) appear to be outdated and more severe than is proportionate according to public opinion polling of D.C. voters, and under D.C. judicial practice.
 - D.C. court data on D.C. Code § 22-4504(b) (PFCOV) sentences pose analysis challenges because such an extremely high percentage of the sentences—over 90%—run concurrent to another sentence for a more serious crime in the case.⁵⁸⁵ However, for all first PFCOV sentences in the Advisory Group Memorandum #28 (Statistics on District Adult Criminal Charges and Convictions), the median sentence (50% of sentences were greater) was 60 months and the 75th quantile (25% of sentences were greater) for was 84 months. That means that between 50-75% of the judicially-imposed sentences were at the 5 year (60-month) mandatory minimum. Even the most severe (97.5%) Superior court sentences for PFCOV (120 months) are far short of the 180-month penalties authorized by current statute.
 - Polling of District voters also strongly suggests that while the mere possession of a dangerous weapon during a crime merits an increased penalty, this increase is quite modest and is almost entirely washed out by the seriousness of the predicate offense for any crime of violence. See the responses to survey questions in Advisory Group Memo #27 (Public Opinion Surveys on Ordinal Ranking of Offenses).⁵⁸⁶ Critically, the polling

⁵⁸⁵ The CCRC will seek to conduct an analysis of non-concurrent sentences in the future. The CCRC’s analysis in Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions did not examine this.

⁵⁸⁶ The effect of a dangerous weapon being present during a crime was a primary focus in the design of the CCRC surveys and many questions address such scenarios, including the following questions. Question

questions asked for an assessment of a hypothetical individual's behavior as a whole, not "possessing a dangerous weapon during a crime" specifically, and there would be additional liability for the predicate crimes under the RCC.

1.03 provided the scenario: "Shooting with a gun, causing serious injury." Question 1.03 had a mean response of 9.3, just more than one class above the 8.0 milestone for causing a serious injury by any means (corresponding to aggravated assault, currently a 10-year offense in the D.C. Code). Question 1.16 provided the scenario: "Robbing someone's wallet by threatening to kill them. The robber secretly carried, but never displayed, a gun." Question 1.16 had a mean response of 6.2, just barely above the 6.0 milestone corresponding to felony assault, currently a 3-year offense in the D.C. Code. Question 1.06 provided the scenario: "Entering an occupied home intending to steal property, but fleeing without being seen, and without taking anything. The person secretly carried a gun, but never displayed it." Question 1.06 had a mean response of 5, well below the 6.0 milestone corresponding to felony assault, currently a 3-year offense in the D.C. Code.

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

- (1) *OAG, App. C at 384, recommends revising the commentary to clarify the meaning of the phrase “[a] District offense that is currently punishable by imprisonment for a term exceeding 1 year, or a comparable offense in another jurisdiction.” (Emphasis added.) OAG offers an example in which a person has a conviction for a crime that was (at the time of the conviction) punishable by more than a year but is now (at the time of the unlawful possession) only a misdemeanor. OAG also recommends 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.*
 - The RCC partially incorporates this recommendation by revising the statutory language to more straightforwardly refer to the defined term “comparable offense,” which includes offenses under prior District law and offenses committed in other jurisdictions.⁵⁸⁷ This change clarifies the revised statute.
- (2) *OAG, App. C at 384 n. 8, recommends revising the exclusion from liability for voluntary surrender to specify that the object must be surrendered “pursuant to District or federal law,” consistent with the commentary.*
 - The RCC incorporates this recommendation by adding the specific language recommended by OAG. This change clarifies the revised offense.
- (3) *USAO, App. C at 394-195, generally recommends for offenses in Report #39 and #40 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. Specifically, with respect to the voluntary surrender exclusions, USAO recommends reclassifying the exclusion as an affirmative defense, with the defense bearing the burden of proof, and including that standard in the revised offense.⁵⁸⁸*
 - The RCC partially incorporates this recommendation by redrafting the exclusion from liability for voluntary surrender as an affirmative defense. RCC § 22E-201 in the General Part specifies the burden of production and proof for affirmative defenses throughout the RCC. This change clarifies the revised offense.
- (4) *OAG, App. C at 384-385, recommends revising the statutory language to clarify that a person is strictly liable with respect to being subject to an order to not possess any firearms. OAG explains that, relying on RCC § 22E-207, it is concerned that 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.*
 - The RCC partially incorporates this recommendation by revising RCC § 22E-207(a) to state, “Any culpable mental state or strict liability specified

⁵⁸⁷ RCC § 22E-701 defines the term “comparable offense” to mean “a crime committed 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 corresponding District crime.”

⁵⁸⁸ See Crim. Jur. Instr. for D.C. 6.501(C) (2019).

in an offense applies to all subsequent result elements and circumstance elements until another culpable mental state or strict liability is specified.”

This change improves the clarity and consistency of the revised statutes and does not further change District law.

(5) *USAO, App. C at 400-401, recommends eliminating the requirement that an out-of-state conviction is comparable to a District offense that is punishable by more than one year in jail, instead requiring only that the out-of-state conviction be punishable by more than one year. USAO says requiring the offense to be comparable to a District felony “will lead to extensive litigation.” USAO also says, regarding identification of a comparable offense, that “it is unclear whether this would be a question of law for a judge or a question of fact for a jury to consider.”*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. Criminal laws vary significantly by jurisdiction. For example, while the District recently decriminalized personal possession of marijuana, possession of similar amounts of marijuana is a felony in some states. Subjecting an actor to criminal penalties in the District under RCC § 22E-4105 because another jurisdiction criminalizes and/or punishes behavior differently would effectively make the values and choices of that jurisdiction applicable to District residents. In contrast, under RCC § 22E-4105, any person who has been convicted of an offense that would be punished by one year if committed in the District, basing liability on the District’s specific legislative views on the seriousness of the conduct, irrespective of the maximum penalty in the other jurisdiction. Measuring a conviction in another jurisdiction by reference to District laws establishes a consistent basis for judging the conduct of criminal offenders and is consistent with current D.C. Code § 22-4503(a)(6).⁵⁸⁹
- The commentary has been updated to clarify that determination of whether a conviction in another jurisdiction is for a “comparable offense” is a matter of law.

(6) *USAO, App. C at 401, recommends eliminating the requirement that an intrafamily offense “requires as an element confinement, nonconsensual sexual conduct, bodily injury, or threats.” USAO explains that it may not be able to prove that an offense resulted in bodily injury, for example, if a complainant is uncooperative. USAO says that, “[a]t 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.*

- The RCC partially incorporates this recommendation by revising the commentary to clarify that the phrase “offense, as defined in D.C. Code §

⁵⁸⁹ Current D.C. Code § 22-4503(a)(6) disallows gun ownership by any person who has “been convicted...of an intrafamily offense, as defined in D.C. Official Code § 16-1001(8), or any similar provision in the law of another jurisdiction.” (Emphasis added.)

16-1001(8), that requires as an element confinement, nonconsensual sexual conduct, bodily injury, or threats” includes convictions for inchoate (e.g. attempt, solicitation) versions of such an offense. The crimes of attempted assault and menacing, mentioned by USAO in its comment, fall within the current RCC language and the commentary will be clarified on this point.

- However, the revised statute retains a limitation on predicate intrafamily offenses to those offenses that require as an element some type of violence or threat, rather than property or other crimes. This aligns the RCC unauthorized person criteria with the District’s firearm registration requirements, which define ‘misdemeanor crime of domestic violence’ to require ‘the use or attempted use of physical force, or the threatened use of a deadly weapon.’⁵⁹⁰ This is narrower than the District’s definition of “interpersonal violence”⁵⁹¹ which broadly includes conduct that falls short of “domestic violence” as it is commonly understood—that is, physical *abuse* of a partner or household member.⁵⁹² For example, in the District currently a person may be convicted of domestic violence and lose their right to bear arms by stealing from their roommate or by damaging the property of a stranger who, coincidentally, once dated someone that they once dated.⁵⁹³

(7) *USAO, App. C at 401, recommends eliminating the requirement that the defendant “know” that they have a prior conviction or open warrant. USAO says that a defendant “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.” USAO says “The requirement that a defendant ‘know’ about this limits the eligible conduct too far.”*

- The RCC does not incorporate this recommendation because it is inconsistent with the RCC general approach to culpable mental states and may authorize disproportionate penalties. As recognized in Supreme Court case law and repeated throughout the RCC commentary, an actor is usually required to know the facts that constitute an offense.⁵⁹⁴ In RCC § 22E-4105, among the critical facts that may subject a person to felony liability is the person’s prior conviction or be subject to a court order.

⁵⁹⁰ See 24 DCMR § 2309; see also *United States v. Castleman*, 572 U.S. 157, 162-63 (2014) (holding that Congress incorporated the common-law meaning of “force”—namely, offensive touching—in § 921(a)(33)(A)’s definition of a “misdemeanor crime of domestic violence”).

⁵⁹¹ D.C. Code § 16-1001(6). The court does not require the government to prove an interpersonal relationship before assigning a case to a domestic violence calendar or before convicting a person of a domestic violence offense.

⁵⁹² Merriam-Webster.com, “domestic violence”, 2018, available at <https://www.merriam-webster.com/dictionary/domesticviolence>.

⁵⁹³ A person may also lose their right to seal their criminal record under D.C. Code § 16-801(9)(A).

⁵⁹⁴ See, *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (“[O]ur cases have explained that a defendant generally must ‘know the facts that make his conduct fit the definition of the offense,’ even if he does not know that those facts give rise to a crime. (Internal citation omitted)”).

Requiring knowledge regarding these elements is logical because such an actor is on notice (at least constructively) of what makes their otherwise legal (and constitutionally protected) possession of a firearm is now illegal.

- Because no other culpable mental state is mentioned, the USAO recommendation appears to be that a person should be strictly liable as to whether they have a relevant prior conviction or an open warrant. The revised statute does not hold a person strictly liable for possessing a firearm when “there is, in fact, an open warrant” for their arrest. An arrest warrant—which requires only a finding of probable cause—may issue without any notice to the person that they must relinquish their lawfully owned firearms. Consider, for example, a person who is misidentified as the perpetrator of a homicide that they had no reason to know anything about.⁵⁹⁵ Under USAO’s proposed language, such a person would be guilty unlawfully possessing their otherwise-legal firearm even after being exonerated of the homicide offense. In contrast, the revised offense applies only to a person who is on the run from the law and knows that they are the subject of an arrest warrant.

(8) *USAO, App. C at 402, recommends including conditional pleas in the definition of “prior conviction.” USAO explains that it is inconsistent to exclude conditional pleas but include convictions after a trial (which may also be reversed on appeal).*

- The RCC incorporates this recommendation by striking the exclusion for conditional pleas from the definition of “prior conviction” in the revised offense. This change improves the consistency of the revised statutes.

(9) *USAO, App. C at 402, recommends removing the 10-year limitation for prior felony convictions. USAO states, “The nature and seriousness of the crime...is the same, regardless of how much time has passed since the conviction.” USAO also notes, “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.”*

- The RCC does not incorporate this recommendation because it may compromise the constitutionality of the statute and may authorize disproportionate penalties. Critically, the 10-year limitation does not apply to crimes of violence, which do not have any time limitation. In the RCC (and under the current D.C. Code, excepting drug crimes) there are virtually no offenses other than crimes of violence that carry a 10-year or more imprisonment penalty. Rather, in the RCC, the 10-year limitation applies chiefly to non-violent drug distribution, weapon possession (without use or display) crimes, and property crimes. Whether commission of these lower-level felonies is sufficiently serious to trigger a lifelong ban on a constitutional right to possess a firearm is a live question

⁵⁹⁵ See, e.g., Keith L. Alexander, *Authorities said video showed a man committed murder. He spent 13 days in jail before his defense team proved it didn’t.*, WASHINGTON POST (November 22, 2019).

undergoing litigation in multiple jurisdictions.⁵⁹⁶ However, limiting the timespan of a person’s restriction from possessing a firearm is one means of narrowly tailoring the restriction on a person’s Second Amendment rights. In part, this is because the passage of time is highly relevant to whether a person is likely to reoffend, with well-established social science research indicating a strong inverse correlation between age and recidivism.⁵⁹⁷ The stronger the connection between deprivation of a right to possess a firearm and a government rationale of protecting public safety, the more likely the statute is to withstand constitutional scrutiny in the years to come. In most instances, a person outside the 10-year window (with no other convictions that would subject them to liability for possession of a firearm by an unauthorized person) is not permitted to obtain a firearm registration certificate or a carry license and would still be subject to criminal liability under RCC § 7-2502.01, Possession of an Unregistered Firearm, Destructive Device, or Ammunition or RCC § 22E-4102, Carrying a Dangerous Weapon.

(10) *USAO, App. C at 423-424, recommends classifying first degree possession of a firearm by an unauthorized person as a Class 6 felony and second degree possession of a firearm by an unauthorized person as a Class 7 felony. USAO compares the penalties for the revised offense to the penalties for the offense in current D.C. Code § 22-4503. USAO further states that possession of a firearm by an unauthorized person should be punished more severely than carrying a dangerous weapon because it “should be a more serious offense to possess a weapon after having been convicted of a crime than to possess a weapon generally.”*

- The RCC partially incorporates this recommendation by classifying first degree possession of a firearm by an unauthorized person as a Class 8 felony and second degree possession of a firearm by an unauthorized person as a Class 9 felony.

⁵⁹⁶ One en banc decision by the 3rd Circuit has held the federal felon-in-possession statute unconstitutional as applied in that case. *Binderup v. Attorney Gen.* U.S., 836 F.3d 336 (3d Cir. 2016) (en banc), cert. denied, 137 S. Ct. 2323 (2017) (No. 16-847). Other federal jurisdictions have generally upheld as applied challenges on a range of facts. The D.C. District Court recently upheld a challenge to the federal felon-in-possession statute but stated:

“This case thus does not involve some sort of nominal crime that has been labeled a felony, perhaps with the purpose of triggering section 922(g)(1)’s applicability. In such a situation, a lengthy term of imprisonment for a nominal crime—two years in prison for jaywalking or leaving bubble gum on the sidewalk outside the White House, for instance—could be deemed unconstitutional if found to be disproportionate to the underlying conduct such that the crime would no longer qualify for the federal felon-in-possession ban. *See Solem v. Helm*, 463 U.S. 277, 290, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983) (“[W]e hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted.... [A] single day in prison may be unconstitutional in some circumstances.”).”

Medina v. Sessions, 279 F. Supp. 3d 281, 291 (D.D.C. 2017), *aff’d sub nom. Medina v. Whitaker*, 913 F.3d 152 (D.C. Cir. 2019), cert. denied *sub nom. Medina v. Barr*, No. 19-287, 2019 WL 6689673 (U.S. Dec. 9, 2019)

⁵⁹⁷ *See*, U.S. Sentencing Commission, *The Effects of Aging on Recidivism Among Federal Offenders*, December 2017.

- D.C. court data on these sentences poses challenges to analysis because such a high percentage of the sentences—about half—run concurrent to another sentence for a more serious crime in the case.⁵⁹⁸ However, for all felon in possession sentences in the Advisory Group Memorandum #28 (Statistics on District Adult Criminal Charges and Convictions), the 90th quantile (10% of sentences were greater) of all imposed sentences (including enhancements) was 48 months for those with a prior crime of violence conviction and 36 months for other felons. The 95th quantile (5% of sentences were greater) of all imposed sentences (including enhancements) was 60 months for those with a prior crime of violence conviction and 36 months for other felons. These numbers are significantly below the current D.C. Code penalties of 36 months (mandatory) to 180 months for prior crime of violence convictions and up to 120 months for other felony convictions. The RCC penalty recommendations, while sharply different from the current statutes, reflect only a modest decrease in penalties compared to current court practice.
- Polling of District voters also strongly suggests that while illegally possessing a firearm and having a felony conviction may warrant felony punishment, without more (e.g., display or use of the weapon), such conduct should be subject to the lowest felony classes. Moreover, polling indicates a significant distinction between prior convictions for violent crimes and non-violent crimes. See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.⁵⁹⁹ Critically, the polling questions asked for an assessment of a hypothetical individual’s behavior as a whole, and so the responses would include additional liability for other crimes (e.g. possession of an unregistered firearm).

(11) *The CCRC recommends revising sub-subparagraph (b)(2)(A)(iii) to include any intrafamily offense that requires as an element sexual conduct, as opposed to only those involving “non-consensual” sexual conduct.*

- This change eliminates a possible gap in liability.

(12) *The CCRC recommends revising the pronouns in sub-subparagraph (b)(2)(C)(ii) to clarify the actor may not violate a court order that restrains the actor from*

⁵⁹⁸ The CCRC will seek to conduct an analysis of non-concurrent sentences in the future. The CCRC’s analysis in Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions did not examine this

⁵⁹⁹ Question 4.06 provided the scenario: “Possessing at home a loaded pistol that hasn’t been registered, as required by law, and having been convicted of non-violent distribution of drugs 15 years ago. The gun is not involved in any crime.” Question 4.06 had a mean response of 5.4, below the 6.0 milestone corresponding to felony assault, currently a 3-year offense in the D.C. Code. Question 4.05 provided the scenario: “Possessing a loaded pistol at home, without registering it as required by law and having been convicted of non-violent distribution of drugs 5 years ago. The gun is not involved in any crime.” Question 4.05 had a mean response of 5.8, again below the 6.0 milestone corresponding to felony assault, currently a 3-year offense in the D.C. Code. Question 4.04 provided the scenario: “Possessing a loaded pistol at home, without registering it as required by law and having been convicted of a violent robbery 15 years ago. The gun is not involved in any crime.” Question 4.04 had a mean response of 6.1, just above the 6.0 milestone corresponding to felony assault, currently a 3-year offense in the D.C. Code.

assaulting, harassing, stalking, or threatening any person, provided that the actor had notice and an opportunity to appear before the order was issued.

- This change clarifies the revised statute and does not further change District law.

(13) *The CCRC recommends relocating the provision prohibiting a repeat offender enhancement to the penalties subsection.*

- This change improves the logical organization of the statute and does not substantively change its meaning.

(14) *The CCRC recommends replacing the defined term “gun offense” with a reference to any offense under Chapter 41, to clarify the offense by eliminating an unnecessary cross-reference.*

- This change clarifies the revised statute.

RCC § 22E-4106. Negligent Discharge of Firearm.

(1) *OAG, App. C at 385, recommends expanding the statute to include a second degree for negligent discharge of an air rifle or torpedo. OAG cites to a medical journal that explains, “injuries from air weapons can be serious and even fatal.”*

- The RCC does not incorporate this recommendation because it would result in unnecessary overlap between offenses. Recklessly causing an injury by any means is punished as an assault under RCC § 22E-1202. Assaults involving the use of a dangerous weapon—including “[a]ny object, other than a body part or stationary object, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person”⁶⁰⁰—are graded more severely than other assaults. Only firearms, which require either registration or licensure under District law, are a predicate for criminal sanctions for negligent conduct.

⁶⁰⁰ RCC § 22E-701.

RCC § 22E-4107. Alteration of a Firearm Identification Mark.

(1) *OAG, App. C at 385-386, comments that it “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.”⁶⁰¹*

- The RCC recommends that Alteration of a Firearm Identification Mark be a Class A misdemeanor. Pending further response from OAG or USAO as to how the penalty affects their views of prosecutorial jurisdiction, the RCC maintains assignment of prosecutorial jurisdiction to USAO.

⁶⁰¹ See D.C. Code§ 23-101; *In re Prosecution of Hall*, 31 A.3d 453 (2011).

RCC § 22E-4108. Civil Provisions for Prohibitions of Firearms on Public or Private Property.

- (1) *The CCRC recommends rephrasing the exception for law enforcement officers to more closely resemble the language in other RCC provisions.*
- This change does not substantively change the revised statute or District law.

RCC § 22E-4109. Civil Provisions for Lawful Transportation of a Firearm or Ammunition.

- (1) *The CCRC recommends substituting the phrase “passenger area” for “passenger compartment,” consistent with the revised possession of an open container or consumption of alcohol in a motor vehicle offense.*⁶⁰²
- This change improves the consistency of the revised statute and does not substantively change its meaning.

⁶⁰² RCC § 25-1001.

RCC § 22E-4110. Civil Provisions for Issuance of a License to Carry a Pistol.

- (1) *The CCRC recommends revising subsection (b) to apply to a resident of another “state or subdivision of the United States,” consistent with subsection (a).*
 - This change improves the consistency of the revised statute.
- (2) *The CCRC recommends removing gendered pronouns from the statutory text.*
 - This change improves the clarity and consistency of the revised statutes and does not further change District law.

RCC § 22E-4111. Unlawful Sale of a Pistol.

- (1) *The CCRC recommends reclassifying this offense from a Class A misdemeanor to a Class 9 felony, so that the penalty for distribution is more severe than the penalty for simple possession.*
- This change improves the proportionality of the revised statute.

RCC § 22E-4112. Unlawful Transfer of a Firearm.

- (1) *The CCRC recommends replacing the phrase “licensed dealer” with the phrase “dealer licensed under RCC § 22E-4114” to clarify its meaning, consistent with RCC § 22E-4113.*
 - This change improves the clarity and consistency of the revised statute and
- (2) *The CCRC recommends reclassifying this offense from a Class A misdemeanor to a Class 9 felony, so that the penalty for distribution is more severe than the penalty for simple possession.*
 - This change improves the proportionality of the revised statute.

RCC § 22E-4113. Sale of Firearm Without a License.

- (1) *OAG, App. C at 386, recommends clarifying the meaning of the phrases “retail dealer” and “wholesale dealer,” which are undefined.*
 - The RCC partially incorporates this recommendation by replacing the phrase “licensed dealer” with the phrase “dealer licensed under RCC § 22E-4114,” to eliminate any confusion between “licensed dealer” and other retailers or wholesalers. The phrases “retail dealer” and “wholesale dealer” are not defined in current law, however, there is no indication from District case law or legislative history that they mean something other than their ordinary meanings of “retailer” and “wholesaler.” “Retailer” is commonly understood to mean a business that sells small quantities of goods directly to individual consumers and “wholesaler” is commonly understood to mean a business that sells items in bulk to other businesses for resale.⁶⁰³
- (2) *OAG, App. C at 386, recommends that the commentary (p. 121) be redrafted to say, “‘Sells’ is an undefined term, intended to include any exchange of a firearm for anything of value,” as opposed to “monetary remuneration.”*
 - The RCC incorporates this recommendation by amending the revised commentary. This change clarifies the revised commentary and eliminates an unnecessary gap in liability.
- (3) *The CCRC recommends striking the phrase “to engage in such activity” as superfluous.*
 - This change improves the consistency of the revised statutes and does not further change District law.
- (4) *The CCRC recommends reclassifying this offense from a Class A misdemeanor to a Class 9 felony, so that the penalty for distribution is more severe than the penalty for simple possession.*
 - This change improves the proportionality of the revised statute.

⁶⁰³ Merriam-Webster.com, “retail”, 2020, available at <https://www.merriam-webster.com/dictionary/retail>; Merriam-Webster.com, “wholesale”, 2020, available at <https://www.merriam-webster.com/dictionary/wholesale>;

RCC § 22E-4114. Civil Provisions for Licenses of Firearms Dealers.

- (1) *OAG, App. C at 386-388, recommends revising the statutory language to prohibit the sale of a pistol to an unknown and unidentified purchaser. OAG explains that current law requires “the purchaser is personally known to the seller or shall present clear evidence of his or her identity.”*⁶⁰⁴
 - The RCC incorporates this recommendation by revising the statutory language to bar all sales to persons under 21 years of age and persons unknown to the seller who does not present clear evidence of the purchaser’s identity. This change improves the clarity and consistency of the revised statutes and eliminates an unnecessary gap in law.
- (2) *The CCRC recommends replacing the word “thereof” with the phrase “of a firearm or imitation firearm.”*
 - This change clarifies the revised statute and does not further change District law.
- (3) *The CCRC recommends revising the statutory language to state “firearm sales” rather than “business” shall occur only in the building designated on the license. Read literally, the word “business” may be understood to include work unrelated to firearm transactions, such as accounting, marketing, and banking.*
 - This change clarifies the revised statute and may improve its proportionality.
- (4) *The CCRC recommends striking the word “color” from paragraph (b)(6). It is unclear why current D.C. Code § 22-4510(a)(5) requires a firearms dealer to record this information. “Color” is a protected trait under the District’s Human Rights Act.*⁶⁰⁵
 - This change improves the consistency of the revised statute.
- (5) *The CCRC recommends removing gendered pronouns from the statutory text.*
 - This change improves the clarity and consistency of the revised statutes and does not further change District law.

⁶⁰⁴ D.C. Code § 22-4510(a)(3).

⁶⁰⁵ D.C. Code § 2-1401.01 et. seq.

RCC § 22E-4115. Unlawful Sale of a Firearm by a Licensed Dealer.

(1) *The CCRC recommends revised the statute to prohibit any violation of subsection RCC § 22E-4414(b), as the reference to paragraphs (b)(1) – (6) in the previous draft was a typographical error.*

- This change clarifies the revised statute.

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

- (1) *OAG, App. C at 388, recommends either defining or striking the phrase “satisfactory evidence.” OAG explains, “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.”*
 - The RCC incorporates this recommendation by striking the phrase “satisfactory evidence.” This change clarifies the revised statute.
- (2) *The CCRC recommends amending the definition of “dangerous article” to include firearms and restricted explosives (as defined in RCC § 22E-701) and exclude other dangerous weapons. The RCC defines the term “dangerous weapon” to include “[a]ny object, other than a body part or stationary object, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person.”⁶⁰⁶ For example, a motor vehicle, a curling iron, or a bottle of bleach may become a dangerous weapon by virtue of how it is used. The revised statute does not treat these items (which have many uses other than weaponry) as a nuisance that is subject to surrender and destruction.*
 - This change clarifies the revised provision and better aligns it with current District law.⁶⁰⁷
- (3) *The CCRC recommends amending subsection (c) to include the subheading “Hearing procedures,” so that the subsection is not left blank.*
 - This change improves the consistency of the revised offenses and does not further change District law.
- (4) *The CCRC recommends removing gendered pronouns from the statutory text.*
 - This change improves the clarity and consistency of the revised statutes and does not further change District law.

⁶⁰⁶ RCC § 22E-701.

⁶⁰⁷ D.C. Code § 22-4517 defines “dangerous article” to mean “(1) Any weapon such as a pistol, machine gun, sawed-off shotgun, blackjack, slingshot, sandbag, or metal knuckles; or (2) Any instrument, attachment, or appliance for causing the firing of any firearms to be silent or intended to lessen or muffle the noise of the firing of any firearms.”

RCC § 22E-4118. Exclusions from Liability for Weapon Offenses.

- (1) *USAO, App. C at 395, recommends revising the statutory language to clarify the burden of proof for each exclusion from liability.*
 - The RCC partially incorporates this recommendation by amending RCC § 22E-201 in the General Part to specify the burden of production and proof for exclusions and affirmative defenses throughout the RCC. This change clarifies the revised offense and improves the consistency of the revised statutes.
- (2) *USAO, App. C at 402, recommends that the exclusion from liability apply only to military service members in paragraph (b)(1) and Department of Corrections employees in paragraph (b)(6) while they are on duty. USAO states that this recommendation tracks current law.*
 - The RCC partially incorporates this recommendation by adding “on-duty” at the beginning of paragraphs (b)(5) and (b)(6). Unlike military members and sworn police officers, special police, campus police, and corrections officers are generally not authorized to carry service weapons or to make arrests outside of the premises they are employed to protect.⁶⁰⁸ Notably, however, this may constitute a change in law by contravening prior case law holding that a Department of Corrections employee may carry a firearm whether on or off duty under an application of the last antecedent rule.⁶⁰⁹ This change reduces an unnecessary gap in liability.
- (3) *The CCRC recommends revising paragraph (b)(4) to strike the phrase “in a location” as potentially confusing.*
 - This change clarifies the revised statute and does not further change District law.

⁶⁰⁸ See, e.g., D.C. Code § 23-582; 6A DCMR § 1103.

⁶⁰⁹ See *United States v. Pritchett*, 470 F.2d 455, 459 (D.C. Cir. 1972) (“We agree that there would be great legislative merit to a statute which prohibited such persons from carrying a pistol when off duty, unless licensed to do so, however, because of the language of the statute and its legislative history, we are unable to find such to be the congressional intent of the present statute for a number of reasons...”). Notably, *Pritchett* is persuasive, not binding, authority as the ruling occurred after establishment of the D.C. Court of Appeals as the District’s highest (and only) appellate court.

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

(1) *USAO, App. C at 403, recommends wholly eliminating the merger provision. No explanation is provided except for subsection (b), which USAO says it “particularly opposes.” USAO says there “is necessarily a greater risk of harm introduced to a situation when a firearm is involved.” USAO also states with respect to (b)(3), “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.” USAO says, “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.”*

- The revised statute does not incorporate this recommendation because it would be inconsistent with the general RCC approach to structuring penalties for weapon-related crimes and may authorize disproportionate penalties. As described in prior responses (see, e.g., response to USAO comments on § 22E-2701 (Burglary)), the RCC authorizes proportionate punishment for criminal behavior, including the most serious forms of that behavior, but the totality of punishment is not always reflected in one offense. With respect to dangerous weapon involvement in an offense, the RCC punishes the actual use or display of a weapon by providing gradations with higher penalties for such conduct (or attempted, solicited, or other inchoate conduct) directly in offenses. Other RCC crimes provide liability when a person only possesses (but does not use or display) a dangerous weapon during a predicate crime or possesses a dangerous weapon with intent at some later time to commit a crime. These many overlapping offenses in the RCC are necessary to ensure liability for involvement of a weapon with a crime, whether far removed or directly involved in a crime. However, these many overlapping offenses aim at the same social harm of involving a dangerous weapon with a crime, and so multiple convictions and multiple punishments for such overlapping crimes would be disproportionate.
- Regarding the USAO statement that a person should have to be convicted of the specific gradation of an offense that involves a dangerous weapon in order for the sentencing for RCC § 22E-4119 to limit convictions, such a change would permit the “stacking” of weapon and other types of penalty enhancements. For instance, the USAO could charge a form of assault that is enhanced on the basis of the complainant’s status (e.g. age), and separately charge a weapon crime, subjecting the actor to an aggregate imprisonment penalty that is far greater than if only one enhancement (weapon or victim status) was achieved. While in principle the stacking of enhancements may appear desirable because it reflects many ways in which a crime may be categorically more serious, in practice the stacking of enhancements can quickly create extremely high punishments that dwarf the predicate conduct. For example, an assault inflicting significant bodily injury is more serious and arguably deserves some greater

punishment if the complainant is over 65 years of age, the complainant is a District public official, the actor has a prior conviction for felony assault, the actor used a dangerous weapon, and the actor committed the crime based on bias toward the complainant. However, raising the imprisonment penalty for each type of enhancement would result in an increase of four or five penalty classes, equating the conduct with the most serious rapes and forms of homicide—and under the current D.C. Code the penalty liability is equal to that of murder.

- To avoid such disproportionate outcomes, the RCC recommends limiting the stacking of penalty enhancements. Individual offenses incorporate (but cap) several types of possible enhancements, while the general enhancements in RCC Chapter 6 (e.g. repeat offender or hate crimes) do stack additional penalties. Within the RCC’s authorized range of statutory penalties, limiting stacking as it does, a sentencing judge retains sufficient discretion to weight the seriousness of the conduct taking into account the seriousness of the particular facts of the case which may or may not be captured in statutorily-specified enhancements. The RCC’s limited form of stacking produces aggregate penalties within the range of most current court sentencing decisions and better accords with polling of District voters.⁶¹⁰ The RCC seeks to ensure that the totality of criminal punishment an actor faces for conduct is proportionate to that conduct—but that approach requires examining all the relevant crimes an actor may be charged with (and punished for) based on the actor’s conduct. Unlike the current D.C. Code, the RCC does not examine just one crime (and its enhancements) to see if the punishment is proportionate to the conduct, because such a comparison misrepresents the total liability an actor faces.
- (2) *The CCRC recommends striking as superfluous the phrase “A person may be found guilty of any combination of the following offenses for which the person satisfies the requirements for liability, provided that...”*
- This change clarifies and does not substantively change the revised statute.

⁶¹⁰ See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

RCC § 22E-4120. Severability.

- (1) *The CCRC recommends striking this provision. The D.C. Council Office of General Counsel Legislative Drafting Manual at 7.4. Severability clauses, states that courts infer severability into District laws, so a severability clause is not necessary. This construction is also explicitly codified at D.C. Official Code § 45-201.*

RCC § 22E-4201. Disorderly Conduct.

- (1) *OAG, App. C at 264-265, recommends amending the commentary to cure an explanation that is circular. OAG explains that the commentary defines “abusive speech” to mean “fighting words” and defining “fighting words” to mean “abusive speech.”*
 - The RCC incorporates this recommendation by revising the commentary to cure the circularity described. The explanatory note now refers only to “abusive speech” and a footnote explains that “abusive speech” has the same meaning as “fighting words” in the *Chaplinsky* line of cases. This change clarifies the revised commentary.
- (2) *OAG, App. C at 408, recommends that disorderly conduct be reclassified as a Class D misdemeanor with a penalty of 1 month/10 days.*
 - The RCC incorporates this recommendation by reclassifying disorderly conduct as a Class D misdemeanor. This change improves the proportionality of the revised offenses.
- (3) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*
 - The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying disorderly conduct as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.
- (4) *The CCRC recommends striking the exclusion from liability for protected activity as potentially confusing.*
 - This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.
- (5) *The CCRC recommends removing gendered pronouns from the statutory text.*
 - This change clarifies the revised statutes and does not further change District law.

RCC § 22E-4202. Public Nuisance.

- (1) *OAG, App. C at 265, recommends clarifying in commentary the meaning of the word “lawful” before the phrase “religious service, funeral, or wedding.” OAG offers a hypothetical in which the service runs afoul of a District regulation such as an occupancy limit.*
 - The RCC incorporates this recommendation by revising the commentary to clarify that the word “lawful” requires that the gathering or event not violate another District or federal law. Consider, for example, a wedding that is blasting music in violation of the District’s noise control regulations.⁶¹¹ A neighbor who disrupts the event by shouting, “Hey, keep it down!” does not commit a public nuisance offense. The statute also specifies that the actor is strictly liable as to whether the event is lawful. This change clarifies the revised offense.
- (2) *OAG, App. C at 265, recommends codifying the definition of “an interruption of quiet enjoyment” that appears in the commentary: “a significant interference with the in-home activities of a person of ordinary sensitivity.”*
 - The RCC partially incorporates this recommendation by revising the statutory language to clarify that the complainant’s enjoyment must be objectively reasonable. The phrase “A person’s quiet enjoyment of his or her residence” is amended to, “A person’s reasonable, quiet enjoyment of their dwelling...” This change clarifies the revised offense.
- (3) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*
 - The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying public nuisance as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.
- (4) *The CCRC recommends striking the exclusion from liability for protected activity as potentially confusing.*
 - This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

⁶¹¹ 20 DCMR § 2701.

RCC § 22E-4203. Blocking a Public Way.

- (1) *OAG, App. C at 265-266, recommends revising the statutory language to clarify that it is the person who must be on public land, not the entrance. OAG offers a hypothetical in which a person stands on a public sidewalk blocking access to the entrance to a drug store on private property.*
 - The RCC incorporates this recommendation by adopting OAG’s proposed language: “While on land or in a building that is owned by a government...”⁶¹² This change clarifies the revised statute.
- (2) *OAG, App. C at 266, recommends revising the commentary to clarify that the police are not required to give a new warning each time they see a person blocking the same public way. OAG cites the legislative history,⁶¹³ which explains, “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.” The Committee offered an example in which a person is asked by the same officer day after day to move away from blocking a store entrance, and then the officer says, “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 apparently expected that such a person could be arrested without another warning.*
 - The RCC incorporates this recommendation by adding the relevant language from the report to a footnote in the commentary. This change clarifies the revised statute.
- (3) *OAG, App. C at 266-267, recommends requiring recklessness (instead of knowledge) that the accused’s actions constitute a continuance or resumption of the blocking conduct that was the object of the law enforcement officer order. OAG offers a hypothetical in which a person returns to the same location a half an hour after being told to leave, but is not practically certain that their actions are a resumption of the blocking conduct.*
 - The RCC does not incorporate this recommendation because the change would be inconsistent with other offenses. Consistent with the revised disorderly conduct offense,⁶¹⁴ blocking a public way requires that a person is practically certain that they are violating the officer’s directive. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.⁶¹⁵

⁶¹² The corresponding commentary is revised 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.”

⁶¹³ Report on Bill 18-425, “Disorderly Conduct Amendment Act of 2009,” Council of the District of Columbia Committee on Public Safety and the Judiciary (November 19, 2010) at Page 7.

⁶¹⁴ RCC § 22E-4201(a)(2)(D) (“Knowingly continues or resumes fighting with another person after receiving a law enforcement officer’s order to stop such fighting.”).

⁶¹⁵ There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to “mak[e] a person legally responsible for the consequences of his or her act or omission” regarding “each of the statutory elements that criminalize otherwise innocent conduct,” even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560,

- (4) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*
- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying blocking a public way as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.
- (5) *The CCRC recommends revising the phrases “such conduct” and “such blocking” to instead state “the blocking.”*
- This change improves the clarity and consistency of the revised statutes and does not further change District law.
- (5) *The CCRC recommends striking the exclusion from liability for protected activity as potentially confusing.*
- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States v. X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette v. United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black’s Law Dictionary 1547 (10th ed. 2014)); see also *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (“[O]ur cases have explained that a defendant generally must ‘know the facts that make his conduct fit the definition of the offense,’ even if he does not know that those facts give rise to a crime.” (Internal citation omitted)).

RCC § 22E-4204. Unlawful Demonstration.

- (1) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*
 - The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying unlawful demonstration as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.
- (2) *The CCRC recommends striking the exclusion from liability for protected activity as potentially confusing.*
 - This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.
- (3) *The CCRC recommends striking the jury trial provision as unnecessary. As of the Second Draft of Report #41, the CCRC recommends classifying unlawful demonstration as a Class D misdemeanor and recommends generally classifying all Class D misdemeanors as non-jury demandable offenses.*
 - This change improves the consistency of the revised statutes and does not further change District law.
- (4) *The CCRC recommends revising the phrases “such conduct” and “such demonstration” to instead state “the demonstration.”*
 - This change improves the clarity and consistency of the revised statutes and does not further change District law.
- (5) *The CCRC recommends repealing D.C. Code § 10-503.17, because it is identical to language in a federal statute that has been held unconstitutional on First and Fifth Amendment grounds.⁶¹⁶*
 - This change removes a criminal statute that has been held to be unconstitutional.

⁶¹⁶ *Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575, 583 (D.D.C. 1972) (concerning 40 U.S.C. § 193g).

RCC § 22E-4205. Breach of Home Privacy.

- (1) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*
 - The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying breach of home privacy as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.
- (2) *The CCRC recommends amending the phrase “looks inside a dwelling” to instead state “observes inside a dwelling, by any means,” to clarify that the offense may be committed by remotely accessing a camera inside the dwelling.⁶¹⁷*
 - This change clarifies the revised statute and may eliminate an unnecessary gap in liability.
- (3) *The CCRC recommends striking the exclusion from liability for protected activity as potentially confusing.*
 - This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

⁶¹⁷ See, e.g., Mark Hanrahan, *Ring security camera hacks see homeowners subjected to racial abuse, ransom demands*, ABC (December 12, 2019); Jessica Holley, *Family says hackers accessed a Ring camera in their 8-year-old daughter’s room*, WMC5 Action News (December 10, 2019).

RCC § 22E-4206. Indecent Exposure.

(1) *OAG, App. C at 434, recommends revising the statute so that an actor cannot avoid liability when the complainant is a young child who consents to the actor's indecent exposure. Specifically, OAG suggests the inclusion of language stating: "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." OAG says that its recommendation is consistent with the D.C. Court of Appeals decision in Parnigoni v. District of Columbia, holding under a prior District indecent exposure statute that consent by a child under 16 years of age was ineffective by that statute.*⁶¹⁸

- The RCC does not incorporate this recommendation because it would be inconsistent with the RCC general approach to consent by young persons, and may create unnecessary overlap with RCC § 22E-1304, Sexually Suggestive Conduct with a Minor.
- First, the RCC definition of "consent" in RCC § 22E-701 excludes apparent consent by a person who "Because of youth, mental illness or disorder, or intoxication, is unable to make a reasonable judgment as to the nature or harmfulness of the conduct to constitute the offense or to the result thereof." This definition does not set a bright-line age as to the age below which consent is ineffective, as the age at which a person can make a reasonable judgement as to the nature or harmfulness of conduct is a fact-specific inquiry that will vary with many factors, including the type of crime, the complainant, and the information available to the complainant. For example, a 7-year-old may be able to give consent for purposes of some matters (e.g. playing football with a 12-year-old involving what otherwise would be assaultive conduct). Bright-line age limits may improperly shield some persons from liability or fail to protect others. RCC § 22E-1302, Sexual Abuse of a Minor, and several other offenses provide bright-line age limits for sexual contact and sexual acts involving minors, but for non-sex crimes the RCC does not categorically deny minor's ability to give consent.
- Second, RCC § 22E-1304, Sexually Suggestive Conduct with a Minor provides liability (as a sex offense) for adults who cause complainants under 16 to remove clothing with intent to cause the sexual arousal or gratification of any person. The RCC offense expands liability

⁶¹⁸ *Parnigoni v. Dist. of Columbia*, 933 A.2d 823, 827 (D.C. 2007) ("But the argument misses the point. O.J. cannot have consented because he was under the age of sixteen when the events at issue took place; such consent is barred by the statute."). The extant version of D.C. Code § 22-1312 stated: "It shall not be lawful for any person or persons to make any obscene or indecent exposure of his or her person, or to make any lewd, obscene, or indecent sexual proposal in the District of Columbia under penalty of not more than \$300 fine, or imprisonment of not more than 90 days, or both, for each and every such offense. Any person or persons who shall commit an offense described in subsection (a) of this section, knowing he or she or they are in the presence of a child under the age of 16 years, shall be punished by imprisonment of not more than 1 year, or fined in an amount not to exceed \$1,000, or both, for each and every such offense."

specifically to removal of clothing, likely encompassing the facts in *Parnigoni* and many scenarios of concern.

(2) *OAG, App. C at 435, recommends striking the requirement in subparagraph (b)(3)(C) that the conduct “[a]larms or sexually abuses, humiliates, harasses, or degrades any person.” OAG offers an example in which a crossing guard notices a man masturbating and becomes concerned that school children will see him.*

- The RCC partially incorporates OAG’s recommendation by clarifying in commentary that the statute provides liability for OAG’s hypothetical because, the word “alarms” includes a person like the crossing guard who is alarmed about the actor’s effect on the welfare of other potential viewers. The word “alarm” is generally understood to mean “disturb,” “excite,” or “strike with fear.”⁶¹⁹ This change clarifies the revised commentary.

(3) *USAO, App. C at 462, recommends striking paragraph (b)(3) entirely. USAO states, “[I]t is the defendant’s actions, rather than the impact of the defendant’s actions, that should create liability for this offense.” USAO also states, “[I]t 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.”*

- The RCC does not incorporate USAO’s recommendation because it may authorize a disproportionate penalty. The scope of the statute includes public restrooms, train compartments, communal areas of multi-unit housing, and unauthorized tents or other dwellings on public land. Eliminating paragraph (b)(3) would categorically criminalize sexual acts, masturbation, and full nudity in these locations even when no one witnesses the conduct (e.g. the only evidence is security camera footage shows the behavior, the actor later admits engaging in the behavior) and no one is offended by the conduct. Such criminalization would particularly affect persons experiencing homelessness and does not distinguish between persons who engage in hidden or consensual activity in a public location and those whose conduct alarms or sexually harasses others.
- The RCC gradations of indecent exposure authorize imprisonment not only for purposely alarming or sexually harassing others, but for doing so recklessly. The USAO comment points out that if “a defendant exposed his genitalia in the middle of a metro car” during rush hour and otherwise meets the requirements as proposed in the RCC, “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.” These practical concerns are not unique to indecent exposure, however, and are common to most criminal offenses, particularly low-level conduct where complainants are unwilling,

⁶¹⁹ Merriam-Webster.com, “alarm”, 2020, available at <https://www.merriam-webster.com/dictionary/alarm>.

for whatever reason, to report the conduct to law enforcement. If a report is received and law enforcement investigates and witnesses the reported conduct, the officer may themselves be a complainant for purposes of arrest and prosecution. Or, where a person's behavior is due to intoxication, mental illness, or another cause requiring social services, an investigating officer may aid the person in obtaining such services.

- (4) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*
- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying first degree indecent exposure as a Class B misdemeanor, second degree indecent exposure as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.
- (5) *PDS, App. C at 449, recommends raising the age of prosecution. PDS states, “[C]hildren 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.”*
- The RCC does not incorporate this recommendation because it may create a gap in liability and is inconsistent with other RCC and D.C. Code provisions recognizing the age of 12 as a critical age between culpable and non-culpable or enhanced and unenhanced sexual conduct. Different children may reach sexual maturity at different ages and the revised provision merely establishes 12 years old as an absolute floor. The provision does not require the arrest or prosecution of children ages 12 and 13 or suggest that prosecution is appropriate in every case. Rather, the provision assumes that these cases will be reviewed individually and that charging decisions will be guided by applicable rules and standards.⁶²⁰ RCC § 22E-1308, “Limitations on Liability for RCC Chapter 13 Offenses,” categorically precludes liability for sex offenses (other than first degree and third degree sexual assault) for persons under 12 years of age, in accord with ALI Model Penal Code Sex Assault draft recommendations, and other provisions in current D.C. Code⁶²¹ and RCC offenses⁶²² that recognize the age of 12 as the critical age between enhanced and unenhanced sexual conduct.
- (6) *USAO, App. C at 461, recommends striking the word “sexually” from the phrase “sexually abuse, humiliate, harass, or degrade the complainant.”*

⁶²⁰ E.g., ABA Model Rule of Professional Conduct 3.8, ABA Model Code of Professional Responsibility Canon 7 (Ethical Consideration 7-13), ABA Criminal Justice Standards (Prosecution Function), the U.S. Attorneys' Manual.

⁶²¹ See, e.g., D.C. Code § 22-3020(a)(1) (“The victim was under the age of 12 years at the time of the offense;”).

⁶²² See, e.g., RCC § 22E-1302(a), First Degree Sexual Abuse of a Minor (“In fact: The complainant is under 12 years of age;”).

- The RCC does not incorporate this recommendation it would create inconsistency with the general RCC approach to sexual offenses. For further explanation of this change, see the Appendix D1 entry responding to the USAO comment, App. C at 453-454, recommending the elimination of the modifier “sexually” for the words “abuse, humiliate, harass, or degrade.” in the revised definition of “sexual act” and “sexual contact.”
- (7) *The CCRC recommends revising the exclusion from liability to specify that it applies only to a person who is inside their own individual dwelling unit, to clarify that it does not apply to a person who is located in the communal area of multi-unit housing.*⁶²³
- This change clarifies the revised statute and may eliminate a gap in liability.

⁶²³ The CCRC revised the definition of “dwelling” to include communal areas secured from the general public, in light of the DCCA’s recent opinion in *Ruffin v. United States*, 15-CF-1378, 2019 WL 6200245, at *3 (D.C. Nov. 21, 2019).

RCC § 22E-4301. Rioting.

- (1) *USAO, App. C at 360, recommends requiring the same number of actors to trigger liability for failure to disperse under RCC § 22E-4301 and rioting under RCC § 22E-4302.*
 - The RCC revises the commentary to clarify the alignment of the two statutes. The RCC effectively defines a riot as a group of eight people engaging in lawless conduct in a group. Accordingly, the revised rioting offense requires the defendant behave in a riotous manner with seven other riotous people nearby. However, the revised failure to disperse offense does not require that the person participate in riotous conduct themselves and only requires proximity to the eight-person riot. This change clarifies the revised commentary.
- (2) *USAO, App. C at 360, recommends the revised rioting statute specifically punish a person who “urges or incites other persons” to engage in rioting, consistent with current D.C. Code § 22-1322. USAO states that, “As written, the RCC no longer includes criminal liability for inciting or urging others to riot.” USAO says it “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.”*
 - The RCC does not incorporate this recommendation because it would create unnecessary overlap in District criminal statutes. The RCC does not create a gap in liability for law enforcement to arrest persons actively encouraging others toward criminal behavior. The revised disorderly conduct statute punishes a person who “[p]urposely commands, requests, or tries to persuade any person present to cause immediate criminal harm involving bodily injury, taking of property, or damage to property, reckless as to the fact that the harm is likely to occur.”⁶²⁴ Where a person is actively encouraging others who are present to engage in criminal behavior, they may be also subject to arrest for aiding,⁶²⁵ attempting,⁶²⁶ soliciting,⁶²⁷ conspiring,⁶²⁸ to commit the underlying offense, be it rioting, assault, criminal damage to property, or another crime. Separately criminalizing urging or inciting a riot may lead to disproportionate punishment of speech that is remote in time or place, hyperbolic, or ineffective.⁶²⁹

⁶²⁴ RCC § 22E-4201(a)(2)(B).

⁶²⁵ RCC § 22E-210.

⁶²⁶ RCC § 22E-301.

⁶²⁷ RCC § 22E-302.

⁶²⁸ RCC § 22E-303.

⁶²⁹ Consider, for example, a person in Arizona who publishes a tweet in March stating, “If that candidate wins the election, everyone should riot in D.C.!” That person should not be held criminally responsible for inciting a riot that occurs in November. Consider also a person who stands in the middle of the National Mall, urging people to form riot immediately, without drawing any attention at all. That person should not be held criminally responsible for inciting a riot that never occurred at all.

(3) *USAO, App. C at 360, recommends including both misdemeanor and felony gradations of rioting. USAO notes that approximately half of reform jurisdictions include multiple gradations for rioting (First Draft of Report #36, App. J at 446).*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The unique harm addressed by the rioting statute and not otherwise accounted for by other RCC offenses, stems from the person’s criminal behavior occurring in a group context where it has the potential to increase others’ criminal behavior. This increased risk, punishable in addition to the punishment from any actual crime or attempted crime (which is punished more directly by other RCC offenses), is relatively low and does not merit a felony gradation. See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.⁶³⁰
- Notably, although approximately half of reform jurisdictions include multiple gradations for rioting, most of these jurisdictions grade based on presence or use of a dangerous weapon⁶³¹ and only seven grade the offense based on the infliction of physical injury or substantial property damage.⁶³² The RCC contains multiple crimes that separately authorize punishment for possession of a dangerous weapon in connection with a crime or property damage or bodily injury.

(4) *USAO, App. C at 361 and 415-419, recommends eliminating the right to a jury trial for a misdemeanor form of rioting.*

- The RCC does not incorporate this recommendation, which predates the RCC’s updated jury demandability recommendation, because it is inconsistent with the RCC general approach to jury demandability. First Amendment protections may also apply to conduct that otherwise may constitute rioting.
- As of the Second Draft of Report #41, the CCRC generally recommends that the RCC classify all Class A misdemeanors and inchoate versions of those offenses as jury demandable offenses, improving the consistency of the revised statutes.
- In addition to the general RCC approach to jury demandability, the RCC rioting particularly merits jury demandability because it, in part, is likely to impact demonstrators. The Council has long recognized a heightened need to provide jury trials to defendants accused of crimes that may

⁶³⁰ Question 2.19 provided the scenario: “Causing \$500 of property damage to a store while in a crowd in which at least ten others are also damaging property.” Question 2.19 had a mean response of 4.6, less than one class above the 4.0 milestone corresponding to simple assault, currently a 180-day offense in the D.C. Code. Notably, however, in addition to rioting, a person engaged in this conduct could also be charged with fourth degree criminal damage to property, an offense recommended as a Class A felony.

⁶³¹ Ark. Code Ann. § 5-71-202; Colo. Rev. Stat. Ann. § 18-9-104; Ind. Code Ann. § 35-45-1-2(Sec. 2); Minn. Stat. Ann. § 609.71; N.H. Rev. Stat. § 644:1(IV); N.J. Stat. 2C:33-1(a)(3); Ohio Rev. Code Ann. § 2917.02; S.D. Codified Laws § 22-10-5; Utah Code Ann. § 76-9-101(3).

⁶³² Conn. Gen. Stat. Ann. § 53a-175; 720 Ill. Comp. Stat. Ann. 5/25-1(b)(3); Ky. Rev. Stat. § 525.020; N.H. Rev. Stat. § 644:1(IV); N.Y. Penal Law § 240.06; Tenn. Code Ann. § 39-17-303; Utah Code Ann. § 76-9-101(3).

involve the exercise of civil liberties.⁶³³ The DCCA recently noted, “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.”⁶³⁴

(5) *The CCRC recommends striking the exclusion from liability for protected activity as potentially confusing.*

- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

⁶³³ See Report on Bill 16-247, the “Omnibus Public Safety Amendment Act of 2006,” Council of the District of Columbia Committee on the Judiciary (April 28, 2006) at Page 7.

The Council has grappled with so-called ‘misdemeanor streamlining’ for over a decade. On the one hand, judicial expediency urges that the number of jury-demandable misdemeanor crimes be minimized. On the other hand, the right to a jury trial seems fundamental.

Generally, the committee print provides for jury demandable offenses where there is a possible conflict between law and civil liberties. For instances, the status offense of gang membership (no criminal activity required other than mere membership) is such that the extra layer protection for the liberty of the accused individual, - that is, allowing for a jury trial - is reasonable. Similarly, the penalty for unlawful entry currently is jury demandable. Because this charge is often brought against demonstrators, the protection of trial by jury seems prudent. The newly created prostitution free zones *will permit law enforcement against otherwise permitted activity* - freedom of association, for instance - and thus the bill permits trial by jury. Another concern is whether the elements of the crime are somewhat subjective. In such cases the defendant should be able to present his or her case to representatives of the community (i.e., a jury) to answer the question whether there is guilt beyond a reasonable doubt.

(Emphasis added.)

⁶³⁴ *Bado v. United States*, 186 A.3d 1243, 1264 (D.C. 2018) (Washington, J., *concurring*).

RCC § 22E-4302. Failure to Disperse.

- (1) *USAO, App. C at 361, recommends requiring the same number of actors to trigger liability for failure to disperse under RCC § 22E-4301 and for rioting under RCC § 22E-4302.*
 - The RCC revises the commentary to clarify the alignment of the two statutes. The RCC effectively defines a riot as a group of eight people engaging in lawless conduct in a group. Accordingly, the revised rioting offense requires the defendant behave in a riotous manner with seven other riotous people nearby. However, the revised failure to disperse offense does not require that the person participate in riotous conduct themselves and only requires proximity to the eight-person riot. This change clarifies the revised commentary.
- (2) *USAO, App. C at 361 and 415-419, recommends eliminating the right to a jury trial for failure to disperse. USAO says that “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.”*
 - The CCRC incorporates this change by eliminating jury demandability for this offense. As of the Second Draft of Report #41, the CCRC recommends classifying failure to disperse as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.
 - As explained in the commentary, the revised offense is not equivalent and does not replace 18 DCMR § 2000.2. That offense, prosecutable by the Attorney General for the District of Columbia, remains available as a charge.
- (3) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*
 - The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying failure to disperse as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.
- (4) *The CCRC recommends striking the exclusion from liability for protected activity as potentially confusing.*
 - This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

RCC § 7-2502.01. Possession of an Unregistered Firearm, Destructive Device, or Ammunition.

- (1) *OAG, App. C at 379-380, recommends regrading the offense to provide three penalty gradations: first degree for possession of restricted pistol bullets; second degree for possession of a firearm without a registration certificate; and third degree for possession of ammunition without a firearm registration certificate. OAG notes that possession of a restricted bullet is punishable by ten years under current District law.*⁶³⁵
 - The RCC partially incorporates this recommendation by regrading possession of one or more restricted bullet as first degree. The OAG recommendation to grade possession of restrict bullets separately as a first degree offense would result in a disproportionate penalty by rating the possession higher than a “destructive device”—e.g., an explosive, incendiary, or poison gas bomb, grenade, rocket, missile, mine, or similar device. This change improves the proportionality of the revised statute.
- (2) *OAG, App. C at 380, recommends revising the exclusion from liability for voluntary surrender to specify that the object must be surrendered “pursuant to District or federal law,” consistent with the commentary.*
 - The RCC incorporates this recommendation by adopting OAG’s proposed language. This change clarifies the revised offense.
- (3) *USAO, App. C at 394-395, generally recommends for offenses in Report #39 and #40 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. Specifically, with respect to the voluntary surrender exclusions, USAO recommends reclassifying the exclusion as an affirmative defense, with the defense bearing the burden of proof, and including that standard in the revised offense.*⁶³⁶
 - a. The RCC incorporates this recommendation by redrafting the exclusion from liability for voluntary surrender as an affirmative defense. RCC § 22E-201 in the General Part now specifies the burden of production and proof for affirmative defenses throughout the RCC. This change clarifies the revised offense.
- (4) *OAG, App. C at 390, recommends a conforming amendment to D.C. Code § 7-2501.01(7)(C) that clarifies when the use of lacrimators are not considered destructive devices. OAG proposes, “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-defense spray and which is propelled from an aerosol container that is labeled with or accompanied by clearly written instructions as to its use.”*
 - a. The RCC partially incorporates this recommendation by revising the possession of an unregistered firearm, destructive device, or ammunition offense to exclude all lacrimators and sternutators (natural and manmade

⁶³⁵ D.C. Code § 7-2507.06(a)(3)(A).

⁶³⁶ See Crim. Jur. Instr. for D.C. 6.501(C) (2019).

compounds). The exclusion states, “A person does not commit an offense under subsection (a) of this section for possession of a lacrimator or sternutator.” This change improves the proportionality of the revised offense.

- (5) *PDS, App. C at 392, recommends expanding the exclusion from liability for empty cartridge casings or shells to also include spent bullets. PDS explains, spent bullets, which have legitimate uses for jewelry and crafts, do not present a public safety concern because they cannot be readily reused in a firearm.*
 - a. The RCC incorporates this recommendation by adopting PDS’ proposed exclusion. This change improves the clarity and proportionality of the revised offense.
- (6) *USAO, App. C at 395, recommends that the RCC clarify that prosecutorial authority will remain consistent with current law. USAO specifically recommends revising the prosecutorial authority provision to state, 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.”⁶³⁷ USAO explains that D.C. Code § 23-101(d) allows USAO to prosecute some OAG charges with OAG’s consent.*
 - a. The RCC does not incorporate this recommendation because it would make the revised statute more ambiguous. The RCC recommendation clearly states that prosecutorial authority lies with the Attorney General. Similar language appears in other current District statutes.⁶³⁸ The Council has no power, under the Home Rule Act, to alter prosecutorial authority and any misassignment of authority is legally without effect whether or not the RCC (or any Council-passed statute) says it is or provides caveats.
- (7) *USAO, App. C at 396, recommends eliminating the right to a jury trial under this section for attempts. USAO states, “[I]t 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.”*
 - a. The RCC does not incorporate this recommendation, which predates the RCC’s penalty and jury demandability recommendations, because it is inconsistent with the RCC general approach to jury demandability. In the First Draft of Report #41 (October 3, 2019), the RCC classifies first degree possession of an unregistered firearm, destructive device, or ammunition as a Class A misdemeanor and second degree possession of an unregistered firearm, destructive device, or ammunition as a Class B misdemeanor.⁶³⁹ In the Second Draft of Report #41, the RCC classifies all Class A and Class B misdemeanors and inchoate versions of those offenses as jury demandable offenses. This improves the clarity and consistency of the revised statutes.

⁶³⁷ D.C. Code § 23-101.

⁶³⁸ See, e.g., D.C. Code §§ 22-2305; 22-1319.

⁶³⁹ Accordingly, the subsection specifying jury demandability is stricken from the offense definition as unnecessary.

- b. The first draft of the revised carrying a pistol in an unlawful manner offense⁶⁴⁰ did not include a jury trial provision because it replaces offenses that do not carry any jail time under current law.⁶⁴¹ In the First Draft of Report #41 (October 3, 2019), the RCC classifies carrying a pistol in an unlawful manner as a Class A misdemeanor.
 - c. The Council has long recognized a heightened need to provide jury trials to defendants accused of crimes that may involve the exercise of civil liberties.⁶⁴² The DCCA recently noted, “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.”⁶⁴³
- (8) *USAO, App. C at 396, recommends disaggregating possession of a firearm and possession of ammunition. USAO states, “Under current law, these are covered by different offenses” and says that “they relate to different conduct, instead of varying levels of the same conduct.”*
- a. The RCC does not incorporate this recommendation because it would result in a less logical organization of the revised statutes. Under current law, these offenses are covered by the same, multi-grade penalty provision.⁶⁴⁴ The offenses are closely related insofar as, generally, a firearm requires ammunition and ammunition requires a firearm to be useful as a lethal weapon.

⁶⁴⁰ RCC § 7-2509.06.

⁶⁴¹ 24 DCMR §§ 2343.1; 2344.

⁶⁴² See Report on Bill 16-247, the “Omnibus Public Safety Amendment Act of 2006,” Council of the District of Columbia Committee on the Judiciary (April 28, 2006) at Page 7.

The Council has grappled with so-called ‘misdemeanor streamlining’ for over a decade. On the one hand, judicial expediency urges that the number of jury-demandable misdemeanor crimes be minimized. On the other hand, the right to a jury trial seems fundamental.

Generally, the committee print provides for jury demandable offenses where there is a possible conflict between law and civil liberties. For instances, the status offense of gang membership (no criminal activity required other than mere membership) is such that the extra layer protection for the liberty of the accused individual, - that is, allowing for a jury trial - is reasonable. Similarly, the penalty for unlawful entry currently is jury demandable. Because this charge is often brought against demonstrators, the protection of trial by jury seems prudent. The newly created prostitution free zones *will permit law enforcement against otherwise permitted activity* - freedom of association, for instance - and thus the bill permits trial by jury. Another concern is whether the elements of the crime are somewhat subjective. In such cases the defendant should be able to present his or her case to representatives of the community (i.e., a jury) to answer the question whether there is guilt beyond a reasonable doubt.

(Emphasis added.)

⁶⁴³ *Bado v. United States*, 186 A.3d 1243, 1264 (D.C. 2018) (Washington, J., *concurring*).

⁶⁴⁴ D.C. Code § 7-2507.06.

- (9) *USAO, App. C at 396, recommends eliminating the exclusion from liability for possession of a firearm frame, receiver, muffler, or silencer. In the alternative, 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.*
- a. The RCC does not incorporate this recommendation because it would create an inconsistent definition and may be confusing. Both the RCC and current D.C. Code offense defines the term “firearm” using meaning specified in D.C. Code § 7-2501.01, which includes frames, receivers, mufflers, and silencers. Consequently, without an exclusion, the revised statute would criminalize the possession of a frame, receiver, etc. as possession of an unregistered firearm. The RCC separately criminalizes possession of a silencer.⁶⁴⁵ Specifying “solely” may raise the question: What, in addition, *would* render possession of a receiver or frame criminal—e.g., a frame and a bullet, or a receiver and a frame?
- (10) *USAO, App. C at 397, recommends revising the exclusion from liability for participation in a in a lawful recreational firearm-related activity to require proof that the person was traveling to or from a firearm-related activity, possession of the firearm is lawful in the person’s jurisdiction of residence, and the firearm is being transported lawfully.*
- a. The RCC does not incorporate this recommendation because it would make the statutory language confusing. The RCC exclusion from liability in subparagraph (c)(2)(A) does not concern transportation of a firearm; it concerns using the firearm during an activity. For example, if the District of Columbia had a gun range, gun show, or shooting contest, a person would not be liable for lawfully participating in that activity. The USAO recommendation would require a person who has arrived at the location of a lawful recreational firearm activity to present proof that “the person is traveling to or from a lawful recreational firearm-related activity outside the District.”

⁶⁴⁵ RCC § 22E-4101, Possession of a Prohibited Weapon or Accessory.

RCC § 7-2502.15. Possession of a Stun Gun.

(1) *OAG, App. C at 381, recommends revising the commentary to clarify 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. OAG proposes adding the following example: “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.”*

- The RCC does not incorporate this recommendation because it would change current law in a way that reduces the clarity and proportionality of the revised statute. Current D.C. Code § 7-2502.15(c) prohibits possession of a stun gun in “(1) A building or office occupied by the District of Columbia, its agencies, or instrumentalities” as well as “(3) A building or portion thereof, occupied by a children’s facility, preschool, or public or private elementary or secondary school.” This language appears to prohibit possession only in the office or building part that is actually occupied by a government agency or a facility serving children. It does not, for example, prohibit possession in “a building occupied by a school, or a part thereof.” Prohibiting stun guns in the entire location would lead to counterintuitive outcomes. Consider, for example, two locations of the same chain of grocery stores, one occupying the ground floor of a District office building at 1100 Fourth Street, SW and the other occupying the ground floor of a privately-owned building at 490 L Street, NW. Each store has its own private entrance. OAG’s proposed language would criminalize possession of a stun gun in the first grocery store and not the second, even though there is no increased risk of danger in that location. In such an instance, the RCC prohibits possession of a stun gun only if that store displays clear and conspicuous signage.⁶⁴⁶
- The statutory language and commentary are revised to clarify the scope of the offense.

(2) *OAG, App. C at 381, recommends prohibiting stun guns within the property line of buildings containing schools, daycare facilities, and the like. OAG says, “These facilities use the grounds around their buildings as extensions of those facilities so that children can get outdoor play and exercise.”*

- The RCC partially incorporates this recommendation by amending subparagraphs (a)(2)(A) and (B) to include “[a] building, building grounds, or part of a building” that the person knows is occupied by the District or a facility serving children. For the reasons stated in comment #1 above, the statute does not reach the property line of every building that contains such a protected location. This change clarifies the revised statute.

⁶⁴⁶ Consider also a sprawling 10-story shopping center that has a daycare with its own secured entrance in the basement. Under OAG’s proposal, criminal liability would attach upon entering the retail portion only.

- (3) *PDS, App. C at 393, recommends replacing the term “public youth center” with “public recreation center,” a more commonly used term in the District.*
- The RCC incorporates this recommendation by adopting PDS’ proposed language. This change improves the clarity of the revised offense.
- (4) *The CCRC recommends revising the affirmative defense provision to more closely resemble other RCC provisions. Specifically, the word “actor” is substituted for “the accused,” the phrase “a person lawfully in charge” is substitute for “the person lawfully in charge,” and the defined term “in fact”⁶⁴⁷ is inserted.*
- This change improves the clarity and consistency of the revised statute.

⁶⁴⁷ RCC § 22E-207.

RCC § 7-2502.17. Carrying an Air or Spring Gun.

- (1) *PDS, App. C at 392-393, recommends expanding the exclusion from liability for theatrical performances to also include possession “related to” an “educational or cultural presentation.” PDS states, “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.”*
 - The RCC partially incorporates this recommendation by amending the exclusion to apply to possession as part of any lawful “educational or cultural presentation.” The phrase “related to” is not included, however, as the term is vague and subparagraph (b)(2)(B) already specifically excludes liability for transporting the instrument or weapon, provided that it is unloaded and securely wrapped.
- (2) *USAO, App. C at 394-395, generally recommends for offenses in Report #39 and #40 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.*
 - The RCC incorporates this recommendation by stating in RCC § 22E-201, in the General Part, the burden of production and proof for affirmative defenses throughout the RCC. This change clarifies the revised offense.
- (3) *USAO, App. C at 395, recommends that the CCRC clarify that prosecutorial authority will remain consistent with current law. USAO specifically recommends revising the prosecutorial authority provision to state, 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.”⁶⁴⁸ USAO explains that D.C. Code § 23-101(d) allows USAO to prosecute some OAG charges with OAG’s consent.*
 - The RCC does not incorporate this recommendation because it would make the revised statute more ambiguous. The RCC recommendation clearly states that prosecutorial authority lies with the Attorney General. Similar language appears in other current District statutes.⁶⁴⁹ The Council has no power, under the Home Rule Act, to alter prosecutorial authority and any misassignment of authority is legally without effect whether or not the RCC (or any Council-passed statute) says it is or provides caveats.
- (4) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*
 - The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying carrying an air or spring gun as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.
- (5) *The CCRC recommends reordering the offense elements to clarify that it is the actor that must be outside a building and it is the weapon that must be conveniently accessible and within reach.*

⁶⁴⁸ See D.C. Code § 23-101.

⁶⁴⁹ See, e.g., D.C. Code §§ 22-2305; 22-1319.

Appendix D. Disposition of Advisory Group Comments & Other Changes From Draft Documents (D1)

- This change clarifies, but does not substantively change, the revised offense.

RCC § 7-2507.02. Unlawful Storage of a Firearm.

- (1) *OAG, App. C at 382, recommends revising the offense to include people who possess an unregistered firearm. OAG says, for example, that leaving a firearm in a girlfriend's closet poses the same danger whether the weapon is registered or not.*
 - The RCC incorporates this recommendation by striking the limiting language “registered under D.C. Code § 7-2502.07.” This change eliminates a gap in liability in the revised statute.
- (2) *OAG, App. C at 382-383, recommends revising the offense to include only some (unspecified) premises that are not under the defendant's control. OAG says, for example, that leaving a firearm in a girlfriend's closet may pose an equivalent danger if children can access the firearm in either situation.*
 - The RCC incorporates this recommendation by striking the limiting language, “On premises under the actor's control.” This change eliminates a gap in liability in the revised statute.
- (3) *OAG, App. C at 388-389, recommends redrafting the offense definition to clarify that the word “neither” modifies both sub-subparagraphs that follow.*
 - The RCC incorporates this recommendation by revising the statutory language to require that the actor knowingly possesses a firearm that is “(A) Not conveniently accessible and within reach; (B) Not in a securely locked container; and (C) Not in another location that a reasonable person would believe to be secure.”
- (4) *The CCRC recommends removing gendered pronouns from the statutory text.*
 - This change does not further change District law.

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

- (1) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*
 - The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying carrying a pistol in an unlawful manner as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.
- (2) *The CCRC recommends revising the offense to include people who possess a firearm without a license to carry because the unlawful carry method poses the same danger whether the person is licensed or not.*
 - This change eliminates a gap in liability in the revised statute.
- (3) *The CCRC recommends revising the phrase “Outside a person’s home or place of business” to state “Outside the actor’s home or place of business,” to clarify that the offense applies to a person who is inside another person’s home or business.*
 - This change clarifies the revised statute and does not further change District law.
- (4) *The CCRC recommends revising the drafting to clarify that it is the actor (and not the pistol) that must be outside the actor’s home or place of business and it is the pistol that must be conveniently accessible and within reach. The words “in a location that is:” are stricken from the first element of the offense. The word “While” is added to the second element of the offense. The phrase “The pistol is” is added to the third element of the offense.*
 - This change clarifies, but does not substantively change, the revised statute.

RCC § 16-1022. Parental Kidnapping.

- (1) *OAG, at App. C. 30, recommends specifying that certain grades of parental kidnapping are designated as felonies, regardless of the maximum allowable penalty, for the purposes of D.C. Code § 23-563.*
 - The RCC incorporates this recommendation by adding to the statute subparagraph (i)(6), which reads: “Notwithstanding the maximum authorized penalties, first and second degree parental kidnapping shall be deemed felonies for purposes of D.C. Code § 22-563.” This specifies that the provisions under D.C. Code § 23-563 apply to first and second degree parental kidnapping.
- (2) *OAG, at App. C 444, notes that the word “complainant” as used in paragraph (d)(3) is ambiguous, and could refer to either the child taken or concealed, or the parent or guardian of the child. OAG recommends replacing the word “complainant” with the words “person taken, concealed, or detained[.]”*
 - The RCC incorporates this recommendation by amending the statute using OAG’s suggested language. This change improves the clarity of the revised criminal code.
- (3) *OAG at App. C. 444, recommends deleting subsection (h), which specifies that the Office of the Attorney General has prosecutorial authority for parental kidnapping. OAG says that “the Council is without authority to designate OAG as [sic] agency to prosecute this offense.”*
 - The RCC incorporates this recommendation by deleting subsection (h). The CCRC has not independently researched whether there are corresponding historic police or municipal ordinances or regulations that would provide a basis for OAG reliability and relies on the agreement of USAO and OAG regarding this matter.⁶⁵⁰ This change improves the clarity of the revised statute.
- (4) *OAG, at App. C 444-445, recommends amending the penalty provision concerning reimbursement of expenses by stating: “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.”*
 - The RCC incorporates this recommendation by amending the statute using OAG’s suggested language. This change improves the clarity of the revised criminal code.
- (5) *PDS, at App. C. 450, recommends that gradations of parental kidnapping that require taking or concealing out of the District of Columbia, should also require that the actor did so “with the purpose of avoiding detection[.]” PDS notes that merely taking a child across the border briefly to run an errand would increase the severity of the offense.*

⁶⁵⁰ This matter was discussed at the agency’s February 5, 2020 Advisory Group meeting, which included an attendee from USAO-DC.

- The RCC partially incorporates this recommendation by amending the statute to require that the actor takes or conceals the person outside of the District for more than 24 hours. Under this revision, first, second, and third degree parental kidnapping would not include briefly taking a child out of the District. This change addresses the specific examples offered by PDS. However, taking a person out of the District for more than 24 hours for any reason would subject the actor to higher punishments because it may make recovery of the child substantially more difficult.⁶⁵¹
- (6) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*
- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying shoplifting as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

⁶⁵¹ For example if a person takes a child to California not for the purpose of avoiding detection, but for the purpose of finding a job, that person has still made it substantially more difficult for the child to be recovered.

RCC § 25-1001. Possession of an Open Container or Consumption of Alcohol in a Motor Vehicle.

- (1) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*
 - The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying possession of an open container or consumption of alcohol as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.
- (2) *OAG, App. C at 440-441, recommends revising the definition of “public highway” consistent with the definition of “highway” in Title 50 of the D.C. Code (concerning driving while impaired). OAG notes that the District definition includes a parking lot, whereas the federal definition may not.*
 - The RCC incorporates this recommendation by amending the definition of “highway” to have the meaning specified in D.C. Code § 50-2206.01. This change improves the consistency of the revised statute.
- (3) *OAG, App. C at 441-442, recommends narrowing the exclusion from liability for vehicles that operate on rails to apply to passengers only. OAG explains, “Person’s [sic.] 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.”*
 - The RCC incorporates this recommendation by striking the exclusion from liability for vehicles that operate on rails. Metrorail passengers are sufficiently covered by the exclusion from liability for persons located in the passenger area of a motor vehicle designed, maintained, or used primarily for the transportation of persons for compensation who are not operating the vehicle. This change eliminates an unnecessary gap in liability in the revised statute.
- (4) *OAG, App. C at 442, recommends broadening the revised offense to include persons who are operating or in physical control of a motor vehicle, consistent with the District’s DUI statute.⁶⁵² OAG does not define or describe the meaning of the phrase “in physical control.”*
 - The RCC does not incorporate this recommendation at this time. It is not clear how the plain language proposed by OAG, “in physical control,” differs from the current RCC “operation,” and the CCRC has not yet reviewed the District DUI statute referenced by OAG’s comment or other traffic offenses. However, the agency’s initial research indicates that at least some District case law concerning the DUI and other traffic statutes treats the phrase “in physical control” as superfluous to the term “operating.”⁶⁵³ Moreover, the DUI statute is governed by a wide array of

⁶⁵² D.C. Code § 50-2206.11.

⁶⁵³ See *Fadul v. D.C.*, 106 A.3d 1093, 1097 (D.C. 2015) (“However, this court’s case law makes it clear that “operating” in this context “means being in actual physical control of the vehicle, capable of putting the vehicle into movement or preventing its movement.” *Maldonado v. District of Columbia*, 594 A.2d 88, 89

other (not “operating” or “in physical control”) specialized definitions.⁶⁵⁴ Until the agency has an opportunity to fully review traffic offenses,⁶⁵⁵ it does not define “operating” nor adopt the recommended language.

(5) *OAG, App. C at 442, notes that the revised offense treats public consumption of alcohol differently than public consumption of marijuana under D.C. Code § 48-911.01. OAG states, “[S]hould 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.”*

- The RCC has not yet issued a recommendation for a revision to the District’s public consumption of marijuana laws and may do so at a later date, if time allows under the Commission’s statutory mandate.

(D.C.1991) (internal quotation marks and citations omitted).”). See also *Maldonado v. D.C.*, 594 A.2d 88, 89 (D.C. 1991) (“This court has held that the term “operating,” in a prosecution for operating a vehicle after suspension of a driver's license, means being “in actual physical control of the vehicle, capable of putting the vehicle into movement or preventing its movement...” *Houston v. District of Columbia*, 149 A.2d 790, 792 (D.C.1959), cited with approval in *Jackson v. District of Columbia*, 180 A.2d 885, 887 (D.C.1962); see also *United States v. Weston*, 151 U.S. App. D.C. 264, 268 n. 24, 466 F.2d 435, 439 n. 24 (1972).”).

⁶⁵⁴ D.C. Code § 50-2206.01. Definitions.

⁶⁵⁵ The CCRC may develop recommendations for the District’s DUI and other traffic statutes at a later date, if time allows under the Commission’s statutory mandate

RCC § 48-904.01a. Possession of a Controlled Substance.

- (1) *OAG, at App. C. 362-363, recommends that first degree possession of a controlled substance should include all substances in Schedules I and II, instead of the list of substances in paragraph (a)(2).*
 - The RCC does not incorporate this recommendation because it would change District law in a way that may authorize disproportionate penalties. The substances listed in paragraph (a)(2) have been taken verbatim from the current definitions of “abusive” or “narcotic” substances. Although some of these substances are in Schedule II, current law designates these specific substances for the most severe penalties when they are distributed, manufactured, or possessed with intent to distribute or manufacture.
- (2) *PDS, at App. C. 368, recommends decriminalizing simple possession of all controlled substances.*
 - The RCC does not incorporate this recommendation because it would create a gap in law. Support among District voters for maintaining criminal penalties for simple possession of controlled substances is apparent in the CCRC public opinion surveys.⁶⁵⁶
- (3) *PDS, at App. C. 368, recommends that if simple possession is not decriminalized, RCC § 48-904.01 (e)(1) should be amended to allow judges to defer further proceedings even if the defendant has been previously convicted of a controlled substance offense in the District or in another jurisdiction, or if the defendant has had proceedings previously deferred under this paragraph.*
 - The RCC incorporates this recommendation by codifying a provision to allow judges to defer proceedings under § 48-904.01 (e)(1) even if the defendant has been previously convicted of a controlled substance offense, or if the defendant has previously had proceedings deferred under the paragraph. This change improves the proportionality of the revised criminal code.
- (4) *PDS, at App. C. 368-369, recommends that the RCC adopt provisions from D.C. Code § 7-403, which provide 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.*
 - The RCC incorporates this recommendation by codifying a provision that allows a person to avoid liability when seeking assistance for a drug overdose. This change will improve the proportionality of the revised criminal code.
- (5) *USAO, at App. C. 374, recommends retaining felony penalties for possession of liquid PCP.*

⁶⁵⁶ See, e.g., Advisory Group Memo #27 Appendix A - Survey Responses, Question 3.01 provided the scenario: “Possessing a small vial of liquid PCP (a controlled substance) for personal use.” Question 3.01 had a mean response of 5.3, falling between a class 6 milestone corresponding to causing significant bodily injury (corresponding to felony assault, currently a 3 year offense under the D.C. Code), and a class 4 milestone corresponding to causing a minor bodily injury (corresponding to simple assault, currently a 10 year offense in the D.C. Code).

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. CCRC public opinion surveys suggest that felony penalties for personal possession of liquid is not supported by most District voters.⁶⁵⁷ Higher, felony-level penalties are available under the RCC for possession of liquid PCP of any amount when that possession is with intent to distribute.
- (6) *USAO, at App. C. 374, recommends using only one penalty gradation for possession of a controlled substance, which would apply to any controlled substance.*
- The RCC does not incorporate this recommendation because it would change current District law in a way that may authorize disproportionate penalties. Adopting this recommendation would risk disproportionately severe penalties. Dividing possession of a controlled substance into penalty grades recognizes distinctions between substances identified as “abusive” or “narcotic,” and other controlled substances. Under the USAO’s proposal, possession of Schedule V substances with the lowest risk of harm or abuse would be penalized the same as possession of the most harmful substances.
- (7) *USAO, at App. C. 375 recommends that subsection (e) cross reference “RCC § 48-901.02” to “D.C. Code § 48-901.02.”*
- The RCC does not incorporate this recommendation at this time because it may reduce the clarity of the revised statute’s references, but this matter will be reevaluated when recommendations are finalized for the Council and Mayor. The RCC updates its references to definitions across the RCC. All defined terms are included in RCC § 22E-701, including the terms “controlled substance,” “immediate precursor,” “opium poppy,” “person,” and “poppy straw.” The cross references in subsection (e) are updated accordingly.
- (8) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*
- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying shoplifting as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

⁶⁵⁷ See, e.g., Advisory Group Memo #27 Appendix A - Survey Responses, Question 3.01 provided the scenario: “Possessing a small vial of liquid PCP (a controlled substance) for personal use.” Question 3.01 had a mean response of 5.3, falling between a class 6 milestone corresponding to causing significant bodily injury (corresponding to felony assault, currently a 3 year offense under the D.C. Code), and a class 4 milestone corresponding to causing a minor bodily injury (corresponding to simple assault, currently a 10 year offense in the D.C. Code).

RCC § 48-904.01b. Trafficking of a Controlled Substance.

- (1) *OAG, at App. C. 362-363, recommends that first degree possession of a controlled substance should include all substances in Schedules I and II, instead of the list of substances in paragraph (a)(2).*
 - The RCC does not incorporate this recommendation because it would change District law in a way that may authorize disproportionate penalties. The substances listed in paragraph (a)(2) have been taken verbatim from the current definitions of “abusive” or “narcotic” substances. Although some of these substances are in Schedule II, current law designates these specific substances for the most severe penalties when they are distributed, manufactured, or possessed with intent to distribute or manufacture.
- (2) *OAG, at App. C. 364, recommends that this offense should be subject to an enhancement for committing the offense while armed in addition to one other enhancement.*
 - The RCC does not incorporate this recommendation because it would authorize disproportionate penalties. While in principle the stacking of enhancements may appear desirable because it reflects many ways in which a crime may be categorically more serious, in practice the stacking of enhancements can quickly create extremely high punishments that dwarf the predicate conduct. For example, distribution of a controlled substance to a minor generally is considered more serious than distribution to a non-minor and arguably deserves a greater statutory punishment. The same is true, however, for other possible aspects of a case such as, for example, if the actor has a prior felony conviction, the actor carried a dangerous weapon, or the actor committed the crime near a school or playground. However, raising the statutorily authorized imprisonment penalty for each type of enhancement would result in an increase of four penalty classes, equating the conduct with offenses such as second degree sexual assault, kidnapping, or sex trafficking of minors when even such a worst case form of drug trafficking is not equivalent to those offenses. To avoid such disproportionate outcomes, the RCC recommends limiting the stacking of penalty enhancements. Individual offenses incorporate (but cap) several types of possible enhancements, while the general enhancements in RCC Chapter 6 (e.g. repeat offender or hate crimes) do stack additional penalties. Within the RCC’s authorized range of statutory penalties, limiting stacking as it does, a sentencing judge retains sufficient discretion to weight the seriousness of the conduct taking into account the seriousness of the particular facts of the case which may or may not be captured in statutorily-specified enhancements.⁶⁵⁸ The

⁶⁵⁸ While the RCC and current D.C. Code codify an array of circumstances that raise the penalty classification of an offense, these circumstances, even when present, may have little bearing on the seriousness of a particular case. Conversely, circumstances in a particular case that are not captured in a statutory enhancement may be highly relevant to seriousness. Statutory enhancements are just one factor in

RCC’s limited form of stacking produces aggregate penalties within the range of most current court sentencing decisions and better accords with polling of District voters.⁶⁵⁹

- The RCC seeks to ensure that the totality of criminal punishment an actor faces for conduct is proportionate to that conduct—but that approach requires examining all the relevant crimes an actor may be charged with (and punished for) based on the actor’s conduct. Unlike the current D.C. Code, the RCC does not examine just one crime (and its enhancements) to see if the punishment is proportionate to the conduct, because such a comparison misrepresents the total liability an actor faces. Notably, with respect to trafficking a controlled substance, there are an array of separate weapons offenses in the RCC (and current D.C. Code) that can be charged and provide additional liability for a person who carries a firearm when distributing drugs.⁶⁶⁰
- (3) *OAG, at App. C. 364 recommends that sub-subparagraph (g)(6)(C)(i) be amended to clarify that the enhancement applies to offenses committed based on the property line, not the building, and by extending the relevant distance from 100 feet to 300 feet by stating: “within 300 feet of the property line of a school, college, university...”*
- The RCC incorporates this recommendation by adding the specific language recommended by OAG. This change improves the clarity of the revised criminal code.
- (4) *OAG, at App. C. 365, recommends that the defense under 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.” OAG does not recommend specific language.*
- The RCC incorporates this recommendation by revising the statute as suggested by OAG. Specifically, the defense is revised to state: “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 *and, either the quantity of the controlled substance*

ensuring proportionate sentencing, and even in the absence of such enhancements judges are provided with a range of possible punishments to determine a proportionate punishment.

⁶⁵⁹ See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

⁶⁶⁰ For this reason, as well as the clear practical effect any factor (whether a statutory enhancement or not) any more serious form of conduct has on a judge’s exercise of their discretion in sentencing, the CCRC disagrees with the OAG statement 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.” Retributive measures of proportionality aside, whether the existence of an incrementally higher statutory penalty due to a codified penalty enhancement is a specific deterrent on an individual is also questionable. General research on deterrence summarized by the Department of Justice’s National Institute of Justice indicates there is little effect by increasing imprisonment penalties. See <https://nij.ojp.gov/topics/articles/five-things-about-deterrence>.

distributed does not exceed the amount for a single use by the recipient, or recipient intends to immediately use the controlled substance.”. This change may eliminate a gap in liability and improves the proportionality of the revised statutes.

- (5) *PDS, at App. C. 369, recommends that since the RCC grades penalties based on weight, the statute be amended to specifically address controlled substances contained within edible products. PDS recommends the following language: 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.*

- The RCC incorporates this recommendation by revising the statute as suggested by PDS. Specifically, the statute is revised to state: “For controlled substances that are contained within edible products and that are intended to be consumed as food 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 compound or mixture containing a controlled substance.” This change improves the clarity and proportionality of the revised statutes.

- (6) *PDS, at App. C. 370, recommends amending the statute to clarify that the weight of non-consumables, such as containers or by product of consuming the substance, should not be included in the weight of the mixture of the controlled substance.*

- The RCC incorporates this change by revising the statute as suggested by PDS. Specifically, the statute is revised to state: “The weight of a non-consumable container in which a controlled substance is stored or carried shall not be included in the weight of the compound or mixture containing the controlled substance.” This change improves the clarity and proportionality of the revised statutes.

- (7) *PDS, at App. C. 371, recommends that the penalty enhancement for distribution to a person under the age of 18 should require that the defendant was reckless as to the age of the person to whom the controlled substances were distributed.*

- The RCC incorporates this recommendation by amending the statute as suggested. This change improves the consistency and proportionality of the revised statutes.

- (8) *PDS, at App. C. 371, recommends amending the commentary with respect to the age-based penalty enhancement to clarify that the enhancement does not apply if the defendant distributes controlled substance to an adult, who then distributes the substance to a person under the age of 18.*

- The RCC incorporates this recommendation by amending the commentary as suggested. This change improves the clarity of the RCC commentary.
- (9) *PDS, at App. C. 371, recommends that the words “public youth center” be replaced with “public recreation center.” PDS does not intend for this to substantively change the scope of the enhancement.*
- The RCC incorporates this recommendation by amending the statute as suggested. This change improves the clarity of the revised statutes.
- (10) *PDS, at App. C. 371-372, recommends re-drafting the exclusion to the defense under paragraph (h)(1). PDS recommends changing the words “value or future expectation of financial gain” to “value or expectation of future financial gain[.]” This recommendation is clarificatory, and is not intended to change the scope of the defense.*
- The RCC incorporates this recommendation by amending the statute as suggested. This change improves the clarity of the revised criminal code.
- (11) *USAO, at App. C. 373, recommends adding the words “a compound or mixture containing [a controlled substance]” to every gradation of controlled substance offenses.*
- The RCC incorporates this recommendation by amending the statute as suggested. This change improves the clarity of the revised statutes.
- (12) *USAO, at App. C. 375, opposes including a penalty enhancement for possessing a firearm while committing trafficking of a controlled substance instead of a stand-alone offense for the same conduct and offenses against persons.*
- The RCC does not incorporate this recommendation because it is inconsistent with the RCC approach to differentiating crimes against persons from other less inherently dangerous crimes, does not logically organize offenses, and may authorize disproportionate penalties.
- (13) *USAO, at App. C. 375-376, recommends that if the firearm enhancement is retained in the trafficking offense, the words “in furtherance of and” should be deleted.*
- The RCC does not incorporate this recommendation. Trafficking a controlled substance while possessing a weapon that has no relationship to the offense does not warrant a heightened penalty. Under USAO’s proposal, a person packaging a controlled substance with a legally registered handgun in the room would be subject to a penalty enhancement, even if the handgun had no relationship to the offense. The fact that an actor possesses a firearm while trafficking a controlled substance may lead to an inference that the actor may use the firearm at some point, in furtherance of the crime, but the RCC does not presume this fact. Illegally possessing a firearm unconnected to the trafficking crime is subject to liability and consecutive punishment under other RCC offenses.
- (14) *USAO, at App. C. 376, recommends removing the defense under § 48-901.01b(h)(1) 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. USAO specifically notes that in some cases, it will be difficult to*

prove that a person intended to distribute a controlled substance in exchange for something of value.

- The RCC partially incorporate this recommendation by narrowing the defense. Specifically, the defense is revised to state: “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 *and, either the quantity of the controlled substance distributed does not exceed the amount for a single use by the recipient, or the recipient intends to immediately use the controlled substance.*” This change may eliminate a gap in liability and improves the proportionality of the revised statutes. Notably, under the RCC current law, a person possessing a controlled substance in a quantity consistent with distribution is still free to argue that he intends to consume the substances himself.

(15) *USAO, at App. C. 425, recommends that all gradations of trafficking of a controlled substance be classified as felonies.*

- The RCC does not incorporate this recommendation because it would change current law in a way that may authorize disproportionate penalties. Under the RCC, trafficking of substances that have been designated “abusive” or “narcotic,” are all felonies while trafficking substances in schedules that have a lower propensity for harm and addiction, and greater medical benefit constitutes fourth and fifth degree trafficking, which are classified as misdemeanors. This distinction in penalties is warranted by the dangerousness of the controlled substances involved and, in significant part, reflects current law under which trafficking of a Schedule V substance is subject to imprisonment for a maximum of one year.

(16) *The CCRC recommends revising the phrasing of the penalty enhancement provision in paragraph (h)(6) to state, “In addition to the general penalty enhancements under this title, the penalty classification for this offense is increased by one class when...” instead of “In addition to any general penalty enhancements in RCC §§ 22E-605 – 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 the following is proven.” Broadening the reference to RCC §§ 22E-605 - 608 to include any general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification “is increased,” instead of “may be increased” clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase “one or more of the following is proven” is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.*

- This revision improves the clarity of the revised statute.

RCC § 48-904.01c. Trafficking of a Counterfeit Substance.

- (1) *USAO reiterates all of its comments and recommendations with respect to trafficking of a controlled substance.*
 - The RCC does or does not incorporate recommendations in accordance with changes to the trafficking of a controlled substance statute, and for the reasons stated there.
- (2) *The CCRC recommends revising the phrasing of the penalty enhancement provision in paragraph (g)(6) to state, “In addition to the general penalty enhancements under this title, the penalty classification for this offense is increased by one class when...” instead of “In addition to any general penalty enhancements in RCC §§ 22E-605 – 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 the following is proven.” Broadening the reference to RCC §§ 22E-605 - 608 to include any general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification “is increased,” instead of “may be increased” clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase “one or more of the following is proven” is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.*
 - This revision improves the clarity of the revised statute.

RCC § 22E 48-904.10. Possession of Drug Manufacturing Paraphernalia.

- (1) *OAG, at App. C. 365-366, recommends amending paragraph (b)(2) to clarify that the exclusion to liability only applies if the actor possessed an item “solely to package or repackage a controlled substance for that person’s own use,” or with intent to “solely to package or repackage a controlled substance for that person’s own use[.]” OAG notes that this will clarify that the exclusion would not apply if a person possesses paraphernalia to package a controlled substance for that person’s own use, as well as for other illicit purposes.*
 - The RCC incorporates this recommendation by amending the statute as suggested by OAG. This change improves the clarity of the revised statutes.
- (2) *PDS, at App. C. 370, recommends amending the offense to exclude possession of items knowing that they have been used to manufacture a controlled substance. PDS argues that many common items can be used to manufacture a controlled substance, and individuals may share homes with people who have used these items for manufacturing.*
 - The RCC incorporates this recommendation by deleting the phrase “That has been used to manufacture a controlled substance.” Merely possessing items that previously have been used to manufacture a controlled substance, without intent to manufacture additional controlled substances, does not warrant criminalization. Although the RCC often criminalizes possession of various items with intent to use them to commit a criminal offense, the RCC generally does not criminalize possession of items that previously have been used to commit a crime. Logically, a person who has previously actually used an object to manufacture paraphernalia at that time also possessed the object with intent to use the object to manufacture a controlled substance—and so remains liable under the revised statute. Commentary has been updated to clarify that a person who possesses an item and used it to manufacture a controlled substance in the past may still be convicted under this statute. This change improves the proportionality of the revised criminal code.
- (3) *USAO, at App. C. 377, says it “opposes decriminalization of drug paraphernalia.” (USAO does not provide any specific re-drafting proposal, but presumably recommends that the revised statute be re-drafted to include possession of any items with intent to use the item to ingest or distribute a controlled substance as in current law.) USAO also notes that the draft revised statute did not separately define the term “manufacturing,” but if the definition from D.C. Code § 48-901.02 (13) is applied, “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.” USAO says that, “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 does not incorporate this recommendation because it may authorize disproportionate penalties. Mere possession of items with intent

to use them to ingest or distribute controlled substances does not warrant criminalization, particularly given the health risks that may arise from use of unsafe objects to ingest or inhale a controlled substance. The RCC maintains criminal penalties for trafficking of drug paraphernalia as provided in RCC § 48-904.11. The RCC will update the revised statute to clarify that the term “manufacture” is defined in RCC § 22-701, and will have the same meaning as under current D.C. Code § 48-901.02 (13). USAO is correct that the revised statute does not criminalize possession of items not intended for use in manufacturing a controlled substance. Substantial criminal penalties remain in other RCC statutes for possession with intent to distribute or distribution of controlled substances.

(4) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying unlawful operation of a recording device as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

RCC § 48-904.11. Trafficking in Drug Paraphernalia.

- (1) *OAG, at App. C. 366, says it is unclear why the revised trafficking of paraphernalia offense includes items intended for use in introducing a controlled substance into the human body, but the revised possession of paraphernalia offense does not.*
 - The RCC incorporates this recommendation by amending the commentary to note that trafficking in certain types of paraphernalia, the possession of which is not criminal, reflects the greater seriousness of commercial conduct that may facilitate consumption of controlled substances. This change improves the clarity of the RCC commentary.
- (2) *PDS, at App. C. 370, recommends that the exclusions to liability under subsection (c) should include distribution of items that will be used to smoke controlled substances.*
 - The RCC incorporates this recommendation by amending the statute to exclude liability for a community organization’s distribution of clean supplies for the smoking of a controlled substance. Specifically, the exception for community-based organizations is revised to state: “Is a community-based organization that sells or delivers, or possesses 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 for the ingestion or inhalation of a controlled substance[.]*” Such an effort to reduce the harm of smoking a controlled substance does not warrant criminal punishment. This change improves the proportionality of the revised statutes.
- (3) *PDS, at App. C. 370, recommends that the exclusions to liability under subsection (c) should include the transfer or delivery of clean supplies from one user to another user. As currently drafted, the exclusion applies to community-based organizations, or persons authorized by subsection (b) of D.C. Code § 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.*
 - The RCC incorporates this recommendation by amending the statute to exclude liability for any sale, distribution or possession with intent to sell or distribute unused hypodermic syringes or needles, regardless of whether the actor is a community based organization or authorized under D.C. Code § 48-1103.01. Specifically, the exclusion for distribution is revised to state: “A person does not commit an offense under this section when that person: . . . Sells, delivers or possesses with intent to sell or deliver an unused hypodermic syringe or needle[.]” This change to decriminalize the sale and distribution of needles and syringes is intended to reduce the harm of using needles and syringes that may transmit HIV, hepatitis, and other diseases. For more information on the public health justification for this change and other jurisdictions’ similar efforts, see: <https://www.cdc.gov/policy/hst/hi5/cleansyringes/index.html>.

(4) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying unlawful operation of a recording device as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

**D.C. Code §§ 7-2502.12 and 7-2502.13. Repeal of Possession of Self-Defense Sprays.
Repeal of D.C. Code §§ 7-2502.12 (Definition of self-defense sprays) and 7-2502.13
(Possession of self-defense sprays).**

(1) *OAG, App. C at 390, recommends a conforming amendment to D.C. Code § 7-2501.01 (7)(C) that clarifies when the use of lacrimators are not considered destructive devices. OAG proposes, “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-defense spray and which is propelled from an aerosol container that is labeled with or accompanied by clearly written instructions as to its use.”*

- The RCC partially incorporates this recommendation by revising the possession of an unregistered firearm, destructive device, or ammunition offense to exclude all lacrimators (natural and manmade compounds). The exclusion states, “A person does not commit an offense under subsection (a) of this section for possession of a lacrimator or sternutator.” This change improves the proportionality of the revised statute.

Repeal of D.C. Code § 48-904.03a. Repeal of Maintaining Location to Distribute or Manufacture Controlled Substances.

(1) *OAG, at App. C. 367, recommends that the RCC include a more limited version of the offense that applies to the manufacture of methamphetamine. OAG states that this offense is warranted due to the “dangerousness associated with methamphetamine production[.]”*

- The RCC partially incorporates this recommendation. The RCC includes a new “Maintaining a Place for Methamphetamine Production” offense. The offense makes it an offense to “knowingly maintain[] or open[] any place to manufacture methamphetamine, its salts, isomers, or salts of its isomers.” However, the term “manufacturing” is limited by the specific language in the revised statute to exclude maintaining or opening locations with the intent merely to engage in packaging, repackaging, labeling, or relabeling of methamphetamine. These types of manufacturing do not create the safety risks associated with actual production of methamphetamine. Accordingly, the revised offense specifically excludes maintaining or opening a place for only these purposes.

D.C. Code § 48-904.07. Repeal of Enlistment of Minors.

(1) *USAO, at App. C. 377, recommends amending the penalty enhancement under the trafficking of a controlled substance offense regarding trafficking to minors 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. USAO notes that this would ensure that “to the extent conduct prohibited by D.C. Code § 48-904.07 is prosecuted under an accomplice liability theory . . . there would be an enhanced penalty for enlisting a minor to distribute a controlled substance.”*

- a. The RCC incorporates this recommendation by amending the enhancements to the trafficking of a controlled substance offense to substantially include the language suggested by USAO. Specifically, an additional enhancement is included for: “The actor is, in fact, 21 years of age or older, and the actor engages in the conduct constituting the offense by knowingly enlisting, hiring, contracting, or encouraging any person under 18 years of age to sell or distribute any controlled substance for the profit or benefit of the actor.”

RCC § 22E-102. Rules of Interpretation.

- (1) *OAG, App. C at 464-465 recommends changing the second sentence of paragraph (a) to replace the text “If necessary to determine legislative intent, the structure, purpose, and history of the provision also may be examined” with “To the extent necessary to resolve ambiguities in the plain statutory text, the structure, purpose, and history of the provision also may be examined.” OAG says that its proposed language clarifies “what function the review...serves.”*
- The CCRC does not incorporate this recommendation because it would make the revised statutes less clear and contravene longstanding District case law. As described in the commentary, ambiguities in the plain wording of statutory text is just one reason to look more broadly to the text’s structure, purpose, and history. Longstanding District (and national) case law recognizes that notwithstanding apparent clarity in statutory text, examination of other sources may be necessary.¹ For example, when otherwise unambiguous text leads to absurd results, examination of other sources is warranted.² Courts are concerned about determining legislative intent when interpreting a statute and that is appropriately reflected in the current paragraph (a) of the RCC provision.

¹ *Peoples Drug Stores, Inc. v. D.C.*, 470 A.2d 751, 754 (D.C. 1983) (en banc) (“Although the “plain meaning” rule is certainly the first step in statutory interpretation, it is not always the last or the most illuminating step. This court has found it appropriate to look beyond the plain meaning of statutory language in several different situations. First, even where the words of a statute have a “superficial clarity,” a review of the legislative history or an in-depth consideration of alternative constructions that could be ascribed to statutory language may reveal ambiguities that the court must resolve.”).

² *Varela v. Hi-Lo Powered Stirrups, Inc.*, 424 A.2d 61, 65 (D.C. 1980) (“However, while (t)he plain meaning of the words is generally the most persuasive evidence of the intent of the legislature ... the plain meaning rule has limitations. It has long been recognized that the literal meaning of a statute will not be followed when it produces absurd results. And since the judicial function is to ascertain the legislative intention the Court may properly exercise that function with recourse to the legislative history, and may depart from the literal meaning of the words when at variance with the intention of the legislature as revealed by legislative history. (*District of Columbia National Bank v. District of Columbia*, 121 U.S.App.D.C. 196, 198, 348 F.2d 808, 810 (1965) (citations omitted). *See also Davis v. United States*, D.C.App., 397 A.2d 951 (1979).”).

RCC § 22E-204. Causation Requirement.

(1) *OAG, App. C at 554-556, recommends deleting paragraph (c)(2) which states: “When the result depends on another person’s volitional conduct, the actor is justly held responsible for the result.”*

- The RCC does not incorporate this recommendation because it may result in disproportionate penalties being imposed. If this paragraph is deleted, then reasonable foreseeability would be the only factor in determining legal causation. An actor would be held criminally responsible for any intervening volitional conduct of another as long as that conduct was reasonably foreseeable. This rule would be overbroad and too easily hold people criminally responsible for the acts of others, regardless of whether it is unjust to do so.³ The OAG recommendation to make reasonable foreseeability the sole basis for determining legal causation for all offenses would go well beyond the DCCA en banc holding in *Fleming* which did not address causation in the felony murder or non-second degree murder context⁴ (whereas the RCC provision applies to all offenses), specifically noted that there may be other considerations in establishing proximate cause besides reasonable foreseeability.⁵

(2) *OAG, App. C at 556-557, recommends that if RCC § 22E-204 retains paragraph (c)(2), that the term “volitional conduct” be defined in statute, and that the phrase “justly held responsible for the result” be amended to “articulate a discernible standard.” In its written comments OAG did not provide any recommended alternate language.*

- The RCC does not incorporate this recommendation at this time. With respect to the term “volitional conduct,” the commentary to RCC § 22E-204 states that paragraph (c)(2) relates to the “free, deliberate, and informed conduct of a third party or the victim.” The term “volitional conduct” and the

³ For example, A wants to end a romantic relationship with B. B is heartbroken, and tells A that as a result, B will commit suicide. A does not wish for any harm to come to B, but decides to end the relationship anyway. If B then commits suicide, under OAG’s proposal, A would be liable for a homicide offense since A’s conduct was a but-for cause of B’s suicide, and B’s volitional conduct was entirely foreseeable.

⁴ *Fleming v. United States*, 224 A.3d 213, 228-29 (D.C. 2020), cert. denied, 207 L. Ed. 2d 1059 (June 15, 2020) (“The causation principles we have discussed in this case are generally applicable in second-degree-murder cases ... this model instruction is not designed to address the issue of causation under the felony-murder statute. See *supra* at 226–27 (leaving open whether causation operates differently under felony-murder statute).”).

⁵ *Fleming v. United States*, 224 A.3d 213, 229 (D.C. 2020), cert. denied, 207 L. Ed. 2d 1059 (June 15, 2020) (“The instruction also does not address situations in which the decedent was dying anyway and the claim is that the decedent hastened death. *Id.* at 222. Although the instruction includes bracketed language to flag the issue of temporal attenuation, the instruction does not attempt to provide any concrete guidance about that issue, because the issue was not raised in this case. *Id.* at 224–25. The instruction does not address the unusual situation in which the theory is that the defendant caused death by an omission rather than an action. Finally, the instruction does not attempt to address the issue of “multiple sufficient causes.” *Id.* at 222.”).

accompanying commentary is sufficiently clear to guide fact finders. With respect to the phrase “justly held responsible for the result,” the commentary notes that ultimately whether a person may be held liable for the volitional conduct of another is a normative judgment. As discussed above, an objective standard premised solely on reasonable foreseeability may produce unjust results. The commentary provides several factors to guide fact finders in determining whether an actor may be “justly held liable” for volitional conduct of another. Although paragraph (c)(2) does not provide a clear bright line rule, it does define the basic principle of legal causation when there is intervening volitional conduct: the actor should only be held legally responsible when it is *just* to do so, given the surrounding facts of a given case. Although the RCC does not incorporate this recommendation at this time, CCRC staff will continue to evaluate principles of legal causation and will consider recommending updated language at a later date. The CCRC would welcome Advisory Group members’ further comments on possible statutory language accounts for factors besides reasonable foreseeability and provides more guidance to factfinders.

(3) *PDS, App. C at 574-575, recommends that RCC § 22E-204 be amended to include language which states, “For offenses that require proof of a mental state and conduct, the mental state that is required for the conduct must concur with the actor’s prohibited conduct. To concur, the mental state required for the conduct must actuate the conduct.”*

- The RCC at this time partially incorporates this recommendation by amending the commentary to RCC § 22E-205, which defines the culpable mental state requirement for criminal liability, to note a presumption of concurrence. It is generally true that a basic requirement of criminal liability is that the defendant must have the requisite mental state at the time the defendant engages in the conduct constituting the offense.⁶ The CCRC does not assume otherwise. As to particular drafting, the CCRC would welcome Advisory Group members’ further comments on possible statutory language (PDS’ recommendation or otherwise) to codify a concurrence requirement.

⁶ See *Fleming v. United States*, 224 A.3d 213, 229–30 (D.C. 2020), cert. denied, 207 L. Ed. 2d 1059 (June 15, 2020) (“We have said that, “[i]f either the actus reus—the unlawful conduct—or the mens rea—the criminal intent—is *230 missing at the time of the alleged offense, there can be no conviction. Reducing it to its simplest terms, a crime consists in the concurrence of prohibited conduct and a culpable mental state.” *Rose v. United States*, 535 A.2d 849, 852 (D.C. 1987) (internal quotation marks omitted). We have recently suggested that the concept of concurrence contains exceptions and presents complications. *Dawkins v. United States*, 189 A.3d 223, 231 & n.11 (D.C. 2018). At least in general, though, considerations of concurrence would suggest that a defendant's acts that lead to a later death could provide the basis for a conviction for second-degree murder only if, at the time the defendant took those acts, the defendant had the mental state required for second-degree murder: intent to kill, intent to inflict serious bodily injury, or conscious disregard of the risk of death or serious bodily injury. *Walker v. United States*, 167 A.3d 1191, 1201 (D.C. 2017).”).

- (4) PDS, App. C at 575-580, recommends that paragraph (c)(2) should be redrafted to state, “*A person’s conduct is the legal cause of a result if the result is reasonably foreseeable in its manner of occurrence. Another person’s volitional conduct is not reasonably foreseeable unless the other person’s volitional conduct consists of lawful self-defense or defense of others that results from the defendant’s actions.*” In other words, another person’s volitional conduct would necessarily negate legal causation, unless the volitional conduct consists of lawful self-defense or defense of others.
- The RCC does not incorporate this recommendation because the proposed standard would change current District law in a way that may result in disproportionate penalties being imposed. For example, consider if A inflicts significant but not immediately fatal injuries on B, who declines medical care due to religious beliefs, which then results in B’s death. PDS’s proposed language would categorically preclude finding that A legally caused B’s death. This would be the case even if A knew of B’s religious beliefs and specifically planned to cause B’s death by inflicting non-fatal injuries, knowing that B would refuse necessary medical care. Although the RCC does not incorporate this recommendation at this time, CCRC staff will continue to evaluate principles of legal causation and will consider recommending updated language at a later date.
- (5) USAO, App. C at 591-592, recommends deleting paragraph (c)(2), or alternatively re-drafting paragraph (c)(2) as “*When the result depends on another person’s volitional conduct, the result is not attenuated by that conduct, or by the passage of time.*” USAO says that: “*Given that attenuation principles are already well-established in the case law analyzing reasonable foreseeability, and would probably be used to interpret when to “justly” hold someone responsible, it would be clearer to refer directly to “attenuation” rather than using “justly” as an undefined but roughly equivalent term.*”
- The RCC does not incorporate USAO’s recommendation to delete (c)(2) for the reasons described in the above entry regarding the same comment by OAG, App. C at 554-556.
 - The RCC also does not incorporate USAO’s proposed alternative drafting proposal at this time. USAO’s comments state that legal causation may be negated even when intervening volitional conduct is reasonably foreseeable through principles of “attenuation.” However, under the USAO recommended language it would remain unclear when intervening conduct becomes so attenuated as to negate legal causation, or what factors may be relevant in making this determination. By contrast, the RCC causation statute clarifies that this legal causation determination involves a *normative* judgment and the commentary identifies some relevant factors in making this judgment. Although paragraph (c)(2) does not create a clear bright line standard, it still provides fact finders with more guidance than asking them to determine whether the result was too attenuated by intervening volitional conduct.

Although the RCC does not incorporate this recommendation at this time, CCRC staff will continue to evaluate principles of legal causation and will consider recommending updated language at a later date.

RCC § 22E-214. Merger of Related Offenses.

(1) *USAO, App. C at 492-493, recommends that the RCC retain an elements based merger test instead of including a fact-based approach to merger. USAO’s comment specifically raises concerns with paragraph (a)(4), which permits merger of offenses when “one offense reasonably accounts for the other offense[.]”*

- The RCC does not incorporate this recommendation—to the extent that USAO is recommending merger only under a *Blockburger* test—because it may result in imposition of disproportionate penalties. However, a premise of the USAO comment appears to be incorrect. To clarify, the RCC’s general merger provision under § 22E-214 does *not* include fact-based merger analysis.⁷ The merger provisions in § 22E-214, including paragraph (a)(4), shall be applied to statutes in the abstract, based on the elements of the offense and the legislative purpose of the offense, and the specific facts of a given case do not guide merger decisions.
- The RCC merger rules, going beyond the traditional elements based *Blockburger* analysis, are necessary to prevent duplicative convictions and penalties based on a single act or course of conduct. Relying solely on a strict elements-based merger test may improperly allow multiple convictions due to minor or technical distinctions between statutes. For example, the RCC robbery statute includes taking property by communicating “that the actor immediately will cause the complainant or another person present to suffer bodily injury, a sexual act, a sexual contact, confinement, or death[.]” The RCC criminal threats statute requires communicating that “the actor will cause a *criminal* harm . . . with intent that the communication be perceived as a serious expression that the actor would cause the harm[.]” Under a strict (*Blockburger*) elements based merger test, robbery and criminal threats would not merge, since each offense includes elements that the other does not. However, the gravamen of robbery involves not only lost property, but also the threat to physical safety caused by use of force or threats. Permitting a separate criminal threats conviction in any robbery case that involves threat of harm is unnecessarily duplicative.

⁷ However, the RCC kidnapping and criminal restraint statutes, RCC § 22E-1401 and § 22E-1402 *do* call for fact-based merger analysis.

RCC § 22E-215. De Minimis Defense.

- (1) *USAO, App. C at 494, recommends deleting the de minimis defense defined under RCC § 22E-215. USAO's comments state that whether a defendant's conduct may be characterized as de minimis is best considered at the sentencing phase rather than at the guilt phase of proceedings.*
- The RCC does not incorporate this recommendation because it may result in imposition of disproportionate penalties. As defined under the RCC, *de minimis* conduct is not merely a mitigating factor to be considered at sentencing. Rather, under RCC § 22E-215, the defendant bears the burden of proving by a preponderance of the evidence that the defendant's "conduct and accompanying mental state are insufficiently blameworthy to warrant the condemnation of a criminal conviction under the circumstances." The *de minimis* defense is intended to cover a narrow range of conduct for which a criminal conviction would be unduly harsh, despite technically satisfies the elements of an offense. Under this standard, even a lenient penalty at the sentencing is disproportionately severe.
 - USAO correctly notes that there is no *de minimis* defense recognized under current District law. However, the DCCA has suggested that the D.C. Council consider adopting a *de minimis* defense. In a concurring opinion, Judge Schwelb wrote, in affirming the appellant's conviction for simple assault, that the conduct in the case was "at most, a *de minimis* and inconsequential violation of the assault statute," such that it was "disproportionate and unjust to saddle [the defendant] with a criminal conviction under all of the circumstances of this case."⁸

⁸ *Watson v. United States*, 979 A.2d 1254, 1258 (D.C. 2009).

RCC § 22E-301. Criminal Attempt.

- (1) *The CCRC recommends revising paragraph (d)(1) to clarify that the penalty reduction for criminal attempt includes a 50% reduction in both the maximum term of imprisonment and any fines allowable for the target offense. This revision is intended to clarify the applicable penalties for criminal attempt.*
 - This change improves the clarity and proportionality of the revised criminal statute.
- (2) *The CCRC recommends amending paragraph (d)(1) to clarify that the maximum penalty for criminal attempt is reduced by 50% after application of any penalty enhancements to the target offense.*
 - This change improves the clarity and proportionality of the revised criminal statute.

RCC § 22E-302. Solicitation

- (1) *The CCRC recommends revising paragraph (d)(1) to clarify that the penalty reduction for solicitation includes a 50% reduction in both the maximum term of imprisonment and any fines allowable for the target offense. This revision is intended to clarify the applicable penalties for criminal attempt.*
 - This change improves the clarity and proportionality of the revised criminal statute.
- (2) *The CCRC recommends amending paragraph (d)(1) to clarify that the maximum penalty for solicitation is reduced by 50% after application of any penalty enhancements to the target offense.*
 - This change improves the clarity and proportionality of the revised criminal statute.

RCC § 22E-303. Criminal conspiracy.

- (1) *OAG, App. C at 465, requests the commentary clarify the jurisdictional rules for conspiracies formed within the District to engage in conduct outside the District. OAG asks when conduct would “constitute a criminal offense under the Statutory laws of the District if performed in the District” and “the statutory laws of the District even if performed outside the District.” OAG requests that the commentary be updated to provide examples of when paragraph (d)(1) and subparagraph (d)(2)(A) are satisfied, and when paragraph (d)(1) and subparagraph (d)(2)(B) are satisfied.*
 - The RCC incorporates this recommendation, and the commentary for RCC § 22E-303 will be updated accordingly.
- (2) *The CCRC recommends revising paragraph (d)(1) to clarify that the penalty reduction for solicitation includes a 50% reduction in both the maximum term of imprisonment and any fines allowable for the target offense. This revision is intended to clarify the applicable penalties for criminal attempt.*
 - This change improves the clarity and proportionality of the revised criminal statute.
- (3) *The CCRC recommends amending paragraph (d)(1) to clarify that the maximum penalty for solicitation is reduced by 50% after application of any penalty enhancements to the target offense.*
 - This change improves the clarity and proportionality of the revised criminal statute.

RCC § 22E-401. Lesser Harm.

(1) *OAG, App. C at 597, recommends amending the statutory language to explicitly state, “The criminal actions were taken in response to exigent circumstances.” USAO, App. C at 601 – 602, recommends the Commentary clarify that, although imminence/immediacy of the harm to be avoided may not be an absolute requirement, consideration of imminence/immediacy of the harm to be avoided is an important factor when assessing whether the actor reasonably believes the conduct constituting the offense is necessary, in both its nature and degree, to avoid that harm.*

- The RCC partially incorporates these recommendations by amending the statutory language and corresponding commentary to specify that the person must reasonably believe that: 1) the actor or another person is in imminent danger of a specific, identifiable harm; and 2) the conduct constituting the offense will protect against the harm and is necessary in degree. This language replaces the prior draft language stating, in relevant part: “The person reasonably believes the conduct constituting the offense is necessary, in both its timing, nature, and degree, to avoid a specific, identifiable harm.” The term “imminent” conveys a very similar concept as was intended by the prior draft’s commentary entry using the word “exigent” to which OAG refers. The term “imminent” also is more consistent with the lesser harm defense in other jurisdictions.⁹ Commentary on the meaning of “imminent” further clarifies that the term is not intended to be strictly temporal, and may include dangers that are not necessarily immediate from a purely objective perspective.¹⁰ The term “nature” is eliminated from the updated RCC draft as unnecessary and potential confusing, and the “necessary in degree” requirement is maintained (though as a separate term in paragraph (a)(2)(B)). This change improves the clarity and consistency of the revised statutes.

(2) *OAG, App. C at 597, recommends adding to the statute an exception to the defense when “There is a reasonable legal alternative available to the person that does not involve a violation of the law.”*

- The RCC does not incorporate this recommendation because the draft statute has been otherwise changed so that it does not refer to the necessity of the conduct constituting the offense, such that a separate statutory provision as suggested by OAG would make the statute less clear. While the Supreme Court in *Bailey* has raised in analysis of duress and necessity (lesser harm) defenses the question of whether there was a reasonable,

⁹ See, e.g., 2 Subst. Crim. L. § 10.1(d)(5) (3d ed.) (“It is sometimes said that the defense of necessity does not apply except in an emergency—when the threatened harm is immediate, the threatened disaster imminent.”); Del. Code Ann. tit. 11, § 463.

¹⁰ See Model Penal Code § 3.02 cmt. at 17 (1985) (“[I]t is a mistake to erect imminence as an absolute requirement, since there may be situations in which an otherwise illegal act is necessary to avoid an evil that may occur in the future. If, for example, A and B have driven in A’s car to a remote mountain location for a month’s stay and B learns that A plans to kill him near the end of the stay, B would be justified in escaping with A’s car although the threatened harm will not occur for three weeks.”).

legal alternative to violating the law,¹¹ there is no indication that the Court meant such an analysis to replace proof of the other requirements of the defense or be a stand-alone provision. Critically, the reference to “reasonable,” if codified independently, is unclear as to whether the actor needs to be aware of the “reasonable” alternative or if it is a purely objective standard. Other jurisdiction statutes also do not codify such a provision. To avoid confusion, the updated commentary omits this quotation from *Bailey* regarding a legal alternative.

- (3) *OAG, App. C at 598, recommends clarifying the meaning of the phrase “significantly greater” in the statutory text or commentary, to provide additional guidance to factfinders. OAG does not provide proposed language.*
 - The RCC does not incorporate this recommendation because it may render the statute less clear and may lead to disproportionate outcomes. As a general matter, the RCC does not provide definitions for words that indicate a quantity of relevance such as “significant,” “substantial,” “material,” or “nontrivial.” Whether one harm significantly outweighs another is a fact-sensitive determination that might be further complicated, instead of clarified, by providing universal guidelines for factfinders who must evaluate very different fact patterns.
- (4) *OAG, App. C at 598, recommends clarifying the explanatory note for paragraph (a)(1) which states, “The question of necessity is not committed to the private judgment of the person engaging in the conduct, it is a mixed question of fact and law for determination at trial.” OAG asks, “[H]ow can it be both what a reasonable person believes and at the same time not be committed to the private judgment of the person?” and suggests further clarification of how the word “reasonably” functions in the statute.*
 - The RCC incorporates this recommendation by revising the commentary to clarify the relationship between a person’s subjective judgment about what is necessary and objective considerations. This change clarifies and does not change the meaning of the statute.
- (5) *The CCRC recommends amending the commentary to clarify that: “The term ‘brings about’ requires that the actor caused the situation requiring the defense. The actor’s conduct must have been a but-for cause of the situation, and the situation must have been reasonably foreseeable.¹² An actor can bring about the situation either by instigating others, or by placing him or herself in circumstances in which others pose a risk of harm.¹³”*
 - This change clarifies the revised statute.

¹¹ *United States v. Bailey*, 444 U.S. 394, 410 (1980).

¹² Legal causation as defined in RCC § 22E-204 requires that the result is reasonably foreseeable, and that if the result is due to another person’s volitional conduct, the actor may be justly held responsible for the result. However, the term “brings about” only requires that the actor’s conduct was a but-for cause of the situation, and that it was reasonably foreseeable. When the situation is the result of another person’s volitional conduct, it is not necessary that the actor is justly responsible for the situation.

¹³ For example, if a person chooses to participate in a criminal enterprise, reckless that a failure to commit criminal acts will be punished by physical harm, the defense may be unavailable if the person commits a criminal offense due to fear of the physical harm.

RCC § 22E-403. Defense of Self or Another Person.

- (1) *OAG, App. C at 611 – 612, recommends revising paragraph (c)(4), to clarify that it concerns the officer’s conduct prior to the use of force and not the officer’s mere presence.*
 - The RCC incorporates this recommendation by revising paragraph (c)(4) to add the words “any conduct” so it states: “Whether *any conduct* by the law enforcement officer increased the risk of a confrontation resulting in deadly force being used.” This change clarifies the revised statute and does not further change District law.
- (2) *OAG, App. C at 612, recommends revising the statutory text or commentary to clarify “what it means to ‘reasonably believe’ something in the heat of passion.”*
 - The RCC incorporates this recommendation by revising the commentary to state, “It may be reasonable for person acting in the heat of passion to believe a greater degree of force is necessary than would seem necessary to a calm mind.” This change clarifies the revised commentary.
- (3) *OAG, App. C at 612, recommends specifying in statutory text, “Conduct is not necessary if the harm can be avoided by a reasonable ‘legal alternative available to the defendants that does not involve violation of the law...’”*
 - The RCC does not incorporate this recommendation because the draft statute has been otherwise changed so that it does not refer to the necessity of the conduct constituting the offense, such that a separate statutory provision as suggested by OAG would make the statute less clear. While the Supreme Court in *Bailey* has raised in analysis of duress and necessity (lesser harm) defenses the question of whether there was a reasonable, legal alternative to violating the law,¹⁴ there is no indication that the Court meant such an analysis to replace proof of the other requirements of the defenses or to be a stand-alone provision. Critically, the reference to “reasonable,” if codified independently, is unclear as to whether the actor needs to be aware of the “reasonable” alternative or if it is a purely objective standard. Other jurisdiction statutes also do not codify such a provision in their self-defense statutes. To avoid confusion, the updated commentary omits this quotation from *Bailey* regarding a legal alternative.
- (4) *OAG, App. C at 612, recommends revising the commentary to state clarify that, apart from menacing speech, a person engaging in speech alone is not normally considered an aggressor. OAG specifically recommends the relevant commentary provision be revised to say: “Under subparagraph (b)(2)(B), the defense is still available to an actor who recklessly brings about the situation requiring the defense when the actor is engaging in speech only” (with the relevant footnotes added back in).*
 - The RCC does not incorporate this recommendation because the statute has been changed in another way that renders it inapplicable. The statutory text now states, “The actor purposely, through conduct other than

¹⁴ *United States v. Bailey*, 444 U.S. 394, 410 (1980).

speech or presence alone, provokes or brings about the situation requiring the defense and, in fact, does not withdraw or make reasonable efforts to withdraw.” The corresponding commentary now states, “the defense is available if the actor provokes the danger through speech¹⁵ or presence alone.¹⁶”

(5) *PDS, App. C at 622 - 623, recommends striking the word “necessary” and bringing the statute it into closer linguistic alignment with current law. PDS states it has serious concerns that adopting new language and structure will obscure the statute’s roots in that common law, confusing practitioners and upending the application of self-defense in the courtroom. PDS further states, “The use of ‘necessary’ in addition to the legal requirement that the actor’s conduct be reasonable both subjectively and objectively invites a jury to speculate about what was truly necessary under those circumstances and whether some alternative conduct was available to the actor.” PDS further states, “The use of the word ‘necessary’ may build in a duty to retreat – if not as a matter of law, then as a matter of how the jury would analyze whether the conduct was ‘necessary,’ as in ‘required.’” PDS provides specific language per its recommendation.*

- The RCC partially incorporates these recommendations by amending the statutory language and corresponding commentary to specify that the person must reasonably believe that: 1) the actor or another person is in imminent danger of a specified harm; and 2) the conduct constituting the offense will protect against the harm and is necessary in degree. This language replaces the prior draft language stating, in relevant part: “The actor reasonably believes the conduct constituting the offense is necessary, in its timing, nature, and degree, to protect the actor or another person from [a specified harm].” Use of the term “imminent” is more consistent with the drafting of the defense in the District’s Redbook instructions and statutes in other jurisdictions.¹⁷ Commentary on the meaning of “imminent” further clarifies that the term is not intended to be strictly temporal, and may include dangers that are not necessarily immediate from a purely objective perspective.¹⁸ The term “nature” is eliminated

¹⁵ Consider, for example, an actor who appears at a political demonstration fighting for racial justice wearing a t-shirt with racist slurs written on it, fully intending and expecting that it will provoke a physical attack. If a demonstrator attacks the actor, the actor still has a right to use the degree of force necessary to protect herself from further assault. While political speech enjoys the greatest protection under the First Amendment, the exercise of other forms of speech does not alone constitute a provocation that bars the speaker from subsequently defending themselves or others if they are attacked and otherwise meet the requirements of the defense.

¹⁶ The phrase “speech or presence alone” does not include menacing under RCC § 22E-1203, criminal threats under RCC § 22E-1204, or the tort of assault, defined as “putting another in apprehension of an immediate and harmful or offensive conduct.” See *Madden v. D.C. Transit System, Inc.*, 307 A.2d 756, 767 (D.C. 1973); *Person v. Children’s Hosp. Nat Medical Center*, 562 A.2d 648, 650 (D.C. 1989).

¹⁷ See, e.g., § 10.4(d) Imminence of attack, 2 Subst. Crim. L. § 10.4(d) (3d ed.) (“Most of the modern codes require that the defendant reasonably perceive an ‘imminent’ use of force....” (citations omitted)).

¹⁸ See Model Penal Code § 3.02 cmt. at 17 (1985) (“[I]t is a mistake to erect imminence as an absolute requirement, since there may be situations in which an otherwise illegal act is necessary to avoid an evil

from the updated RCC draft as unnecessary and potential confusing, and the “necessary in degree” requirement is maintained (though as a separate term in paragraph (a)(2)(B)). This change improves the clarity and consistency of the revised statute.

(6) *PDS, App. C at 623 - 624, recommends amending the statutory language to state, “Retreat is a factor in the reasonableness of the actor’s response only when the actor has used or attempted to use deadly force. PDS relies on Dawkins v. United States,¹⁹ in which the D.C. Court of Appeals explained, “[I]n the deadly force context, this court has acknowledged that a defendant’s ability to retreat is a special consideration in assessing the viability of his self-defense claim.”*

- The RCC does not incorporate this recommendation because a blanket prohibition on any consideration of the availability of retreat in non-deadly force fact patterns may create a gap in liability. The revised statute does not impose a duty to retreat in deadly force cases, in nondeadly force cases, or in other cases. It does, however, permit the factfinder to consider a person’s ability to retreat when assessing the reasonableness of the person’s belief that there is an imminent danger. The D.C. Court of Appeals has not squarely addressed this issue of the defendant’s ability to retreat in non-deadly force cases.²⁰ However, the ability to consider the defendant’s ability to avoid the criminal conduct (and the defendant’s awareness of that ability) may be relevant in non-deadly force cases and fact patterns that have not yet been reviewed or decided by the D.C. Court of Appeals (which, under case law, limits which offenses where self-defense may be raised).²¹

(7) *PDS, App. C at 624, recommends amending subparagraph (b)(1)(B)(i) to include individuals who are located in the common space of multi-unit housing. PDS states that the current formulation provides more protection to individuals who live in single-family housing. PDS further states, “The heightened need to protect*

that may occur in the future. If, for example, A and B have driven in A’s car to a remote mountain location for a month’s stay and B learns that A plans to kill him near the end of the stay, B would be justified in escaping with A’s car although the threatened harm will not occur for three weeks.”); § 10.4(d) Imminence of attack, 2 Subst. Crim. L. § 10.4(d) (3d ed.) (“As a general matter, the requirement that the attack reasonably appear to be imminent is a sensible one. If the threatened violence is scheduled to arrive in the more distant future, there may be avenues open to the defendant to prevent it other than to kill or injure the prospective attacker; but this is not so where the attack is imminent. But the application of this requirement in some contexts has been questioned.”).

¹⁹ 189 A.3d 223, 231-33 (D.C. 2018).

²⁰ In *Dawkins*, the court stated that there is no duty to disengage from every potential interpersonal conflict and no *duty* to safely retreat before using nondeadly force. However, the court did not hold that a factfinder is prohibited from considering a defendant’s ability to retreat (and the defendant’s awareness of that ability) before engaging in the conduct constituting the offense.

²¹ Consider, for example, person A awaits a bus on a public sidewalk when person B, out for a run, yells “get out of my way” and heads in the direction of person A. Person A does not move aside and, when person B comes within arm’s reach, pushes person B to the side and onto the ground, causing bodily injury. If person A is charged with an assault and claims self-defense, the revised statute does *not* allow the government to argue that person A had a duty to retreat. However, the revised statute also does not prohibit the factfinder from considering the feasibility of taking a step to be out of the runner’s path when assessing the reasonableness of the A’s belief that an assault was imminent.

oneself in one's own home should not be differentiated based on income level and type of home."

- The RCC does not incorporate this recommendation because it may create a gap in liability. The revised defense allows use of deadly force in one's individual dwelling unit to defend against a bodily injury or a sexual contact, assuming all requirements of the defense are met. However, the RCC statute does not permit any person to use deadly force to defend against a bodily injury or a sexual contact in the courtyard or lobby of a residential building. This distinction reflects a distinction between the integrity of a dwelling and a person's special expectation and right to safety in their dwelling. The CCRC appreciates and takes seriously the PDS concern about possible income-based differential impacts of the defense. However, the defense does not differentiate based on income level as the term "dwelling"²² includes structures such as a tent or a cardboard box²³ and the exclusion of common areas of multi-unit housing encompasses the shared amenities in the District's most extravagant luxury buildings.²⁴

(8) *PDS, App. C at 624 – 626, recommends narrowing the exception in paragraph (b)(2) to apply when "[w]hile acting with the purpose to provoke, the actor engages in an unlawful affirmative act that would induce a reasonable person in the passion of the moment to lose self-control and commit a violent or lethal act on impulse and without reflection unless, the actor withdraws or makes reasonable efforts to withdraw from the conflict." PDS states the CCRC should "plainly and vehemently disavow" and "repudiate" Laney v. United States, 294 F. 412 (D.C. Cir. 1923), and "bring the District's provocation doctrine in line with other jurisdictions."*

²² RCC § 22E-701.

²³ See *Jones v. United States*, 172 A.3d 888 (D.C. 2017).

²⁴ While finding data comparing District luxury to lower-income (including but not limited to public) housing is difficult to locate and varies by the definitions used, it appears the number of affordable housing units in the District is currently comparable to or lower than the number of luxury rental units. One estimate puts the number of multi-family units at 70% of the District's total housing stock, consisting of "120,600 rental apartment units, 64,300 condominium units, and 25,600 units in cooperatives or conversions" as of 2016. See D.C. Policy Center, *Taking Stock of the District's Housing Stock* (March 2018) at 11 (available at <https://www.dcpolicycenter.org/publications/taking-stock/>). Luxury units alone now appear to make up about a third of the District's rental housing market. See Jessica M. Goldstein, *While construction continues, the D.C. luxury rental market has crashed*, Washington Post November 16, 2020) (available at https://www.washingtonpost.com/lifestyle/magazine/while-construction-continues-the-dc-luxury-rental-market-has-crashed/2020/11/16/98f61be4-22ac-11eb-8672-c281c7a2c96e_story.html).

That proportion of luxury units (calculating a third of about 200,000 multi-family units, or about 66,000 units) appears roughly comparable to, or a bit higher than, the number of all affordable housing units. The total number of affordable housing units (defined as public housing, Inclusionary Zoning, federal and local financial subsidies, and land dispositions), including both single-family and units in multi-family buildings, was estimated at 51,960 as of 2018. D.C. Office of Planning, *Housing Equity Report: Creating Goals for Areas of Our City* (October 2019) (available at <https://dhcd.dc.gov/sites/default/files/dc/sites/dhcd/publication/attachments/Housing%20Equity%20Report%2010-15-19.pdf>).

- The RCC partially incorporates this recommendation by revising the exception to apply only when an actor purposely provokes brings about the situation requiring the defense and, as it is no longer necessary, eliminating the prior paragraph (b)(2)(A) allowing conduct by a law enforcement engaged in their duties from bringing about the situation requiring the defense. This change to a “purposely” culpable mental state reflects the standard approach taken in most other jurisdictions.²⁵ However, this change in culpable mental states further changes District case law as articulated in *Laney* and its more recent progeny. The RCC commentary has been updated to clearly note the RCC departure from the standard in *Laney* and its progeny. The revised defense effectively requires an affirmative act by specifying that the person must bring about the situation by conduct other than speech. As there is no concern that a law enforcement officer acting within the reasonable scope of that role would purposely bring about the situation requiring the defense, the reference to a law enforcement officer is struck from the updated draft. These changes improve the consistency and proportionality of the revised statutes.
- (9) *PDS, App. C at 626, recommends changing subparagraph (b)(2)(C) to include a person who withdraws from the conflict but not necessarily the location. PDS states, “An individual may effectively withdraw from a conflict and communicate the withdrawal without leaving...”*
- The RCC incorporates this recommendation by deleting the phrase “from the location” from the statute and the commentary. The term “location” as used here is ambiguous and unnecessary. Notably, the current commentary already states “Efforts to withdraw include communicating a desire to withdraw.” This change improves the clarity of the revised statute.
- (10) *PDS, App. C at 626, objects to the use of the word “nature” as vague. PDS recommends specific language omitting this term.*
- The RCC incorporates this recommendation, by omitting the term “nature” from the updated RCC draft as unnecessary and potential confusing. This change clarifies the revised statute.
- (11) *PDS, App. C at 626, recommends including use of force standards for non-deadly force by law enforcement officers that include many of the considerations required for deadly force including whether the officer engaged in de-escalation measures and whether the officer increased the risk of confrontation. PDS does not offer a definition of non-deadly force and its scope is unclear.*

²⁵ § 10.4(e)The aggressor's right to self-defense, 2 Subst. Crim. L. § 10.4(e) (3d ed.) (“Some modern codes specify still other circumstances in which a person, by virtue of his own prior conduct, has lost the right of self-defense he would otherwise have. Most common is a provision that one who provokes the use of force against himself for the purpose of causing serious bodily harm may not defend against the force he has provoked.” (citing to twenty-four jurisdictions statutes). Note that many jurisdictions define “intentionally” in a manner similar to the RCC term “purposely,” so the term “intentionally” appears frequently in these statutes.

- The RCC does not incorporate this recommendation at this time. However, recommendations for a revised resisting arrest offense and a revised fleeing offense are planned by the CCRC in the future and may address these common fact patterns involving law enforcement officers' use of non-deadly force.
- (12) *PDS, App. C at 626 - 627, recommends permitting use of deadly force by a law enforcement officer only in response to an imminent threat. PDS states, "[L]aw enforcement officers should be held to a standard of absolute imminence given their training, the availability of back-up, and the abundance of resources to address situations that are not absolutely imminent without killing people."*
- The RCC incorporates this recommendation insofar as the defense generally has been changed to require the actor to reasonably believe there is an imminent danger of harm. However, contrary to some of the PDS comments, the RCC declines to adopt an "absolute" standard for imminence with respect to law enforcement officers if that means something different from the general requirements for the defense in subsection (a) and paragraph (b)(1). The meaning of "imminent" in the RCC defense of self or another person statute is the same, is not intended to be strictly temporal, and may include dangers that are not necessarily immediate from a purely objective perspective.²⁶ This change improves the clarity and consistency of the revised statute.
- (13) *USAO, App. C at 633 – 635 states its strong opposition to eliminating the imminence or immediacy requirement for the use of force in self-defense.*
- The RCC incorporates this recommendation by amending the statutory language and corresponding commentary to specify that the person must reasonably believe that: 1) the actor or another person is in imminent danger of a specified harm; and 2) the conduct constituting the offense will protect against the harm and is necessary in degree. This language replaces the prior draft language stating, in relevant part: "The actor reasonably believes the conduct constituting the offense is necessary, in its timing, nature, and degree, to protect the actor or another person from [a specified harm]." Use of the term "imminent" is more consistent with the drafting of the defense in the District's Redbook instructions and statutes in other jurisdictions.²⁷ RCC Commentary on the meaning of "imminent"

²⁶ See Model Penal Code § 3.02 cmt. at 17 (1985) ("[I]t is a mistake to erect imminence as an absolute requirement, since there may be situations in which an otherwise illegal act is necessary to avoid an evil that may occur in the future. If, for example, A and B have driven in A's car to a remote mountain location for a month's stay and B learns that A plans to kill him near the end of the stay, B would be justified in escaping with A's car although the threatened harm will not occur for three weeks."); § 10.4(d) Imminence of attack, 2 Subst. Crim. L. § 10.4(d) (3d ed.) ("As a general matter, the requirement that the attack reasonably appear to be imminent is a sensible one. If the threatened violence is scheduled to arrive in the more distant future, there may be avenues open to the defendant to prevent it other than to kill or injure the prospective attacker; but this is not so where the attack is imminent. But the application of this requirement in some contexts has been questioned.")

²⁷ See, e.g., § 10.4(d) Imminence of attack, 2 Subst. Crim. L. § 10.4(d) (3d ed.) ("Most of the modern codes require that the defendant reasonably perceive an 'imminent' use of force...." (citations omitted)).

further clarifies that the term is not intended to be strictly temporal, and may include dangers that are not necessarily immediate from a purely objective perspective.²⁸ This change improves the clarity and consistency of the revised statutes.

²⁸ See Model Penal Code § 3.02 cmt. at 17 (1985) (“[I]t is a mistake to erect imminence as an absolute requirement, since there may be situations in which an otherwise illegal act is necessary to avoid an evil that may occur in the future. If, for example, A and B have driven in A’s car to a remote mountain location for a month’s stay and B learns that A plans to kill him near the end of the stay, B would be justified in escaping with A’s car although the threatened harm will not occur for three weeks.”); § 10.4(d) Imminence of attack, 2 Subst. Crim. L. § 10.4(d) (3d ed.) (“As a general matter, the requirement that the attack reasonably appear to be imminent is a sensible one. If the threatened violence is scheduled to arrive in the more distant future, there may be avenues open to the defendant to prevent it other than to kill or injure the prospective attacker; but this is not so where the attack is imminent. But the application of this requirement in some contexts has been questioned.”).

RCC § 22E-404. Defense of Property.

- (1) *OAG, App. C at 612, recommends specifying in statutory text, “Conduct is not necessary if the harm can be avoided by a reasonable ‘legal alternative available to the defendants that does not involve violation of the law...’”*
- The RCC does not incorporate this recommendation because the draft statute has been otherwise changed so that it does not refer to the necessity of the conduct constituting the offense, such that a separate statutory provision as suggested by OAG would make the statute less clear. While the Supreme Court in *Bailey* has raised in analysis of duress and necessity (lesser harm) defenses the question of whether there was a reasonable, legal alternative to violating the law,²⁹ there is no indication that the Court meant such an analysis to replace proof of the other requirements of the defenses or to be a stand-alone provision. Critically, the reference to “reasonable,” if codified independently, is unclear as to whether the actor needs to be aware of the “reasonable” alternative or if it is a purely objective standard. Other jurisdiction statutes also do not codify such a provision in their defense of property statutes. To avoid confusion, the updated commentary omits this quotation from *Bailey* regarding a legal alternative.
- (2) *The CCRC recommends amending the statutory language and corresponding commentary to specify that the person must reasonably believe that: 1) Real or tangible personal property is in imminent danger of damage, taking, trespass, or misuse; and 2) the conduct constituting the offense will protect against the harm and is necessary in degree. This language replaces the prior draft language stating, in relevant part: “The person reasonably believes the conduct constituting the offense is necessary to protect real property or tangible personal property from damage, taking, trespass, or misuse.”*
- This change aligns the Defense of Property defense with the Lesser Harm and Defense of Self or Another Person defenses and thereby improves the clarity and consistency of the revised statutes.

²⁹ *United States v. Bailey*, 444 U.S. 394, 410 (1980).

RCC § 22E-501. Duress.

(1) *OAG, App. C at 614, recommends that paragraph (a)(1) be redrafted to say, “The actor reasonably believes another person communicated to the actor that unless the actor commits the act constituting the offense the person will cause a criminal bodily injury, sexual act, sexual contact, or confinement to any person.”*

- The RCC does not incorporate this recommendation because it would make the statute less clear and may lead to disproportionate outcomes. The OAG language would narrow the offense to cover communications of an “if this...then that” nature. However, the offense that the actor commits may not be referenced (directly or indirectly) in the communication the actor receives. In fact, the conduct that the actor engages in to avoid the harm may not have been contemplated by the person causing the duress. Consider for example, Person A threatens to sexually assault Person B, who is confined at the D.C. Jail. Person A may intend only to put Person B in a state of fear before committing the act. But, should Person B escape from the D.C. Jail to avoid the sexual assault, the fact that the communication by Person A did not mention or even contemplate Person B’s escape should not limit the availability of a duress defense.

(2) *OAG, App. C at 614, recommends that the commentary on paragraph (b)(1) of the defense describe the contours of the phrase “brings about” and give examples of situations that fall within and without that requirement.*

- The RCC partially incorporates this recommendation by adding description in the commentary on the phrase “recklessly brings about the situation requiring a choice of harms.” Specifically, the commentary now includes the statement that, “The term ‘brings about’ requires that the actor caused the situation requiring the defense. The actor’s conduct must have been a but-for cause of the situation, and the situation must have been reasonably foreseeable.³⁰ An actor can bring about the situation either by instigating others, or by placing him or herself in circumstances in which others pose a risk of harm.³¹” Also, the commentary already states: “For example, if a defendant agrees to engage in a highly dangerous criminal endeavor, and a co-conspirator then threatens the defendant to commit an additional crime in furtherance of the conspiracy, the duress defense may not be available, if the defendant was aware of a substantial risk that a co-conspirator would compel him to commit an additional crime.” This change clarifies the RCC commentary.

³⁰ Legal causation as defined in RCC § 22E-204 requires that the result is reasonably foreseeable, and that if the result is due to another person’s volitional conduct, the actor may be justly be held responsible for the result. However, the term “brings about” only requires that the actor’s conduct was a but-for cause of the situation, and that it was reasonably foreseeable. When the situation is the result of another person’s volitional conduct, it is not necessary that the actor is justly responsible for the situation.

³¹ For example, if a person chooses to participate in a criminal enterprise, reckless that a failure to commit criminal acts will be punished by physical harm, the defense may be unavailable if the person commits a criminal offense due to fear of the physical harm.

- (3) *OAG, App. C at 614, recommends clarifying in commentary how the exception in paragraph (b)(3) applies when a defendant raises multiple defenses at trial.*
- The RCC does not incorporate this recommendation because it is unnecessary; the revised statute now deletes paragraph (b)(3) per another Advisory Group comment (see below).
- (4) *OAG, App. C at 614 – 615, recommends specifying in the RCC statutory text, “Conduct is not necessary if the harm can be avoided by a reasonable ‘legal alternative available to the defendants that does not involve violation of the law...’”*
- The RCC does not incorporate this recommendation because the draft statute has otherwise been changed so that it does not refer to the necessity of the conduct constituting the offense, such that a separate statutory provision as suggested by OAG would make the statute less clear. While the Supreme Court in *Bailey* has raised in analysis of duress and necessity (lesser harm) defenses the question of whether there was a reasonable, legal alternative to violating the law,³² there is no indication that the Court meant such an analysis to replace proof of the other requirements of the defenses or to be a stand-alone provision. Critically, the reference to “reasonable,” if codified independently, is unclear as to whether the actor needs to be aware of the “reasonable” alternative or if it is a purely objective standard. Other jurisdiction statutes also do not codify such a provision in their defense of property statutes. To avoid confusion, the updated commentary omits this quotation from *Bailey* regarding a legal alternative.
- (5) *OAG, App. C at 615, recommends noting the applicability of the defense to situations where the person was granted a temporary absence and either fails to return or waits longer than reasonable to return in the commentary.*
- The RCC incorporates this recommendation by revising the commentary as suggested. This change clarifies the revised commentary.
- (6) *PDS, App. C at 628, recommends removal of subsection (b)(3) of the defense that prevents presenting a duress defense to a jury if the conduct constituting the offense is expressly addressed by another available defense. PDS says that, consistent with the Sixth Amendment, all defenses should go to the jury. PDS says the restriction is particularly unjust given that the government is not limited in the various theories of liability it may present at trial.*
- The RCC incorporates this recommendation by removing subsection (b)(3) of the defense. The MPC³³ and other jurisdictions allow a person to raise a duress offense in addition to a lesser harm (aka choice of evils) defense. This change improves the clarity and proportionality of the revised statutes.
- (7) *USAO, App. C at 636, recommends limiting this defense to situations where the threatened harm is imminent or immediate.*

³² *United States v. Bailey*, 444 U.S. 394, 410 (1980).

³³ § 2.09. Duress., Model Penal Code § 2.09.

- The RCC incorporates this recommendation by amending the statutory language to specify only that the actor reasonably believes that the actor or third person is in imminent danger of the communicated harm. This language replaces the prior draft language stating, in relevant part: “The person reasonably believes the conduct constituting the offense is necessary, in both its timing, nature, and degree, to avoid a specific, identifiable harm.” The term “imminent” conveys a very similar concept as was intended by the prior draft’s “necessary in timing.” The term “imminent” is more consistent with the duress defense recognized in prior District law, which alternately uses the terms “imminent” and “immediate” without distinction.³⁴ New commentary on the meaning of “imminent” further clarifies that the term is not intended to be strictly temporal, and may include dangers that are not necessarily immediate from a purely objective perspective.³⁵ The requirements of being necessary in “nature and degree” are eliminated from the updated RCC draft as unnecessary and potential confusing given the reasonable person standard in paragraph (a)(2)—drafting that is consistent with many other jurisdictions’ statutes.³⁶ This change improves the clarity and consistency of the revised statute.
- (8) *USAO, App. C at 636, recommends adding a proportionality requirement to the offense. Specifically, USAO recommends the statute include as an element in (a)(2): “The actor reasonably believes the conduct constituting the offense is necessary and proportionate, in its timing, nature, and degree, to avoid the threatened criminal harm.” USAO says that this proportionality language would require that the harm to be avoided be objectively worse than the harm committed. USAO gives the example that, “if person A threatens to punch person B in the face unless person B kills person C, it would be absurd to allow person B to claim duress as a complete defense to the murder of C.” USAO notes that RCC subsection (a)(3) may permit government argument that a reasonable person in the situation of person B would not have murdered person C because the harms were so disproportionate. However, USAO recommends inclusion of a proportionality requirement to “eliminate any ambiguity.”*
- The RCC does not incorporate this recommendation because the recommended language would change current law to be less clear and potentially disproportionate, and, as noted by USAO, subsection (a)(3) of

³⁴ See, e.g., *Stewart v. United States*, 370 A.2d 1374, 1377 (D.C. 1977) (“Third, the defendant must establish that he immediately returned to custody once the threat of harm was no longer imminent.”).

³⁵ “[I]t is a mistake to erect imminence as an absolute requirement, since there may be situations in which an otherwise illegal act is necessary to avoid an evil that may occur in the future. If, for example, A and B have driven in A’s car to a remote mountain location for a month’s stay and B learns that A plans to kill him near the end of the stay, B would be justified in escaping with A’s car although the threatened harm will not occur for three weeks.” See Model Penal Code § 3.02 cmt. at 17 (1985).

³⁶ See, e.g., N.Y. Penal Law § 40.00 (McKinney) (“In any prosecution for an offense, it is an affirmative defense that the defendant engaged in the proscribed conduct because he was coerced to do so by the use or threatened imminent use of unlawful physical force upon him or a third person, which force or threatened force a person of reasonable firmness in his situation would have been unable to resist.”).

the RCC defense already address concerns about extreme disproportionality. While some commentators have explicitly argued that commission of greater harms should still be allowed under a duress offense, the RCC follows the MPC approach in relying instead on the more objective standard in subsection (a)(3) to determine the appropriate degree of harm a person must be willing to withstand before committing what amounts to a crime.³⁷ The defense is not available in the hypothetical fact pattern USAO offered,³⁸ because the RCC statute (both the prior and present version) requires that a reasonable person of the same background and in the same circumstances as the actor would comply.

(9) *USAO, App. C at 636 - 637 recommends changing the statute so as to be clearer “that the actor must reasonably believe that the harm will occur.”*

- The RCC incorporates this recommendation by the requirement in (a)(1)(B) of the updated offense that the actor reasonably believe “The actor or third person is in imminent danger of the communicated harm.” This change improves the clarity of the revised statute.

(10) *USAO, App. C at 637, recommends including the word “death” in subsection (a)(1).*

- The RCC incorporates this recommendation by adopting USAO’s proposed language. This change clarifies the revised statute and does not change its meaning.

(11) *The CCRC recommends changing the RCC commentary to the duress defense to characterize the scope of “criminal bodily injury, sexual act, sexual contact, or confinement” as a clear change in law. While the DCCA has not squarely addressed the matter, repeated court dicta³⁹ and the common law have historically held the duress defense limited to “serious bodily injury or death.”⁴⁰ The change in law is well-supported in the Model Penal Code and other jurisdictions’ comparable language.⁴¹*

- This amendment of the commentary does not further change District law.

³⁷ For further discussion, see § 9.7(a)Nature of the defense of duress, 2 Subst. Crim. L. § 9.7(a) (3d ed.).

³⁸ USAO states, “For example, if person A threatens to punch person B in the face unless person B kills person C, it would be absurd to allow person B to claim duress as a complete defense to the murder of person C.”

³⁹ *See, e.g., Stewart v. United States*, 370 A.2d 1374, 1377 (D.C. 1977) (“First, the defendant must show that his flight from custody (or failure to return following a temporary lawful absence) was necessitated by coercion of such a nature as to induce in the defendant's mind a well-grounded apprehension of immediate death or serious bodily injury.”).

⁴⁰ *See United States v. Bailey*, 444 U.S. 394, 409 (1980) (“Common law historically distinguished between the defenses of duress and necessity. Duress was said to excuse criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law.”).

⁴¹ *See, e.g., Model Penal Code* § 2.09; *Del. Code tit. 11, § 431.*

RCC § 22E-502. Temporary Possession.

- (1) *PDS, App. C at 594 – 595, recommends expanding the temporary possession defense to include possessing a weapon in self-defense. PDS offers a number of hypotheticals where temporary possession of a weapon is not culpable.*
- The RCC does not incorporate this recommendation because the RCC’s Defense of Self or Another Person Defense (issued after this comment was made and referenced in the PDS comment as another means of addressing the PDS hypotheticals) addresses the core concern raised by this recommendation.
 - Notably, however, the RCC defense of self and others statute would not (absent additional facts about protecting oneself or another) provide a defense to the PDS hypothetical where: “Y attempts to rob X with a pistol. Y trips and falls and loses control off the pistol. X picks up the pistol and points it at Y to prevent Y from escaping until the police arrive.” In that hypothetical, if person X is charged with a weapon possession offense, they would appear to have a temporary possession defense to that charge under paragraph (a)(2)(A). However, if person X is charged with criminal restraint or a threats offense for brandishing the pistol at Y, there does not appear to be either a defense of self or others, or a temporary possession defense available. There may, nonetheless, be an execution of public duty defense under RCC § 22E-402 if X reasonably believes the conduct constituting the offense is required or authorized by law to assist a public official in the performance of their official duties.
- (2) *PDS, App. C at 595, recommends not limiting the Temporary Possession defense to only weapons and controlled substances offenses and specifically suggests certain obscenity offenses and the possession of an open container of alcohol offense should have such a defense. Instead of listing specific predicate offenses, PDS recommends that the defense apply broadly to “any offense where the gravamen of the criminal conduct is the possession or distribution of contraband.”*
- The RCC does not incorporate this recommendation because it is unnecessary and may render the revised statutes less clear. The RCC already separately addresses temporary possession situations in other revised statutes and a general reference to “any offense where the gravamen of the criminal conduct is the possession or distribution of contraband” is unclear. The RCC already separately addresses in specific obscenity statutes, in a more tailored manner that also addresses distribution, good faith efforts to report possible illegal conduct or seek legal counsel from any attorney. The temporary possession defense does not appear necessary for the RCC possession of an open container of alcohol offense given the restrictions in the offense for possession in the passenger area of a vehicle. Finally, while the CCRC supports PDS’ goal of ensuring the defense is appropriately updated in the future, as evidenced by PDS’ own detailed explanations of which offenses it believes do and do not have such a gravamen, it is difficult to discern what elements of an

offense are significant enough to make its gravamen something beyond possession. The CCR is concerned there would be unnecessary litigation over the scope of the defense and suggests any and all offenses to which the defense applies be listed.

RCC § 22E-503. Entrapment.

(1) *OAG, App. C at 615 – 616, recommends clarifying the scope or applicability of the derivative entrapment defense. OAG says that, contrary to a hypothetical in a footnote to the commentary,⁴² “[t]he statute captures indirect entrapment, but that indirect entrapment still has to be directed at a target set by the law enforcement officer, since the indirect entrapper still has to be acting at the law enforcement officer’s direction.”*

- The RCC incorporates this recommendation by amending the statute to eliminate the prior reference to “directly or indirectly” and better address the role of agents of law enforcement officers and derivative entrapment, including specification of the relationship between the law enforcement officer’s scheme and the conduct undertaken by the person derivatively entrapped. The updated statutory language extends derivative entrapment to situations where the law enforcement officer (or their witting cooperator) purposely commanded, requested, etc. an unwitting intermediary to engage in conduct constituting a criminal offense while reckless that that person (the unwitting cooperator) would in turn command, request, etc. one or more additional persons to engage in or assist the conduct specified by the law enforcement officer or their witting cooperator. The person derivatively entrapped must be induced into the conduct constituting the offense by the unwitting intermediary, but—contrary to the D.C. Circuit holding in *U.S. v. Washington*⁴³—the inducement by the unwitting intermediary need not be the exact same as the government’s inducement to the unwitting intermediary. In the commentary hypothetical, there is no reason why the child participating in the college admissions scheme should be denied the defense because their inducement and role in the scheme is slightly different than that of the parent (unwitting intermediary). If the government or its agent is ultimately reckless as to the involvement of the child in the scheme, there is a strong public policy incentive to ensure that that the defense extends to all victims of such law enforcement wrongdoing. This change improves the clarity and proportionality of the revised statutes.

⁴² Consider, for example, a law enforcement officer who runs a sting operation to take down a fraudulent college admissions scheme. The officer arrests the owner of the business running the scheme and, by offering a plea bargain, persuades the owner to wear a wire and ask a desperate parent to sign up her child to participate. The parent subsequently agrees and then convinces her child to participate in the scheme. In this hypothetical the owner is a person acting directly at the encouragement of a law enforcement officer. The parent may raise an entrapment defense on the ground that the owner persuaded her (but must also satisfy subsection (b)). With respect to their child, the parent is a person acting indirectly at the encouragement of a law enforcement officer. The child may raise an entrapment defense on the ground that the parent persuaded her (but must also satisfy subsection (b)).

⁴³ *U.S. v. Washington*, 106 F.3d 983, 993 (D.C. Cir. 1997) (“After carefully examining case law in this and other jurisdictions, we conclude that a limited form of the “derivative entrapment” theory is recognized in this circuit and extends to cases in which unwitting intermediaries—at the government’s direction—deliver the government’s inducement to a specified third party.”).

- (2) *PDS, App. C at 628, recommends defining “predispose” in the text of the statute, using the explanation in the commentary. Specifically, PDS recommends adding the definition: “‘Predisposed’ means the defendant was ready and willing to commit the offense whenever an opportunity presented itself.”*
- The RCC partially incorporates this recommendation by supplanting the statutory language regarding predisposition with the phrase “the actor is merely afforded the opportunity or means to engage in such conduct.” With this addition, the exclusion in subsection (b), as a whole, reads: “This defense is not available when, in fact, the actor already was predisposed to engage in the specific conduct constituting the offense and the actor is merely afforded the opportunity or means to engage in such conduct.” The RCC commentary continues to note that, change consistent with Supreme Court and District case law, a predisposition requires that a person already was “ready and willing” to commit the offense before the involvement of the law enforcement officer, cooperator, or derivative entrapper. However, the phrase “ready and willing” is arguably no more informative than “predisposed.” Supreme Court case law provides a variety of factors that may be relevant to predisposition and codifying “ready and willing” may actually shortcut consideration of these factors. On the other hand, case law is clear that an entrapment defense does not apply when the actor was merely afforded the opportunity or means to engage in such conduct, and that is a common and specific requirement that is codified in many other jurisdictions along with the disposition requirement.⁴⁴ This change improves the clarity of the revised statutes.
- (3) *The CCRC recommends recharacterizing as a clear change in law (rather than as a possible change in law) in the commentary the burden of proof being on the government to prove the actor already was predisposed to commit the crime. Further CCRC review indicates that the DCCA has treated lack of predisposition as a requirement for which the defense has the burden of proof.⁴⁵ The RCC entrapment defense, however, continues its prior recommendation that, once the defense has met its burden with respect to inducement, the government bears the burden of proving predisposition or lack of inducement. This is consistent with the approach in many other jurisdictions nationally.⁴⁶*
- This change clarifies the revised commentary.

⁴⁴ See, e.g., Ariz. Rev. Stat. Ann. § 13-206; Utah Code Ann. § 76-2-303.

⁴⁵ *Daniels v. United States*, 33 A.3d 324, 328 (D.C. 2011).

⁴⁶ John H. Derrick, *Burden of proof as to entrapment defense—state cases*, 52 A.L.R.4th 775.

RCC § 22E-504. Mental Disability Defense.

- (1) *OAG, App. C at 616, recommends revising subsection (a) to clarify that paragraphs (a)(1) and (a)(2) are disjunctive. OAG suggests changing subsection (a) to read as a single sentence without subparts.*
 - The RCC partially incorporates this recommendation by changing the lead-in language to “lacked substantial capacity either:” at the beginning of each paragraph. This language further emphasizes the disjunctive nature of the defense while avoiding unnecessary duplication of language in paragraphs (a)(1) and (a)(2). This change clarifies the revised statute and does not change its meaning.
- (2) *OAG, App. C at 616 – 617, also notes an incongruity between the definition of “mental disease or defect” and the defense in paragraph (a)(2). Namely, a person’s failure to recognize the wrongfulness of their conduct does not flow from their inability to regulate and control their conduct. OAG does not recommend specific language for a new or amended definition.*
 - The RCC incorporates this recommendation by revising the definition of “mental disability” (previously “mental disease or defect”) to state, “In this section, the term “mental disability” means an abnormal condition of the mind, regardless of its medical label, that affects mental or emotional processes and *either* substantially impairs a person’s ability to regulate and control their conduct, *or substantially impairs a person’s ability to recognize the wrongfulness of their conduct*” (emphasis added). This is a modification of the *Durham-McDonald* definition that was repeated in *Brawner*⁴⁷ and adopted by the DCCA in *Bethea*.⁴⁸ The RCC modification seeks to correct the *Bethea* court failure to supplement the *Durham-McDonald* definition when the *Bethea* court adopted the alternative prong regarding the failure to appreciate the wrongfulness of one’s conduct. As the OAG comment highlights, a definition in terms only of volitional conduct is either incomplete or conflicts with the defense language regarding appreciation of the wrongfulness of one’s conduct. This change clarifies the revised statute and does not change its meaning.
- (3) *PDS, App. C at 628, objects to the use of the word “defect,” as antiquated, offensive, and stigmatizing. PDS proposes using the phrase “mental disease or atypical mental condition” instead.*
 - The RCC partially incorporates this recommendation by replacing the phrase “mental disease or defect” with the phrase “mental disability.” As noted below, the updated statute uses only one term because the temporary or permanent nature of the mental disability is irrelevant to the defense and may cause confusion as to whether the factfinder must have unanimity

⁴⁷ *United States v. Brawner*, 471 F.2d 969, 973 (D.C. Cir. 1972) (“We highlight, as most notable of these, our decision to retain the definition of “mental illness or defect” that we evolved in our 1962 *McDonald* opinion en banc.”).

⁴⁸ *Bethea v. United States*, 365 A.2d 64, 81 (D.C. 1976) (“We specifically retain the *McDonald* definition of ‘mental disease or defect’ as an integral part of the ALI standard.”).

on the temporal nature of the disability. The term “disability” is commonly understood and has a non-technical meaning. PDS’ proposed language is quite rarely used and may be misread to include intoxication. This change improves the clarity of the revised statute.

(4) *PDS, App. C at 628, recommends clarifying in commentary that this defense does not amend D.C. Code § 24-501.*

- The RCC incorporates this recommendation by adding a footnote to the commentary that states, “RCC § 22E-504 does not repeal, replace, or amend D.C. Code § 24-501.” As a general rule, the RCC does not change a law unless it so states. This change clarifies the revised commentary.

(5) *PDS, App. C at 628 – 629, recommends revising the statement in the commentary that says, “‘mental disease or disability’ does not include voluntary intoxication.” PDS states that the commentary and accompanying footnote are at odds with the RCC approach to voluntary intoxication and how it “excuses” criminal behavior. PDS states that an actor’s mental disease or atypical mental condition is relevant when, pursuant to RCC § 22E-209, a factfinder is considering whether the actor’s intoxication negates the existence of a culpable mental state.*

- The RCC incorporates this recommendation by amending the commentary to state that voluntary intoxication cannot serve as the basis for a mental disability defense and noting that this does not preclude the possible relevance of evidence of voluntary intoxication to otherwise establish mental disability.
- In general, voluntary intoxication does not excuse criminal behavior under current law or the RCC. Rather, in some cases,⁴⁹ a person’s voluntary intoxication inhibits them from acting purposely, knowingly, recklessly, or negligently, as a criminal statute requires. In those cases, a person does not satisfy the elements of the offense, which is different than meeting the elements of the offense and also the elements of an excuse defense. This defense concerns only the latter. Accordingly:
 - When a person raises a defense under RCC § 22E-504, that person’s voluntary intoxication does not itself qualify as a mental disability.
 - When a person raises a defense under RCC § 22E-209, evidence of that person’s mental disease may be relevant to a factfinder’s determination of whether the person’s voluntary intoxication negated the existence of a culpable mental state.
 - When a person raises a defense under RCC § 22E-504, evidence of that person’s voluntary intoxication may be relevant to a factfinder’s determination of whether the person lacked substantial capacity to conform or recognize the wrongfulness of their conduct.

⁴⁹ See RCC § 22E-209.

- The prior RCC commentary which PDS in part cited read: “‘Mental disease or defect’ does not include voluntary intoxication.”⁵⁰
 - The new RCC commentary entry on this point reads: “Voluntary intoxication alone cannot serve as the basis for a mental disability defense.”⁵¹
 - This change clarifies the RCC commentary.
- (6) *PDS, App. C at 629, recommends striking subsection (d) but does not object to including the same language in commentary. PDS says including this language in the statutory text implies that the court, as a matter of settled and static law, has some “ability” sua sponte to order a psychiatric examination or to raise a mental disease or [atypical mental condition] defense.*
- The RCC partially incorporates this recommendation by revising the statutory language to state, “This section shall not be construed to *create or limit a court’s authority*, on its own initiative, to order a psychiatric examination or to raise a mental disability defense.” By characterizing this defense as an affirmative that the defendant must prove, the revised statute does not intend to disturb the court’s authority to raise the defense *sua sponte*.⁵² This change clarifies the revised statute and does not change its meaning.
- (7) *USAO, App. C at 637, recommends clarifying that this commitment occurs when the defendant is “acquitted solely on the ground of mental disease or defect,” consistent with D.C. Code § 24-501(d)(1).*
- The RCC incorporates this recommendation by adopting USAO’s proposed language. This change clarifies and improves the consistency of the revised statute and does not change its meaning.
- (8) *USAO, App. C at 637, recommends striking the word “civilly” before “committed,” to clarify that the commitment is criminal.*⁵³
- The RCC incorporates this recommendation by adopting USAO’s proposed language. This change clarifies and improves the consistency of the revised statute and does not change its meaning.
- (9) *USAO, App. C at 637 – 638, recommends revising the definition of “mental disease or defect” (now “disability”) to specify that “A ‘mental disease’ is a*

⁵⁰ *McNeil v. United States*, 933 A.2d 354, 365 (D.C. 2007) (“[w]hen drug or alcohol abuse is proffered as the basis for a mental disease or defect, there is significant tension between the insanity defense and the universally-accepted tenet that voluntary intoxication does not excuse criminal behavior.”).

⁵¹ *McNeil v. United States*, 933 A.2d 354, 365 (D.C. 2007) (“[w]hen drug or alcohol abuse is proffered as the basis for a mental disease or defect, there is significant tension between the insanity defense and the universally-accepted tenet that voluntary intoxication does not excuse criminal behavior.”). Note, however, that evidence of voluntary intoxication may be relevant under the mental disease or disability defense of RCC § 22E-504 to a factfinder’s determination of whether the person lacked substantial capacity to conform or recognize the wrongfulness of their conduct. (Conversely, evidence of mental disease or disability may be relevant under the voluntary intoxication provisions of RCC § 22E-209 to a factfinder’s determination of whether the person’s voluntary intoxication negated the existence of a culpable mental state.)

⁵² *Frendak v. United States*, 408 A.2d 364, 380 (D.C. 1979); *see also Briggs v. United States*, 525 A.2d 583, 594 (D.C. 1987).

⁵³ *See Brown v. United States*, 682 A.2d 1131 (D.C. 1996).

condition which is capable of either improving or deteriorating; a ‘mental defect’ is a condition not capable of improving or deteriorating.

- The RCC does not incorporate this recommendation because it may render the statute less clear. As noted above, the RCC has been updated to replace the terms “disease or defect” with the term “disability.” Distinguishing between a disease and a defect, or a temporary and permanent state in the statutory text may suggest that a jury must evaluate and agree upon whether the condition is capable of improving or deteriorating. No such finding is required for the defense to apply.
- (10) *USAO, App. C at 637 – 638, opposes the revised statute’s change to District case law, which currently has a categorical exclusion that abnormal conditions of the mind evidenced only by repeated criminal or otherwise antisocial conduct is not sufficient to establish a mental disease or defect (now “disability”) under the defense. USAO also raises a concern that a defendant could prove the defense without expert testimony about their mental condition by introducing their criminal history records alone.*
- The RCC does not incorporate this recommendation because this blanket evidentiary exclusion does not reflect a modern medical understanding of psychopathy and personality disorders and may lead to disproportionate outcomes. Courts have interpreted such language regarding repeated criminality and antisocial conduct to exclude psychopaths or those suffering from antisocial personality disorder from the protection of an insanity defense.⁵⁴ Such exclusion provisions have been heavily criticized by experts as being unsupported by current medical understanding.⁵⁵ Modern medical evidence suggests that psychopathy and many personality disorders may well affect cognitive and volitional functions that fall squarely within the ambit of the insanity defense as formulated in the MPC insanity provision (depending, as with all mental conditions, on severity).⁵⁶
 - The inclusion of evidentiary rules, more generally, is unnecessary in the statute and may render the statute less clear. It is unlikely, if not impossible, for a defendant to meet their burden of proving by a preponderance of the evidence that abnormal condition of the mind substantially impaired their ability to control their mental processes and behavior through the admission of criminal records alone. Expert

⁵⁴ Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82(2) Colum. L. Rev. Ch.5 § 173 (b)(2) (March 1982).

⁵⁵ See, e.g., Ralph Slovenko, *Commentary: Personality Disorders and Criminal Law*, 37 J. Am. Acad. Psych. Law 182, 183 (2009). It is widely suggested among critics of this provision that such categorical exclusions are not based on current medical evidence and seek to reinforce a laymen’s understanding of moral culpability against individuals with real mental impairments, supported by scientific evidence.

⁵⁶ Joseph Langerman, *The Montwheeler Effect: Examining the Personality Disorder Exclusion in Oregon’s Insanity Defense*, 22 Lewis & Clark L. Rev. 1027, 1049-50 (2018). See also Robert Kinscherff, *Proposition: A Personality Disorder May Nullify Responsibility for A Criminal Act*, 38 J. L. Med. & Ethics 745, 748 (2010).

testimony will almost certainly be proffered, if not required, under the District's evidentiary rules.

(11) *USAO, App. C 638 – 639, recommends incorporating the notice requirements in D.C. Code § 24-501(j) into the statute. USAO says that, as currently drafted, “this defense under the RCC would not require this procedural mechanism of notice to the prosecution to invoke this defense.”*

- The RCC partially incorporates this recommendation by adding a sentence to the commentary noting that codification of the defense is not intended to change statutorily specified procedures for the insanity defense described elsewhere. The revised statute does not disturb the various procedural provisions in D.C. Code § 24-501 (not just subsection (j)), § 16-2307(h), § 16-2315, or other statutes relevant to the defense, which remain good law. Copying some, but not all, the relevant procedures into the RCC defense would create unnecessary overlap and be confusing. This change improves the clarity of the revised commentary.

RCC § 22E-505. Developmental Incapacity Defense.

(1) *OAG, App. C at 570-571, while agreeing that there should be a cutoff “around the age of 12,” recommends that subsection (a) of the RCC defense regarding a minimum age of liability for an offense instead be codified in D.C. Code § 16-2305 as a new subsection (c)(3) that states: “No charges can be filed in a petition against a child for a delinquent act that was committed when the child was under [x] years of age.” OAG states that Title 16 “establishes who is a child eligible for prosecution in the Family Court, what a delinquent act is; how juvenile competency challenges are handled; and all other aspects of delinquency proceedings. Persons who litigate delinquency proceedings, and others who want to understand how these proceedings work, look to D.C. Code § 16-2301, et. seq., for the statutory framework for delinquency proceedings.”*

- The RCC does not incorporate this recommendation because doing so would make the RCC less clear and consistent as to the limits of liability and would result in an illogical ordering of statutes. The developmental incapacity defense bears a close relationship to the mental disease or defect defense and other excuse defenses that recognize a bar to liability based on the lack of moral responsibility of an actor for what they do. It is properly addressed as a defense even if there is a separate limitation on OAG jurisdiction intended to prevent a petition being filed in the first place. As to placement of the defense, while D.C. Code Title 16 Chapter 23 describes a wide range of procedures regarding Family Court proceedings, the law controlling the juvenile delinquency system is by no means confined to that chapter and in many respects the chapter is derivative of criminal law stated elsewhere. For example, while Title 16 Chapter 23 defines a “delinquent act,”⁵⁷ the basis for juvenile proceedings, it does so by reference to an “offense under the law of the District of Columbia.” But, such offenses are codified not in Title 16 Chapter 23 but in Title 22. While the current D.C. Code does not codify any general defenses, there is no separate case law regarding the requirements⁵⁸ of such defenses in juvenile as opposed to adult proceedings. It would be illogical, inconsistent, and confusing to create such a rift between fundamental requirements for liability articulated in criminal law and the juvenile justice system that refers to those offenses.

(2) *OAG at App. C at 571-573 recommends, beyond limiting OAG’s ability to file a delinquency petition against children of an unspecified age in family court, that*

⁵⁷ D.C. Code § 16–2301(7) (“The term “delinquent act” means an act designated as an offense under the law of the District of Columbia, or of a State if the act occurred in a State, or under Federal law. Traffic offenses shall not be deemed delinquent acts unless committed by an individual who is under the age of sixteen.”).

⁵⁸ As noted below, there are different procedures related to the timing, manner, and effect of insanity claims for juveniles versus adults. But, the standard requirements that must be proven are identical even for that defense.

there should not be codified a developmental immaturity defense “at this time,” pending further study of the issue. OAG states that: “While OAG is always interested in working with the Council to improve the District’s juvenile justice system, we do not believe that the undertaking should be taken by the CCRC.” OAG also states that: “Before enacting a defense for youth in the Family Court that is so closely related to the insanity defense, OAG would like an opportunity to review the effect of establishing a developmental immaturity defense in those jurisdictions that have enacted it, including what non-juvenile justice programs have been implemented by those jurisdictions to work with youth who lack developmental immaturity so that public safety is ensured. We would also like to evaluate the effectiveness of those programs.” No additional written comments have been received from OAG regarding this matter since the OAG comments received June 19, 2020.

- The RCC does not incorporate the OAG recommendation (assuming OAG still object to the defense since its further evaluation), because doing so would appear to change District law in way that may violate the fundamental fairness of the proceedings for 12 and 13 year-old children. As described in the commentary to this defense, although long dormant the common law doctrine of *doli incapax* appears to apply in the District, providing a rebuttable presumption that children under age 14 are not liable for misconduct. No evidence to the contrary has been discovered by the CCRC or referenced by OAG to date. Unlike incompetency provisions based on mental disease or defect which the DCCA has found are applicable only at the dispositional (sentencing) stage of delinquency proceedings,⁵⁹ there are no comparable statutory provisions addressing a child’s incapacity due only to developmental immaturity and no legislative history indicating that Congress intended or believed the District’s delinquency system should supplant the prior protections of *doli incapax*. The government’s interest in interceding to redress conduct based on ordinary (non-pathological) developmental immaturity is not the same as for conduct based on mental disease or defect. The RCC narrows the applicability of the doctrine by making developmental immaturity an affirmative defense (with a burden of proof on the child) and specifies volitional and cognitive prongs. However, elimination or further diminution of the defense raises issues of fundamental fairness insofar as a child would be held liable in a juvenile proceeding for conduct they lack the cognitive or volitional ability to control. A recommendation on this matter is a necessary adjunct to the CCRC mandate to issue recommendations defining liability criminal offenses and its work to codify all general defenses in the District. The common law doctrine of *doli incapax* precedes the District’s current distinctions between (adult) criminal law and juvenile justice and was framed as a rebuttable presumption (not a defense)—the absence of which was an element the

⁵⁹ See *Matter of C. W. M.*, 407 A.2d 617, 625 (D.C. 1979) (cited by OAG in its comments).

government has to prove in every case. Particularly given the inattention to the doctrine in current practice, addressing both the criminal and juvenile implications alongside other fundamental principles of liability appears most appropriate for the agency's recommendations.

- (3) *OAG at App. C at 573 recommends that, if the RCC retains the developmental incapacity defense, the language be changed in subsection (a)(2)(A) to replace the current reference to a person who “lacks substantial capacity to conform the conduct alleged to constitute an offense to the requirements of the law” to a reference to a person who is “unable to conform his or her conduct to the law.” OAG says that the current language is unclear and that “[c]onduct ‘constitut[ing] an offense’ does not, by definition, conform to the requirements of the law.”*
- The CCRC partially incorporates the OAG recommendation by modifying subsection (a)(2)(A) to state “conform the actor’s conduct to the requirements of the law.” The OAG language replacing “lacks substantial capacity” with “unable” would create an inconsistency with the RCC § 22E-504, Mental Disability Affirmative Defense. This change clarifies the revised statutes.
- (4) *The CCRC recommends changes to the style of the introductory language to the defense and the formatting in paragraph (a)(2). These changes align the defense with other RCC defenses, including the RCC § 22E-504, Mental Disability Affirmative Defense.*
- These changes improve the clarity and consistency of the revised statutes.

RCC § 22E-601. Offense Classifications.

(1) OAG suggests that commentary for the parental kidnapping statute, RCC § 16-1022 should specifically note that parental kidnapping's designation as a felony offense is an exception to the general definitions of "misdemeanor" and "felony" under RCC § 22E-701.

- The RCC incorporates this recommendation and the commentary for the parental kidnapping statute will be amended to clarify that the designation of the offense as felony is an exception to the general definitions of "misdemeanor" and "felony."

RCC § 22E-604. Authorized Fines.

- (1) *OAG, App. C at 527, recommends that a new subsection (d) be added, which states “The authorized fines established in this section shall not apply when a law enacted after this Act creates or modifies an offense and such law, by specific reference, exempts the offense from the fines established in this section.”*
- The RCC does not incorporate this recommendation because it would make the statute less clear. Adding this subsection is unnecessary and would raise the question why every general provision does not include a similar caveat that it may not apply in the future if there’s a change in law. Subsection (a) of RCC § 22E-604 specifies the maximum allowable fines for each class of felony or misdemeanors “unless otherwise expressly authorized by statute[.]” RCC § 22E-604 already clarifies that the fines under this section do not apply if a specific statute specifies otherwise.

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

- (1) *OAG, App. C at 527-528 recommends revising the statute with additional language to specify that (a)(2) does not include felony convictions under (a)(1).*
 - The RCC does not incorporate the language recommended by OAG because it may substantially narrow the enhancement and provide for disproportionate penalties. OAG is correct to note that (a)(2), by its plain language, includes felonies that are already addressed in (a)(1). However, the inclusion in (a)(2) of the Subtitle II felonies in (a)(1) does not create a conflict or confusion as to the statute’s scope. The OAG recommended language, however, would narrow the (a)(2) provision to only Title 22E felonies, omitting felonies under Title 48 or otherwise in the D.C. Code, contrary to the intent of the enhancement and current District law.
- (2) *OAG, App. C at 527-528 recommends amending the statute with additional language that states the prior convictions were not on the same occasion as the instant offense in (a)(1) and as with each other in (a)(2).*
 - The RCC incorporates the language recommended by OAG except for replacing the suggested phrase “the offense for which the enhancement would apply” with “the offense being enhanced.” This change improves the clarity of the revised statutes.
- (3) *PDS, App. C at 533 opposes all enhancements based on prior offenses. PDS says that “individuals who have previously been convicted of offenses received sentences for those prior offenses and served the sentence deemed appropriate by the judge.” PDS also notes that due to the prior conviction the D.C. Voluntary Sentencing Guidelines will provide for a more severe sentence for the new offense, such that a statutory enhancement counts as a double or triple counting of the prior offense.*
 - The RCC does not incorporate the PDS recommendation to eliminate this enhancement. Whether and how the *D.C. Voluntary Sentencing Guidelines* continue to be based on criminal history is not within the ambit of the CCRC. The CCRC is aware of “three-strikes” laws’ disproportionate penalties and per the comment below recommends sharply lower penalty enhancements based purely on repeat offenses (as compared to the seriousness of the instant crime, which should be the primary determinant of liability). However, a modest increase in the maximum penalty possible for the instant offense based on prior conduct is warranted.
- (4) *PDS, App. C at 533-534 recommends narrowing the penalty enhancement by limiting subsection (a) to cases where the instant offense is a Subtitle II (Offenses against persons) felony offense and the prior convictions were for “the same or comparable felony offense as the instant offense,” committed within the prior 10 years, and not committed on the same occasion. PDS also recommends parallel changes to subsection (b). PDS says that, as currently drafted, the enhancement*

simply punishes again for the prior offense as the Sentencing Guidelines do and the judge in the prior case did.

- The RCC partially incorporates the PDS recommendation by limiting subsection (a) to cases where the instant offense is a felony under Subtitle II. This change makes the enhancement for felonies similar in approach to that for misdemeanors and focuses the enhancement on crimes against persons and omits the possibility of the enhancement being applied to drug or other offenses outside Subtitle II. However, the RCC does not adopt the further limitations recommended by PDS. This change improves the proportionality of the revised statutes.

(5) *PDS, App. C at 535 recommends lowering repeat offender penalties across all classes, providing:*

(1) For the felony repeat offender penalty –

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

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

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

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

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

(2) For the misdemeanor repeat offender penalty –

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

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

PDS says that this would reduce the unfairness of the enhancement.

- The RCC partially incorporates these changes, amending the enhancement as recommended except making (1)(A) 6 years, (1)(B) 4 years, and retaining fine enhancements. This change improves the proportionality of the revised statutes.

(6) *USAO, App. C at 548-549 recommends including citations to burglary and arson offenses in subsections (a)(1) and (b)(2) of the revised enhancement. USAO recommends all offenses currently categorized as crimes of violence crimes of violence under D.C. Code § 22-1331(4) be treated the same under this enhancement—and arson and burglary are so categorized.*

- The RCC does not incorporate these changes because they may result in disproportionate penalties. While arson and burglary may be felonies, they do not require injury to people—and where arson or burglary involves infliction of bodily injury or some other harm of a person (e.g., threats, sexual harms), those charges may be brought and, as charges in Subtitle II, they are subject to this enhancement as currently drafted. Treating crimes that do not require bodily injury the same as Subtitle II offenses is unwarranted here. See also responses elsewhere in this document to USAO recommendations for more severe penalties for burglary.

(7) *USAO, App. C at 549 recommends the commentary on this statute be revised to state that a conviction under current District law is a “comparable offense.”*

USAO says that it “wants to ensure that convictions under the current D.C. Code could be used as prior convictions for purpose of this enhancement (or for purposes of liability for offenses such as Possession of a Firearm by an Unauthorized Person under RCC § 22E-4105).” USAO says that: For example, the elements of robbery under current law are different from the elements of robbery under the RCC. If a defendant perpetrated an armed robbery under current law, that defendant’s conviction would not “necessarily prove the elements” of the RCC armed robbery offense, even if the defendant’s actual conduct for which he was convicted would be subject to liability under the comparable RCC offense.” USAO says that the RCC commentary “creates a gap in liability, as many defendants who should be eligible for this enhancement—and held liable for offenses that rely on a prior conviction or “comparable offense”—will not be held accountable for those enhancements and offenses.”

- The RCC does not incorporate these changes because they would create inconsistency in the revised offenses and may result in disproportionate penalties. USAO is correct to note that due to the differences between the elements of unrevised and revised District statutes, some convictions under the former may not be subject to enhancement as the latter even though the *facts* of those prior convictions under unrevised statutes hypothetically would satisfy the elements of the revised statutes. However, even under the current District repeat offender enhancement the conviction of record often does not reflect what charges may have been brought and proven based on the facts of the case—e.g., due to charge or plea bargaining—and speculating as to whether certain facts would lead to a conviction under a different law is likely to lead to inconsistency in practice. The RCC instead relies on the elements of the offense of conviction to determine whether one offense is comparable to another, improving the consistency of the enhancement. The more basic decision to disallow prior convictions that do not at least meet the elements of revised offenses—be those prior convictions in the District or another jurisdiction—is due to the fact that those prior convictions may reflect profoundly different values and a wide range of facts. For example, a prior felony conviction for simple marijuana possession (no intent to distribute) in another jurisdiction should not be treated as a felony under the revised enhancement. Similarly, a prior District conviction for robbery which may have been based on facts that would sustain only a pickpocketing charge in another jurisdiction or theft from a person under the revised statutes should not be treated as a felony under the revised enhancement.

(8) *The CCRC recommends adding to the enhancement a subsection clarifying that this enhancement may be stacked with other general enhancements or enhancements in a specific offense. The subsection says: More than one penalty enhancement under this chapter may apply to any offense. A penalty*

enhancement under this section is in addition to, and does not limit application of, additional penalty enhancements specified elsewhere in Title 22E to an offense.”

- This change clarifies the revised statutes.

RCC § 22E-607. Pretrial Release Penalty Enhancement.

- (1) *PDS, App. C at 535 opposes any additional liability for offenses committed while on release, including as a pretrial release penalty enhancement under RCC § 22E-607. PDS says that this conduct is already punishable as a form of contempt and the increased penalty is unnecessary and duplicative. PDS says that because the enhancement does not require conviction for the first-in-time offense (the offense for which the actor was on release when the predicate offense subject to the RCC § 22E-607 enhancement was committed), the actor was presumed innocent and should not face additional penalties.*
 - The RCC does not incorporate this change because it may make the revised statutes less clear and proportionate. While it is true that the committing a crime while on pretrial release is also punishable as contempt and the RCC § 22E-607 is, strictly speaking, duplicative, the enhancement does provide more specific language and a penalty graduated to the harm caused while on release than other general contempt-type charges.⁶⁰
- (2) *CCRC recommends lowering the penalties under the enhancement for commission of class 1 or class 2 offenses to 6 years (from 10 years), class 3 or class 4 offenses to 4 years (from 6 years), class 5 or class 6 offenses to 2 years (from 3 years), class 7 or class 8 offenses to 1 year (from 2 years), class 9 offenses to 180 days (from 1 year), and class A or class B offenses to 60 days (from 90 days). The lower penalties better reflect the limited harm targeted by the enhancement of violating terms of pretrial release, allowing the seriousness of the predicate offense to remain the primary form of liability and punishment.*
 - This change improves the proportionality of the revised statute.
- (3) *The CCRC recommends adding to the enhancement a subsection clarifying that this enhancement may be stacked with other general enhancements or enhancements in a specific offense. The subsection says: More than one penalty enhancement under this chapter may apply to any offense. A penalty enhancement under this section is in addition to, and does not limit application of, additional penalty enhancements specified elsewhere in Title 22E to an offense.”*
 - This change clarifies the revised statutes.

⁶⁰ E.g., compare to D.C. Code § 11-741; § 23-1329(a).

RCC § 22E-608. Hate Crime Penalty Enhancement.

(1) *USAO, App. C at 549-550, recommends changing the words “because of” to “motivated by.” USAO says: “The most natural reading of the current statute at D.C. Code § 22-3701(1), as the text and legislative history indicate, is that an act ‘demonstrates an accused’s prejudice’ if the accused’s prejudice is a ‘contributing cause’ of the crime or, put another way, if the crime was motivated by the accused’s prejudice.” USAO cites a passage in the legislative history in support of this language: ‘Indeed, the legislative history for the current hate crimes statute demonstrates that the statute was enacted as a response “to an alarming increase in crimes motivated by bigotry and prejudice in the District.”’⁶¹ USAO also notes that at the time of writing, an appellate case was pending before the DCCA on this issue.*

- The CCRC does not incorporate the USAO recommendation at this time, but invites further Advisory Group comment on the RCC draft in light of the recent DCCA opinion in *Lucas v. United States*, 240 A.3d 328 (D.C. 2020). The commentary has been updated to cite *Lucas* in several places.
- In *Lucas*, a three judge panel unanimously held, in an opinion by Chief Judge Blackburne-Rigsby, that, contrary to the interpretation of USAO, the District’s bias-related crime enhancement requires “but-for” causation. The court said:

In sum, we hold that § 22-3701(1) requires that a defendant's bias against a victim due to the victim's protected characteristic must be a but-for cause of the defendant's underlying criminal act. Bias need not be the sole cause, or even the primary cause. And it may interact with several other causes in causing the end result. For purposes of the Bias-Related Crime Act, however, bias against the victim's protected characteristic must be a but-for cause for a factfinder to find that the accused committed the underlying crime.⁶²

The *Lucas* court went on to describe but-for causation using the ordinary language “because of”⁶³ as used in the RCC draft statute and many other states’ statutes. Indeed, the jury instruction

- The *Lucas* court opinion bluntly states that the District’s current statutory language raises constitutional concerns.⁶⁴ The opinion proceeds at length

⁶¹ *Report from the Committee on the Judiciary, Bill 8-168, the “Bias-Related Crimes Act of 1989.*

⁶² *Lucas v. United States*, 240 A.3d 328, 342 (D.C. 2020).

⁶³ *Lucas v. United States*, 240 A.3d 328, 340–41 (D.C. 2020) (“In adopting a but-for causation standard, we do not restrict a description of such causation to the words ‘but for,’ but instead recognize that such language reflects a causation standard similar in meaning to language such as “based on,” “because of,” and “results from.” (citation omitted))

⁶⁴ *Lucas v. United States*, 240 A.3d 328, 336 (D.C. 2020) (“As the parties note, the District's Bias-Related Crime Act is different from most states' hate-crime laws, in that the “majority of [state] statutes define a hate crime as one in which the actor committed the offense ‘because of,’ ‘by reason of,’ or ‘on account of’ ” another person's race or other protected status.” Zachary J. Wolfe, *Hate Crimes Law* § 3:8 (June 2019) (surveying statutes). Instead, the “demonstrates ... prejudice” language of the District of Columbia's Act

to construct an interpretation that avoids constitutional limitations on causation. Notably, while but-for causation is the norm in other jurisdictions' hate crime statutes and throughout District and other jurisdictions' doctrine on causation,⁶⁵ the *Lucas* court specifically explored whether an alternative causation standard would be constitutionally permissible.⁶⁶ The *Lucas* court found the Council's legislative history "provid[es] little insight as to the Council's intent regarding causation."⁶⁷ In the end, however, the court held that under the Supreme Court's opinion in *Burrage v. United States*, 571 U.S. 204, (2014), the District's law "requires but-for causation."⁶⁸

- Whether or not, as a policy matter, it may be desirable to expand liability under the District's hate crime statute, the *Lucas* opinion raises serious doubts about whether the DCCA would uphold the constitutionality of a new statute with a standard lower than "but-for" causation which is most commonly communicated using "because of" language. While legislative intent was considered in the opinion (and deemed unenlightening as to the intended causation standard), the opinion is primarily and explicitly focused on a construction of the statute that is constitutionally sound. Beyond policy considerations, the CCRC would particularly appreciate Advisory Group opinions on whether, in light of *Lucas*, an alternative to but-for causation would meet constitutional standards and be upheld by the DCCA.

(2) *USAO, App. C at 550, opposes removal of marital status, personal appearance, family responsibility, and matriculation as potential bases for a hate crime penalty enhancement. USAO says that while there is no MPD record of these crimes, this "does not, however, foreclose the possibility that, in the future, an individual could commit an offense while motivated by one of these factors, and should be held accountable for that behavior as a hate crime."*

- The CCRC does not incorporate this recommendation because it makes the reduces the clarity and potentially the proportionality of the revised statutes. As noted in the commentary, prejudice based on these characteristics may be difficult to distinguish from individual dislikes and hatred, and such bias is not ordinarily included in hate crime legislation.

(3) *USAO, App. C at 551, recommends changing the words "intimidating, physically harming, damaging the property of, or causing a pecuniary loss to any person or group of persons" to "committing the offense." USAO says that, because "the words 'intimating,' 'physically harming,' and 'damaging the property of' are not defined in the RCC[,] [t]his will lead to unnecessary confusion about what these*

does not expressly require a causal connection between bias and the criminal act and would appear to punish "the fact of being prejudiced," *Shepherd*, 905 A.2d at 262-63, thus raising constitutional concerns. See *R.A.V.*, 505 U.S. at 391, 112 S.Ct. 2538 (finding hate crime statute that prohibits speakers from expressing views on disfavored subjects places an unconstitutional limit on freedom of expression).")

⁶⁵ *Lucas v. United States*, 240 A.3d 328, 340 (D.C. 2020).

⁶⁶ *Lucas v. United States*, 240 A.3d 328, 338 (D.C. 2020).

⁶⁷ *Lucas v. United States*, 240 A.3d 328, 339 (D.C. 2020).

⁶⁸ *Lucas v. United States*, 240 A.3d 328, 340 (D.C. 2020).

terms mean, and whether certain offenses are included within these terms.” USAO says that the enhancement should apply to “any offense.”

- The CCRC partially incorporates this recommendation by substituting the word “threatening” in the statute in place of “intimidating,” a less clear term that is not commonly used in the RCC or current D.C. Code. However, CCRC notes that the RCC hate crime enhancement is already applicable to all crimes in the RCC, consistent with the DCCA holding in *Aboye*.⁶⁹ While the current D.C. Code definition of a “Designated act” in current D.C. Code § 22-3701 is confusing, the revised statute takes the approach that any crime may be subject to the hate crime enhancement, although the types of harm are limited to those articulated in subsection (a) of the statute.
- (4) *USAO, App. C at 551, recommends amending the commentary in a provision that refers to a person who “...selected the target of the offense because of prejudice...”. USAO suggests the sentence instead be “This general penalty provides a penalty enhancement where the defendant committed the offense motivated by prejudice against certain perceived attributes of the target.”*
- The RCC partially adopts this recommendation by amending the commentary entry identified to read, in relevant part: “This general penalty provides a penalty enhancement where the defendant committed the offense because of prejudice against certain perceived attributes of the target.” Selection in the narrow sense described in *Wisconsin v. Mitchell*, 508 U.S. 476, 479-480 (1993) is not meant to be required under the revised statute. However, the USAO motivating factor language falls short of but-for causation.
- (5) *The CCRC recommends adding to the enhancement a subsection clarifying that this enhancement may be stacked with other general enhancements or enhancements in a specific offense. The subsection says: More than one penalty enhancement under this chapter may apply to any offense. A penalty enhancement under this section is in addition to, and does not limit application of, additional penalty enhancements specified elsewhere in Title 22E to an offense.”*
- This change clarifies the revised statutes.
- (9) *The CCRC recommends reordering the list of protected characteristics, adding “in fact” to clarify no mental state is necessary as to the specific cross-referenced definition for “gender identity or expression as defined in D.C. Code § 2-1401.02(12A),” and eliminating the redundant words “of persons” from the phrase “group of persons.”*
- This change clarifies the revised statutes.

⁶⁹ *Aboye v. United States*, 121 A.3d 1245 (D.C. 2015)

RCC § 22E-609. Hate Crime Penalty Enhancement Civil Provisions.

(1) *The CCRC recommends changes to align the civil provisions with the updated language for the hate crime penalty enhancement in RCC § 22E-608, including changing “menacing” to “threatening,” reordering the list of protected characteristics, adding “in fact” to clarify no mental state is necessary as to the specific cross-referenced definition for “gender identity or expression as defined in D.C. Code § 2-1401.02(12A),” eliminating the redundant words “of persons” from the phrase “group of persons,” and updating the cross-referenced list of definitions.*

- This change clarifies the revised statutes.

RCC § 22E-610. Abuse of Government Power Penalty Enhancement.

- (1) *The CCRC recommends replacing the phrase “law enforcement officer or public official” with the term “public official,” which is defined to include a law enforcement officer.*
 - This change clarifies the revised statute and does not substantively change its meaning.
- (2) *The CCRC recommends adding to the enhancement a subsection clarifying that this enhancement may be stacked with other general enhancements or enhancements in a specific offense. The subsection says: More than one penalty enhancement under this chapter may apply to any offense. A penalty enhancement under this section is in addition to, and does not limit application of, additional penalty enhancements specified elsewhere in Title 22E to an offense.”*
 - This change clarifies the revised statutes.

RCC § 22E-701. Generally Applicable Definitions.

“Bodily injury”

- (1) *The CCRC recommends replacing “any impairment of physical condition” with “impairment of physical condition” in the definition of “bodily injury.” With this change, the definition reads “physical pain, physical injury, illness, or impairment of physical condition.” Deleting “any” makes the impairment of physical condition provision consistent with the rest of the definition, which does not specify “any.” It also consistent with the RCC de minimis defense (RCC § 22E-215), under which an impairment of physical condition may be so trivial as to satisfy the defense.*
 - This change improves the clarity, consistency, and proportionality of the revised statutes.

“Coercive threat”

- (1) *OAG, App. C at 466, recommends replacing references to RCC Title 22E with the words “this title” in the definition of “coercive threat.” OAG states that references to RCC Title 22E will be unnecessary when the RCC is enacted.*
 - The RCC adopts this recommendation. This change improves the clarity of the revised statute.
- (2) *The CCRC recommends replacing the word “threatens” with the word “communicates.” Using the word “communicates” instead of “threatens” is consistent with the revised criminal threats statute and avoids possible inferences that the elements of the criminal threats statute are incorporated into the definition.⁷⁰*
 - This change improves the clarity and consistency of the revised criminal code.

“Community-based organization”

- (1) *OAG, App. C at 466, recommends re-drafting the definition of “community-based organization” as follows: “Community-based organization” (A) Means an organization that provides services, including medical care, counseling, homeless services, or drug treatment, to individuals and communities impacted by drug use; and (B) Includes any organization currently participating in the Needle Exchange Program with the Department of Human Services under § 48-1103.01.*
 - The RCC does not adopt this recommendation. The term “community-based organization” is no longer defined in RCC § 22E-701, and instead relies on the definition in D.C. Code § 7-404.

“Comparable offense”

⁷⁰ For further discussion on replacing the word “threatens” with “communicates,” see Appendix D entry regarding Criminal Threats RCC 22E-1204 at X.

(1) *CCRC recommends replacing the phrase “District crime” with the phrase “current District offense.” The term includes any crime committed against the District of Columbia under laws predating the RCC that would necessarily prove the elements of a corresponding RCC offense.*⁷¹

- This change clarifies the revised definition and does not substantively change its meaning.

“Consent”

(1) *The CCRC recommends replacing “known” with “believed” in sub-subparagraph (B)(ii) of the definition of “consent.” With this change, sub-subparagraph (B)(ii) requires, “Because of youth, mental illness or disorder, or intoxication, is believed by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct to constitute the offense or to the result thereof.” “Known” (“knowingly”) is a culpable mental state in RCC § 22E-205, and per the rule of construction in RCC § 22E-207, applies to every element that comes after it unless a different culpable mental state or strict liability is specified. If “known” is included in an RCC offense through the definition of “consent” that would complicate the interpretation of culpable mental states in that offense and future drafting.*

- This change improves the clarity and consistency of the revised statutes.

(2) *The CCRC recommends codifying a new subparagraph (C) in the definition of “consent”: that consent “Has not been withdrawn, explicitly or implicitly, by a subsequent word or act.” This change makes clear that consent, once given, can be changed.*

- This change improves the clarity and consistency of the revised statutes.

“Controlled substance”

(1) *The CCRC recommends including a definition of “controlled substance” in RCC § 22E-701. The prior version of RCC § 22E-701 did not include a definition for “controlled substance,” and instead specific offenses that used the term cross-referenced the definition under D.C. Code § 48-901.02.*

- *This change improves the clarity of the revised criminal code, and is not intended to substantively change the meaning of the term “controlled substance.”*

“Debt bondage”

(1) *OAG, App C at 465, recommends that the word “labor” be deleted from the definition of “debt bondage.” OAG notes that the term “labor” is unnecessary, because the definition of “debt bondage” includes the term “services,” which includes “labor.”*

⁷¹ See USAO comment at App. C at 527-528.

- The RCC adopts this recommendation. This change improves the clarity of the revised criminal code.
- (2) *USAO, App. C at 494, recommends that the definition of “debt bondage” be redrafted to read, “the status of condition of a person who provides forced labor, services, or commercial sex acts, for a real or alleged debt.”*
- The RCC does not incorporate this recommendation because it may lead to disproportionate penalties. USAO’s recommendation would require that the person provide *forced* labor, services, or commercial sex acts. This recommendation could potentially limit the scope of debt bondage, and omit cases in which no coercive threat was used to compel a person to perform labor, services, or commercial sex acts to pay off debt. The definition codified in RCC § 22E-701 clarifies that even in the absence of coercive threats, debt bondage includes labor, services, or commercial sex acts under certain defined circumstances. For example, under USAO’s hypothetical, if a person is brought to the U.S. to work as a housekeeper and is told that she will have to work for 30 years to repay \$1,000 in fees that she will incur, this would constitute debt bondage regardless of whether any actual coercive threats are made.

“Deceive” and “deception”

- (1) *OAG, App. C at 467, recommends that the definition of “deceive” and “deception” be re-drafted as follows:*

“Deceive” and “deception”:

(A) Mean:

(1) Creating or reinforcing a false impression as to a material fact, including false impressions as to intention to perform future actions, provided, that deception as to a person’s intention to perform a future act shall not be inferred solely from the fact that he or she did not subsequently perform the act;

(2) Preventing another person from acquiring material information;

(3) Failing to correct a false impression as to a material fact, including false impressions as to intention, which the person previously created or reinforced, or which the deceiver knows to be influencing another to whom he or she stands in a fiduciary or confidential relationship; or

(4) For offenses against property in Subtitle III of this title, failing to disclose a known lien, adverse claim, or other legal impediment to the enjoyment of property which he or she transfers or encumbers in consideration for property, whether or not it is a matter of official record; and

(B) Do not mean puffing statements unlikely to deceive ordinary persons.

- The RCC adopts this recommendation. This recommendation does not substantively change the definition of the terms “deception” and “deceive.” This change improves the clarity of the revised definition.

“Demonstrating”

- (1) *The CCRC recommends changing the phrase “for the purpose of” to “with the desire to,” so as to avoid confusion with the defined term “purpose” in RCC § 22E-206.*
 - This change clarifies the revised definition and does not substantively change its meaning.

“Dwelling”

- (1) *The CCRC recommends rephrasing the definition so that it is easier to read. It now states, “a structure that is either designed or actually used for lodging or residing overnight...” The prior definition stated, “a structure that is either designed for lodging or residing overnight at the time of the offense, or that is actually used for lodging or residing overnight...”*
 - This change clarifies the revised definition and does not substantively change its meaning.

“Felony”

- (2) *OAG, App. C at 528, recommends amending the definition of “felony” to include “First or Second Degree Parental Kidnapping pursuant to RCC § 16-1022 (h)(6).”*
 - The RCC incorporates this recommendation.
 - This change improves the consistency and clarity of the revised definition.

“Incapacitated individual”

- (1) *The CCRC moves to RCC § 22E-701 the definition of “incapacitated individual” that previously was specified in RCC § 22E-408, and provides a standard commentary entry for the definition. The definition reads: “‘Incapacitated individual’ has the meaning specified in D.C. Code § 21-2011.” The revised definition is used not only in the RCC § 22E-408 defenses, but also in the updated kidnapping and criminal restraint statutes.*
 - These changes improve the clarity of the revised commentary.

“Labor”

- (1) *USAO, App. C at 495, recommends that the definition of “labor” omit the words “other than a commercial sex act.”*
 - The RCC incorporates this recommendation. This change addresses a possible gap in liability in cases in which an actor compels a person to perform labor, without knowing that the labor is actually a commercial sex

act. This change also ensures that forced labor and trafficking in forced labor are lesser included offenses of forced commercial sex and trafficking in forced commercial sex, respectively. This change improves the proportionality of the revised criminal code.

“Law enforcement officer”

- (1) *OAG, App. C at 468, recommends revising the definition to include campus police officers, who serve a similar role to licensed special police officers.*
 - The RCC incorporates this recommendation by adding licensed campus police officers to the definition. This change improves the consistency and proportionality of the revised offenses.
- (2) *CCRC recommends revising and reordering the definition to include: (A) An officer or member⁷² of the Metropolitan Police Department of the District of Columbia, or of any other police force operating in the District of Columbia;⁷³ (B) An investigative officer or agent of the United States; (C) An on-duty, civilian employee of the Metropolitan Police Department; (D) An on-duty, licensed special police officer; (E) An on-duty, licensed campus police officer; (F) An on-duty employee of the Department of Corrections or Department of Youth Rehabilitation Services; or (G) An on-duty employee of the Court Services and Offender Supervision Agency, Pretrial Services Agency, or Family Court Social Services Division.*
 - First, the revision makes clear that a federal law enforcement officer, Metro Transit Police officer, or federal investigator is a law enforcement officer, irrespective of whether they are “performing functions comparable” to the functions of a Metropolitan Police Officer. For example, a federal officer is an officer, even if they are not investigating a local crime.
 - Second, the revision does not include a person who performs a comparable function in another state for an agency that does not operate in the District of Columbia. For example, a Maryland probation officer is not a law enforcement officer under the updated definition.
 - Third, the revised definition applies only when a civilian employee of the Metropolitan Police Department, special police officer, campus police officer, or employee of the Department of Corrections, Department of Youth Rehabilitation Services, Court Services and Offender Supervision Agency, Pretrial Services Agency, or Family Court Social Services Division is on-duty.⁷⁴

⁷² E.g., reserve officer.

⁷³ E.g., Metro Transit Police, D.C. Housing Authority Police Department, Department of General Services Protective Services Police.

⁷⁴ Compare *Dist. of Columbia v. Coleman*, 667 A.2d 811, 818 (D.C. 1995) (“Members of the police force are ‘held to be always on duty’, and are required to take police action when crimes are committed in their presence”) with *Timus v. United States*, 406 A.2d 1269, 1272 (D.C. 1979) (explaining a special police officer will be considered a policeman or law enforcement officer only to the extent that he acts in conformance with the regulations governing special officers).

- Fourth, the revised definition does not include an express reference to “[a]ny officer or employee of the government of the District of Columbia charged with supervision of juveniles being confined pursuant to law in any facility of the District of Columbia regardless of whether such institution or facility is located within the District.” These employees are already covered by the paragraph that applies to an employee of the Department of Youth Rehabilitation Services.
- Fifth, the revised definition uses the conjunction “or” instead of “and,” to make clear that a person may qualify under any paragraph.
- These changes improve the logical order, clarity, consistency, and proportionality of the revised statutes.

“Live broadcast”

- (1) *The CCRC recommends replacing “by one or more people” in the definition of “live broadcast” with “by an audience, including an audience of one person.” With this revision, the definition reads: “a streaming video, or any other electronically transmitted image, for simultaneous viewing by an audience, including an audience of one person.” This change makes the definition consistent with the closely-related definition of “live performance.”*⁷⁵
 - This change improves the clarity and consistency of the revised statutes.

“Motion picture theater”

- (1) *The CCRC recommends deleting the definition of “motion picture theater” from the general definitions in RCC § 22E-701 and instead codifying it directly in the only RCC offense in which it appears, Unlawful Operation of a Recording Device in a Motion Picture Theater (RCC § 22E-2106). Including this definition in RCC § 22E-701 could be potentially confusing with other RCC offenses that refer to a “movie theater,” such as Creating or Trafficking an Obscene Image of a Minor (RCC § 22E-1807). This is not a substantive change.*
 - This change improves the clarity and consistency of the revised statutes.

“Official custody”

- (1) *The CCRC recommends codifying the following definition of “official custody”:*
“Official custody” means:
 - (A) *Detention for a legitimate police purpose, or detention following or pending:*

⁷⁵ RCC § 22E-701 defines “live performance” as “a play, dance, or other visual presentation or exhibition for an audience, including an audience of one person.”

- (i) Arrest or surrender in lieu of arrest for an offense;*
 - (ii) A charge or conviction of an offense, or an allegation or finding of juvenile delinquency;*
 - (iii) Commitment as a material witness; or*
 - (iv) Civil commitment proceedings, extradition, deportation, or exclusion;*
- (B) Custody for purposes incident to any detention described in subparagraph (A) of this paragraph, including transportation, medical diagnosis or treatment, court appearance, work, and recreation.*

The term is used in the RCC sexual abuse by exploitation statute (RCC § 22E-1303). This revision is discussed in detail in this Appendix for the RCC sexual abuse by exploitation statute, as well as the commentaries to the definition in RCC § 22E-701 and the RCC sexual abuse by exploitation statute.

- This change improves the clarity, consistency, and proportionality of the revised statutes and removes a possible gap in liability.

“Open to the general public”

- (1) The CCRC recommends revising the commentary to note the DCCA’s recent opinion in Broome v. United States,⁷⁶ which was issued after the most recent draft language was released. The decision does not change the meaning of the revised statute and the reference is only clarificatory.*
- This change clarifies the revised commentary.

“Person acting in the place of a parent per civil law”

- (1) The CCRC adds brief commentary on this phrase that was missing from the prior compilation.*
- These changes improve the clarity of the revised commentary.

“Person with legal authority over the complainant”

- (1) The CCRC recommends amending the definition to mean: “(A) When the complainant is under 18 years of age, the parent, 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 someone acting with the effective consent of such a parent or such a person; or (B) When the complainant is an incapacitated individual, the court-appointed guardian to the complainant, or someone acting with the effective consent of such a guardian.” This change makes the reference to legal duty in (A) consistent with other RCC language. The change also eliminates from*

⁷⁶ 240 A.3d 35 (D.C. 2020).

(B) reference to “engaging in conduct permitted under civil law controlling the actor’s guardianship,” which is now unduly narrow and confusing given the use of the defined phrase in multiple offenses in the updated RCC (instead of just general defenses). Commentary on this phrase that was missing from the prior compilation but has now been added to reflect the amended definition.

- These changes do not further change District law and improve the clarity and consistency of the revised statutes.

“Position of trust with or authority over”

(1) *The CCRC recommends revising subsection (A) of the definition of “position of trust with or authority over” to include a “great-grandparent.” With this revision, subsection (A) of the definition includes a great-grandparent, whether related by blood, adoption, marriage, or domestic partnership, as well as an individual with whom such a great-grandparent is in a romantic, dating, or sexual relationship. The previous version of this definition was limited to grandparents, as is the current D.C. Code definition of “significant relationship.”⁷⁷ Including great-grandparents recognizes that great-grandparents occupy a position of trust with or authority over minor complainants and is consistent with the scope of the RCC incest statute (RCC § 22E-1308). The commentary to the definition of “position of trust with or authority over” has been updated to reflect that this is a change to current District law.*

- This change improves the clarity, consistency, and proportionality of the revised statutes, and removes a gap in liability.

(2) *The CCRC recommends replacing “aunt” and “uncle” with a “parent’s sibling” in subsection (A) of the definition of “position of trust with or authority over.” This is a non-substantive change that improves the consistency of the definition with the RCC incest statute (RCC § 22E-1308).*

- This change improves the clarity of the revised statutes.

(3) *The CCRC recommends revising subsection (A) of the definition of “position of trust with or authority over” to include a “child of a parent’s sibling” (first cousin). With this revision, subsection (A) of the definition includes a first cousin, whether related by blood, adoption, marriage, or domestic partnership, as well as an individual with whom such a cousin is in a romantic, dating, or sexual relationship. Neither the previous version of this definition nor the current D.C. Code definition of “significant relationship”⁷⁸ includes first cousins in the list of “per se” individuals in subsection (A). It is inconsistent to exclude cousins from the definition, especially since the definition includes siblings, which, like cousins, may tend to be closer in age to a minor complainant than the other “per se” relatives listed in subsection (A) of the definition, such as parents, aunts, or uncles. This revision is also consistent with the scope of the RCC incest statute*

⁷⁷ D.C. Code § 22-3001(10)(A) (“‘Significant relationship’ includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption.”).

⁷⁸ D.C. Code § 22-3001(10)(A) (“‘Significant relationship’ includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption.”).

(RCC § 22E-1308). The commentary to the definition of “position of trust with or authority over” has been updated to reflect that this is a change to current District law.

- This change improves the clarity, consistency, and proportionality of the revised statutes, and removes a gap in liability.
- (4) *The CCRC recommends codifying a new subsection (B) in the definition of “position of trust with or authority over”: “A half-sibling related by blood, or an individual with whom such a person is in a romantic, dating, or sexual relationship.” The previous version of the definition and the current D.C. Code definition of “significant relationship”⁷⁹ include a “sibling” by blood, adoption, marriage, or domestic partnership, and it is unclear if “sibling” includes a half-sibling. Including half-siblings by blood recognizes that they occupy a position of trust with or authority over minor complainants and is consistent with the scope of the RCC incest statute (RCC § 22E-1308). The commentary to the definition of “position of trust with or authority over” has been updated to reflect that this is a possible change to current District law.*
- This change improves the clarity, consistency, and proportionality of the revised statutes, and removes a gap in liability.
- (5) *The CCRC recommends including specified relatives, and their significant others, by marriage or domestic partnership “either while the marriage or domestic partnership creating the relationship exists, or after such marriage or domestic partnership ends.” The previous version of the definition and the current D.C. Code definition of “significant relationship”⁸⁰ specify “related by . . . marriage [or] domestic partnership” and it is unclear whether this includes the specified relatives after the marriage or domestic partnership ends. Including specified relatives after the marriage or domestic partnership ends recognizes that they occupy a position of trust with or authority over minor complainants and is consistent with the scope of the RCC incest statute (RCC § 22E-1308). The commentary to this offense has been updated to reflect that this is a possible change in law.*
- This change improves the clarity, consistency, and proportionality of the revised statutes, and removes a gap in liability.
- (6) *USAO, App. C at 495-496, recommends deleting from the definition of “position of trust with or authority over” the requirement that the actor “has significant contact with the complainant or exercises supervisory or disciplinary authority over the complainant.” USAO states that this language results in “an unjustified exemption to certain liability and increased penalties for individuals in very powerful positions of authority with a victim, by virtue of the amount of time they interacted with the victim before the abuse and/or the scope of their duties.” USAO states that “such an exemption is counterintuitive and inconsistent with the reality of abuse by many individuals in positions of authority.” USAO gives as an*

⁷⁹ D.C. Code § 22-3001(10)(A) (“‘Significant relationship’ includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption.”).

⁸⁰ D.C. Code § 22-3001(10)(A) (“‘Significant relationship’ includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption.”).

example “a priest at a church, or another religious figure, [that] rarely has supervisory or disciplinary authority over a child, but should fall within the definition.” USAO states that “there are certain members of the community that the public should be able to trust with their children, such as members of religious establishments, and that the harm to the community is particularly potent when a child is abused by a person that their caretakers and their community should be able to trust.” USAO states that “for the victim, the religious or educational figure holds, by nature of his/her employment status, a position of trust and authority over him/her and others within the abuser’s scope of responsibilities, regardless of the nature and extent of professional contact the victim has with the abuser.” USAO states that the requirement of “significant contact” is “very vague” because the timing, amount, and nature of the contact is unclear.

- The RCC partially incorporates this recommendation by: 1) deleting the requirement in what is now subsection (F) that the actor has “significant contact” with the complainant; and 2) codifying as “per se” categories of a “position of trust with or authority over” the religious leaders in D.C. Code § 14-309 (what is now subsection (D)) and certain persons of authority in secondary schools (what is now subsection (E)). The “per se” religious and educational actors in subsection (D) and subsection (E) match the scope of the religious and educational actors in the RCC sexual abuse by exploitation statute (RCC § 22E-1303) and recognize the significance of the positions these individuals hold. Subsection (D) and subsection (E) are discussed in detail below.
 - The RCC does not incorporate the recommendation to delete the requirement that the actor “exercises supervisory or disciplinary authority over the complainant” in subsection (F). In current law and in the RCC, whether an actor that is 18 years of age or older is in a “position of trust with or authority over” or a “significant relationship” with the complainant is the basis of criminalizing otherwise consensual conduct with a complainant that is over the age of 16 years, but under the age of 18 years. Requiring the individuals in subsection (F) to exercise supervisory or disciplinary authority over the complainant ensures that the relationship between the actor and the complainant rises to the level of coerciveness necessary to make otherwise consensual sexual activity criminal.
- (7) *The CCRC recommends adding as subsection (D) “A religious leader described in D.C. Code § 14-309” to the definition of “position of trust with or authority over.” The current D.C. Code definition of “significant relationship” includes “[a]ny employee or volunteer of a . . . church, synagogue, mosque, or other religious institution . . . including a . . . clergy, youth leader, chorus director . . . administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.”⁸¹ There is no DCCA case law interpreting the current D.C. Code definition of “significant relationship.” It is unclear in the current D.C. Code definition whether “any other person in a position of trust with*

⁸¹ D.C. Code § 22-3001(10)(D).

or authority over” a complainant modifies the preceding list of specified individuals and requires a substantive analysis of the relationship between the actor and the complainant, or if an actor holding a specified job title is sufficient. As USAO stated in its comments on this definition, App. C at 496, “there are certain members of the community that the public should be able to trust with their children, such as members of religious establishments, and . . . the harm to the community is particularly potent when a child is abused by a person that their caretakers and their community should be able to trust.” Codifying “A religious leader described in D.C. Code § 14-309” as a per se” category of a “position of trust with or authority over” clarifies the revised definition and is consistent with the scope of religious figures included in the RCC sexual abuse by exploitation statute (RCC § 22E-1303).

- This revision improves the clarity, consistency, and proportionality of the revised statute. The commentary to the RCC definition has been updated to reflect that this is a possible change in law.

(8) *The CCRC recommends adding as subsection (E) to the definition of “position of trust with or authority over” “A coach who is not a secondary school student, a teacher, counselor, principal, administrator, nurse, or security officer, provided that such an actor is an employee, contract employee, or volunteer at the school at which the complainant is enrolled or at a school where the complainant receives services or attends programming.” The current D.C. Code definition of “significant relationship” includes “[a]ny employee or volunteer of a school . . . including a teacher, coach, counselor . . . chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.”⁸² There is no DCCA case law interpreting the current D.C. Code definition of “significant relationship.” It is unclear in the current D.C. Code definition whether “any other person in a position of trust with or authority over” a complainant modifies the preceding list of specified individuals and requires a substantive analysis of the relationship between the actor and the complainant, or if an actor holding a specified job title is sufficient. As USAO stated in its comments on this definition, App. C at 496, an “educational figure holds, by nature of his/her employment status, a position of trust and authority over [the complainant].” Codifying the educational figures listed in subsection (D) of the definition as a “per se” category of a “position of trust with or authority over” clarifies the revised definition and is consistent with the scope of educational figures included in the RCC sexual abuse by exploitation statute (RCC § 22E-1303). In current law and in the RCC, whether an actor that is 18 years of age or older is in a “position of trust with or authority over” or a “significant relationship” with the complainant is the basis of criminalizing otherwise consensual conduct with a complainant that is over the age of 16 years, but under the age of 18 years. Requiring that the actor is at the school at which the complainant is enrolled or at a school where the complainant receives services or attends programming, and, in the case of a coach, that the actor is not also a secondary school student, ensures that the relationship between the actor*

⁸² D.C. Code § 22-3001(10)(D).

and the complainant rises to the level of coerciveness necessary to make otherwise consensual sexual activity criminal. In addition, the revised definition requires that the actor is “an employee, contract employee, or volunteer,” which is consistent with the requirements in subsection (F) of the definition.

- This revision improves the clarity, consistency, and proportionality of the revised statute. The commentary to the RCC definition has been updated to reflect that this is a possible change in law.
- (9) *The CCRC recommends replacing “contractor” with “contract employee” in subsection (F) of the revised definition of “position of trust with or authority over.” The RCC incorporated “contractor” in the previous draft based on a written comment from the Advisory Group.⁸³ However, “contract employee” appears more accurate because it refers to the individual hired on a contract basis as opposed to the individual that does that the hiring. The current D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes include a “contract employee,”⁸⁴ as does the RCC sexual abuse by exploitation statute (RCC § 22E-1303).*
- This change improves the clarity and consistency of the revised statute.
- (10) *The CCRC recommends limiting subsection (C) of the revised definition to “current” spouses or domestic partners of a person acting in the place of a parent per civil law. This specification is necessary because subsection (A) of the revised definition, as discussed above, has been revised to include spouses or domestic partners “either while the marriage or domestic partnership creating the relationship exists, or after such marriage or domestic partnership ends.” Limiting subsection (C) of the revised definition to “current” spouses or domestic partners is consistent with the scope of a “person acting in the place of a parent per civil law” as defined in RCC § 22E-701. The commentary has been updated to reflect that this is part of a possible change in law.*
- This change improves the clarity, consistency, and proportionality of the revised statutes.

“Possess”

- (1) *The CCRC recommends clarifying in commentary that a person may be said to know the location of an object if they are generally aware of its whereabouts, even without knowing its exact position.⁸⁵*
- This change clarifies the revised commentary.

⁸³ Advisory Group Memo #30 (issued 2-19-2020) App. D1 at 86.

⁸⁴ See, e.g., D.C. Code § 22-3013 (first degree sexual abuse of a ward, patient, client, or prisoner statute referring to “[a]ny member, employee, contract employee, consultant, or volunteer at a hospital, treatment facility, detention or correctional facility, group home, or other institution . . .”).

⁸⁵ For example, a person who is practically certain that their keys are somewhere in a set of drawers constructively possesses their keys.

“Prior conviction”

- (1) *The CCRC recommends clarifying that the term “prior conviction” includes a conviction that is pending appeal but does not include a conviction that has been vacated or reversed. The DCCA’s recent opinion in Blocker v. United States,⁸⁶ which was issued after the most recent draft language was released, noted an ambiguity here but did not resolve it.*
- This change clarifies the revised definition.

“Protection order”

- (1) *The CCRC recommends striking this definition as unnecessary and potentially confusing. Where applicable, individual statutes will refer to a temporary protection order under D.C. Code § 16-1004, a final protection order under D.C. Code § 16-1005, or a valid foreign protection order as defined in D.C. Code § 16-1041.*
- This change clarifies, but does not substantively change, the revised code.

“Public official”

- (1) *CCRC recommends adding a commentary for the definition of “public official.”*
- This change clarifies, but does not substantively change, the revised definition.

“Sexual act”

- (1) *The CCRC corrects an error in the revised definition of “sexual act” in the Compilation of Draft RCC Statutes by moving “sexually” so that it modifies all the verbs that follow (“with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person.”). This correct text was discussed extensively in the commentary to the RCC definition (First Draft of Report #50 – Commentary to Subtitle I General Part), but the statutory language in the Compilation of RCC Statutes was incorrect.*
- This change improves the clarity and consistency of the revised statute.

⁸⁶ 240 A.3d 35 (D.C. 2020).

RCC § 22E-1101. Murder.

- (1) *OAG, App. C at 469, recommends re-drafting subsection (c), so that the entire subsection is in the past tense.*
 - The RCC incorporates this recommendation. Subsection (c) will be re-drafted as follows: “A person shall be deemed to have consciously disregarded the risk required to prove that the person acted with extreme indifference to human life in paragraph (b)(1) if the person, was unaware of the risk due to self-induced intoxication, but would have been aware had the person been sober.” This change improves the clarity of the revised statute.
- (2) *PDS, App. C at 484-485, recommends that the “random shooting” penalty enhancement under subparagraph (d)(3)(H) be omitted.*
 - The RCC adopts this recommendation and removes this enhancement. Random shootings, in which the actor fires a gun indiscriminately, endanger bystanders who happen to be in the vicinity. To account for this added danger, the RCC included random shooting as a penalty enhancement for murder. However, when the CCRC initially made this recommendation, it had not yet drafted and proposed separate offenses to criminalize discharging a firearm. The proposed discharge offenses⁸⁷ provide additional liability for the additional danger of a random shooting. In addition, the term “random shooting” is undefined and is unclear exactly which types of shootings qualify. Random shootings may include firing a gun indiscriminately into a crowd, into any location regardless of whether it is occupied, or may also include shooting a person for no discernable motive. This creates uncertainty as to which types of murders will be subject to the penalty enhancement. Eliminating “random shootings” as an aggravating factor for murder improves the clarity and proportionality of the revised statutes.
- (3) *PDS, App. C at 485, recommends that the “drive by shooting” penalty enhancement for murder be re-drafted as a “Commits the murder by shooting committed from a vehicle that is being driven at the time of the shooting[.]”*
 - The RCC adopts this recommendation. This change more clearly specifies the situations in which the penalty enhancement applies, and improves the clarity and consistency of the revised statutes.
- (4) *USAO, App. C at 496, recommends that felony murder be classified as first degree murder instead of second degree murder.*
 - The RCC does not adopt this recommendation because classifying felony murder, which includes unintentionally causing the death of another, as first degree murder would authorize disproportionately severe penalties. Under the RCC, first degree murder requires the highest degree of culpability; the actor must *purposely* cause the death of another with premeditation and deliberation. Felony murder, which involves accidentally causing the death of another while committing or attempting

⁸⁷ Negligent discharge, RCC § 22E-1406; and endangerment with a firearm, RCC § 22E-4120.

to commit an enumerated felony involves a significantly lower degree of culpability, and does not warrant being equated to purposeful and premeditated murder.

- USAO notes that felony murder involves a degree of planning and preparation that is not present with other forms of second degree murder. This is likely true, but it does not follow that felony murder involves a higher degree of culpability. Felony murder may involve planning and preparation to commit *a predicate felony*, not to cause the death of another. Accidentally causing the death of another after planning and preparation to commit a predicate felony is not inherently more culpable than *intentionally* causing the death of another, and does not warrant being classified as a higher degree of murder.
- USAO argues that categorizing felony murder as second degree murder does not provide sufficient penalties, especially in particularly egregious cases. The RCC authorized penalties for second degree murder, which includes *intentionally* killing another person, are sufficiently severe for felony murder. Moreover, additional penalties beyond those authorized for second degree murder are available in the particularly egregious cases the USAO cites to in its written comments.
- USAO's written comments cite to several cases involving particularly egregious facts, as examples of cases in which the penalties for second degree murder would be insufficient. However, in these egregious cases the RCC authorizes penalties in excess of the maximum penalty for second degree murder in two main ways: first there may be alternate grounds for murder liability apart from felony murder; and second, the RCC includes numerous penalty enhancements that account for particularly egregious cases.
 - For example, a case cited by USAO *Ingram v. United States*, demonstrates various means by which the RCC authorizes additional penalties beyond the maximum authorized for second degree murder. In *Ingram*, the USAO states that the defendant struck the decedent, a special needs student, in the head with a bottle, and continued to beat the decedent on the ground with such force that "the beating was causing a nearby air-conditioning unit to vibrate." The defendant then picked up a metal pole and apparently forced it into the decedent's anus. The defendant was acquitted of first degree premeditated murder, but convicted of first degree sexual assault and of first degree felony murder. The USAO notes that since the jury did not find that the defendant acted with premeditation, the defendant in this case could not have been convicted of first degree murder under the RCC. This case is especially heinous, but the RCC accordingly provides for additional penalties beyond the maximum sentence authorized for second degree murder.
 - First, under the facts of *Ingram*, it is likely that there are alternate theories of murder liability, apart from felony murder. Causing the

death of another by means of a continued beating of the severity described in USAO's comments would satisfy the requirements for second degree depraved heart murder under the RCC.

- The availability of alternate grounds for murder liability has significant penalty implications. Under current District law and the RCC, when a person is convicted of felony murder the convictions for murder and the predicate felony merge.⁸⁸ However, if there is an alternate basis for murder liability, the murder conviction and the separate felony do *not* merge, and the sentences may be ordered to be served consecutively. Given the facts in *Ingram*, under the RCC a defendant could be convicted of second degree depraved heart murder *and* first degree sexual assault. Arguably, since the defendant in *Ingram* used a metal pole to sexually assault the decedent, depending on the particular facts of the case, the defendant could be convicted of *enhanced* first degree sexual assault.⁸⁹
- Second, the facts described in *Ingram* may satisfy various penalty enhancements for second degree murder specified in the RCC. Under the RCC, second degree murder is subject to a penalty enhancement if the defendant “[k]nowingly inflicts extreme physical pain or mental suffering for a prolonged period of time immediately prior to the decedent’s death,” or “mutilates or desecrates the decedent’s body.” Forcing a metal pole into the decedent’s anus may satisfy either, or both, of these penalty enhancements.
- In addition, second degree murder is also subject to a penalty enhancement if the defendant was “reckless as to the fact that the decedent is a protected person.” In *Ingram* the decedent may have been a “protected person” as the term is defined under in the RCC. The term “protected person” includes a “vulnerable adult,” which is defined as “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.” USAO notes that the decedent was a special needs student who when confronted by the defendant was “distressed, confused, and unable to speak coherently[.]” If the decedent in this case was a

⁸⁸ *Norris v. United States*, 585 A.2d 1372, 1374 (D.C. 1991).

⁸⁹ Under RCC § 22E-1301, the penalty classification for sexual assault may be increased in severity by one class if “The actor recklessly causes the sexual act or sexual contact by displaying or using an what is, in fact, a dangerous weapon or imitation dangerous weapon[.]” The term “dangerous weapon” is defined under RCC § 22E-701, and includes “[a]ny object, other than a body part or stationary object, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person.” In this case, if evidence presented at trial, including any expert testimony, proves that a metal pole violently thrust into a person’s anus is likely to cause serious bodily injury, then it constitutes a dangerous weapon, and the penalty enhancement for sexual assault would apply.

“protected person,” and the defendant was aware of a substantial risk that the decedent’s status, this provides an additional basis for enhanced penalties.

- Based on the facts of *Ingram* as described by USAO, a defendant could potentially be convicted of both enhanced second degree murder and enhanced first degree sexual assault. If convicted of both, the RCC authorizes the same penalty as the maximum currently authorized for first degree murder under the D.C. Code, 60 years, or possibly more depending on the facts of the case. The RCC recognizes that some murders that occur during the commission of a predicate felony may be egregious, and accordingly provides for heightened penalties. However, the heightened penalties may not be available through a single charge of felony murder as in the current D.C. Code.

(5) *USAO at App. C 504 opposes eliminating accomplice liability for felony murder. USAO says that not specifically providing accomplice liability for felony murder and reliance on regular accomplice liability principles for murder, “will cause some of the most terrible murders to go unpunished and will lead to an increase in violence committed by groups of individuals.” USAO does not cite any social science research or statistics in support of its statement that this change in law would lead to an increase in violence committed by groups of individuals.*

- The RCC partially incorporates this recommendation by allowing for accomplice liability for felony murder but also providing a defense for such an accomplice when they do not commit the lethal act and either believe that no participant in the predicate felony intends to cause death or serious bodily injury, or makes reasonable efforts to prevent another participant from causing the death or serious bodily injury of another. In the Second Draft of Report #19 the CCRC proposed this defense as an affirmative defense,⁹⁰ but now recommends the burden of proof be that of a defense. Where a person meets the requirements of the defense, a murder charge and penalty does not appear to be warranted though of course the person would remain liable for the predicate felony and, depending on the facts of the case, may be subject to other charges as well. The CCRC continues to review this matter, however, as the deterrence rationale referenced in the court opinion cited by USAO⁹¹ has been called into question by social science analysis⁹² and some jurisdictions have

⁹⁰ USAO did not provide written comments regarding the changes proposed in the Second Draft of Report #19.

⁹¹ *Wilson-Bey v. United States*, 903 A.2d 818, 835 (D.C. 2006).

⁹² Scholars have concluded that the severity of sentences, as measured by sentence length, has a negligible deterrent effect. Bill McCarthy, *New Economics of Sociological Criminology*, 28 ANNU. REV. SOCIOLOG. 417–442 (2002); National Institute of Justice, *Five Things About Deterrence* 2 (2016). One paper analyzing state-level felony and felony murder data concluded that “Policymakers should draw one conclusion from this paper: the felony-murder rule does not substantially improve crime rates. If the main reason a state retains the rule is to reduce crime, it should reconsider the rule.” Malani, Anup, “Does the

eliminated felony murder altogether. This change improves the proportionality of the revised criminal statutes.

(6) USAO, *App. C at 545*, recommends retaining a 30 year mandatory minimum sentence for first degree murder. USAO notes that a 30 year mandatory minimum is especially appropriate for premeditated purposeful murder, and notes that 32 states impose a mandatory minimum sentence of life or life without parole.

- The RCC does not incorporate this recommendation because it would result in disproportionate penalties. For more information on the subject, see Advisory Group Memorandum #32, Supplemental Materials to the First Draft of Report #52.
- The CCRC also notes that USAO does not assert that the current mandatory minimum and statutory maximum penalty in the D.C. Code adequately deter purposeful premeditated first degree murder.⁹³
- USAO's comparisons with other jurisdictions that impose mandatory minima for first degree murder is somewhat misleading because many states allow for parole⁹⁴, and because the elements of first degree murder in other jurisdictions do not necessarily correspond to the elements of first degree murder under the RCC.⁹⁵

Felony-Murder Rule Deter? Evidence from FBI Crime Data," (2007) <http://www.nytimes.com/packages/pdf/national/malani.pdf>

⁹³ See U.S. Department of Justice, National Institute of Justice, *Five Things About Deterrence*, NCJ 247350 (May 2016) at 1 ("1. The *certainty* of being caught is a vastly more powerful deterrent than the punishment... 2. Sending an individual convicted of a crime to prison isn't a very effective way to deter crime... 3. Police deter crime by increasing the perception that criminals will be caught and punished... 4. Increasing the severity of punishment does little to deter crime... 5. There is no proof that the death penalty deters criminals.").

⁹⁴ Under current law, first degree murder carries a mandatory minimum sentence of 30 years with no possibility of release. By contrast, many states that impose mandatory minimum sentences for first degree murder allow for parole. Even in states that impose a mandatory life sentence, defendants convicted of first degree murder may be eligible for release after they have been imprisoned for fewer than 30 years. For example, USAO cites to Rhode Island as an example of a state with a mandatory minimum life sentence for first degree murder. However, in Rhode Island defendants convicted of first degree murder are eligible for parole after 15 years. 11 R.I. Gen. Laws Ann. § 11-23-2.2.

⁹⁵ The elements of first degree murder statutes in other jurisdictions do not necessarily correspond to first degree murder under the RCC, and may involve more serious or culpable conduct. For example, USAO cites the first degree murder statute from New York, which imposes a 15 year mandatory minimum. However, as USAO notes in its comments, New York's *second degree* murder statute more closely corresponds to the RCC's first degree murder statute. New York's first degree murder statute requires that the decedent was an on duty police officer, peace officer, or other designated public safety employee. N.Y. Penal Law § 125.27.

In addition to differences in statutory elements, courts in different jurisdictions may have interpreted elements of seemingly comparable murder more narrowly than the DCCA. For example, USAO cites to Ohio's *aggravated* murder statute, which requires that the defendant causes the death of another "with prior calculation and design."⁹⁵ However, this "prior calculation and design" element may require a greater showing than that required for "premeditation" and "deliberation" under District law. See *State v. Jenkins*, 355 N.E.2d 825, 826-27 (Ohio Ct. App. 1976) ("'Prior calculation and design' sets up a new and more demanding standard than the old first degree murder standard of 'deliberate and premeditated malice.' 'Prior calculation and design' require some kind of studied analysis with its object being to cause the death of another. Momentary premeditation is no longer sufficient.")

- (7) *PDS, App. C at 581 objects to inclusion of felony murder as a basis for liability under second degree murder or manslaughter.*
- The RCC does not incorporate this recommendation at this time. Although felony murder does not require causing death recklessly or intentionally, the predicate felonies are highly dangerous and create a significant risk of death or serious injury. The penalties authorized under the RCC's second degree murder and manslaughter offenses are not disproportionately severe for negligently causing the death of another while committing or attempting to commit a predicate felony, given that the homicide and predicate offense merge.
- (8) *PDS App. C at 581 recommends that if the RCC retains felony murder under second degree murder and manslaughter, that the actor be required to commit the "lethal act." Alternatively, PDS recommends that the defense under subsection (g) be incorporated as elements of the offense, instead of as a defense.*
- The RCC partially incorporates this recommendation. The updated murder statute includes a defense if the actor did not commit the lethal act, and either believes that no fellow participant intends to cause death or serious bodily injury, or make reasonable efforts to prevent a fellow participant from causing death or serious bodily injury. This defense accounts for the diminished culpability of actors who do not commit the lethal act. This is a change from the prior RCC recommendation for an affirmative defense.
- (9) *PDS, App. C at 583 recommends that first and second degree criminal abuse of a minor be removed from the list of predicate felonies for felony murder. PDS also recommends that felony murder requires that the "predicate felony must have a purpose that is independent of the decedent's death or serious injury."*
- The RCC incorporates this recommendation, and first and second degree criminal abuse of a minor will be removed from the list of predicate felonies for felony murder. First and second degree criminal abuse of a minor criminalize *recklessly* causing serious or significant bodily injury. In most cases, applying the felony murder rule to these offenses criminalizes recklessly causing the death of another as murder, without any intentional or purposeful wrongful conduct. All of the other predicate offenses require at least *knowing or intentional* conduct. This change improves the proportionality of the revised criminal code.
 - The RCC does not incorporate the recommendation that the predicate felony must have a purpose that is independent of the decedent's death or serious injury. This limitation is unnecessary and does not change the scope of second degree murder. Under this proposal, if an actor commits a predicate felony with the purpose of causing death or serious bodily injury, the felony murder rule would not apply. However, if the actor acts with this purpose and causes the death of another, that actor would still be guilty of second degree murder under paragraph (b)(1).⁹⁶

⁹⁶ Paragraph (b)(1) states that second degree murder includes recklessly, with extreme indifference to human life, causing the death of another. This form of second degree murder is satisfied if a person

- (10) *The CCRC recommends redrafting subparagraph (b)(2)(F) to reference only first and second degree robbery, instead of first, second, third, and fourth degree robbery. Under the prior version of the robbery statute, fourth degree robbery included recklessly causing significant bodily injury in the course of committing a robbery. The CCRC has recommended reducing the number of penalty gradations in robbery from five to three. Under this revised robbery statute, second degree robbery includes recklessly causing significant bodily injury in the course of committing a robbery. Accordingly, the murder statute is revised to refer to the appropriate grades of the revised robbery statute.*
- This change improves the consistency and proportionality of the revised criminal statutes.

intentionally causes the death of another, or causes death of another by acting with intent to cause serious bodily injury.

RCC § 22E-1102. Manslaughter.

- (1) *PDS, App. C at 583, recommends the same changes be made to paragraph (1)(b) as it recommended to felony murder under RCC § 22E-1101.*
 - The RCC makes the same changes to paragraph (1)(b) as it does with respect to felony murder under RCC § 22E-1101.
- (2) *The CCRC recommends that in accordance with changes made to the murder statute, that the affirmative defense under subsection (e) be changed to a defense. The elements of the defense remain unchanged. For further discussion of this change, see responses to RCC § 22E-1101 above.*

RCC § 22E-1201. Robbery.

- (1) *USAO, App. C at 507, recommends that the commentary be revised to state that physical force that “overpowers” the complainant is sufficient under subparagraph (e)(4)(D), and that the force need not be “significant.”*
 - The RCC partially incorporates this recommendation by replacing the words “Using physical force that overpowers the complainant or any person present other than an accomplice” with the words “By applying physical force that moves or immobilizes another person present[.]” This revised language is not intended to substantively change the scope of the robbery offense. Both the prior and revised language is intended to criminalize taking property by using force that does not cause bodily injury (which is separately addressed in the robbery statute), but still moves or immobilizes the complainant, such as shoves or bear hugs. The updated language is intended to more clearly define the degree of force required for robbery. This change improves the clarity of the revised criminal code.
- (2) *USAO, App. C at 507, recommends that the commentary clarify that a complainant’s injury need not actually be caused by the dangerous weapon or imitation dangerous weapon.*
 - The RCC incorporates this recommendation by adding the example suggested by USAO to the commentary footnote referenced by USAO. Specifically, the footnote now includes the sentence: “For example, if a defendant displays a gun during a robbery and the gun’s display causes a complainant to step back, trip, fall, and suffer an injury from the fall, the weapon penalty enhancement would be satisfied even though there was no gunshot.” Under this penalty enhancement, there is no requirement that the actor specifically caused bodily injury by using or displaying a weapon or imitation weapon. This change clarifies the RCC commentary.
- (3) *The CCRC recommends re-organizing the revised robbery statute into three penalty gradations and adding penalty enhancements such that the total number of classes for the conduct is the same—five. The three penalty grades will be determined by the severity of bodily injury caused during the robbery, as well as whether the property taken in the robbery is a motor vehicle or valued at more than \$5,000. The two penalty enhancements are applicable if the robbery is committed by recklessly displaying or using a dangerous weapon or imitation weapon, or if the complainant is a protected person.*
 - Under the prior version of the robbery statute, causing bodily injury by using or displaying a weapon was subject to more severe penalties than causing bodily injury to a protected person. Under the revised version of the robbery statute, each grade of robbery is increased in penalty severity by one class if the robbery is committed by using or displaying a weapon, or if the complainant is a protected person. Notably, under the prior version of the robbery statute, robbery of property valued at \$5,000 or more, and simple theft of property valued at \$5,000 or more were subject to the same maximum penalty of 3 years. Under the revised robbery

statute, committing robbery of property valued at more than \$5,000 will be subject to more severe penalties than theft of property valued at more than \$5,000. This change improves the organization of the revised statutes.

- (4) *The CCRC recommends replacing the word “kidnap” with the word “confines.” The prior version of the robbery statute included threatening that a person would “kidnap” the complainant or another person. However, “kidnapping” is a specific offense under the RCC, which requires confinement with intent to inflict some additional harm on the complainant. Kidnapping includes confinement with intent to facilitate the commission of a felony. In virtually any case in which a person threatens to confine a person in order to commit a robbery, which is a felony offense, that confinement would constitute a kidnapping. Substituting the word “confines” for “kidnap” does not substantively alter the scope of the robbery offense, but more clearly communicates that threats of confinement are sufficient for robbery liability, without reference to the specific elements of the RCC kidnapping offense.*

- This change improves the clarity of the revised criminal statutes.

- (5) *The CCRC recommends revising the robbery offense to include taking property by causing injury to a person present, regardless of whether the injured person is an accomplice. Although this technically changes the scope of the revised robbery statute, in practice it will have little if any effect because the bodily injury still must be the cause of the taking or exercise of control over the complainant’s property. Under the prior version of the statute, only taking property by causing injury to a person other than an accomplice constituted robbery. The revised robbery statute now potentially includes robbery by injury to an accomplice. Instances in which a person takes property by causing injury to an accomplice in the robbery are likely very rare and among those instances it is likely rarer still that the injury to the accomplice is the means of accomplishing the robbery. Yet, should such a complainant be caused to give property to the actor by injury to the actor’s accomplice (perhaps out of concern for the welfare of the accomplice), such a coercive circumstance still makes such a situation more comparable to robbery rather than other types of theft.*

- This change improves the clarity and proportionality of the revised criminal code.

- (6) *The CCRC recommends revising robbery to include taking property by “communicating” that the actor will immediately cause another person to suffer bodily injury, sexual act, sexual contact, confinement, or death. The word “communicating” replaces the word “threatens” from the prior version of the robbery statute to maintain consistency with the revised criminal threats statute. In addition, using the word “communicates” aligns the elements more with criminal threats and ensures that the criminal threats offense is a lesser included offense of robbery.*

- These changes improve the clarity and proportionality of the revised criminal code.

- (7) *The CCRC recommends adding an affirmative defense to robbery that the actor reasonably believed that an owner of the property gave effective consent for the actor to take or exercise control over the property. The affirmative defense is*

different than the effective consent defense for assault and applies only in situations where the actor believes they have the effective consent of an owner to take property that is held or possessed by the complainant. If this defense applies, the actor may still be convicted of other property offenses or offenses against persons (e.g., assault), depending on the facts of the specific case. Use of force in reclaiming property of another may be permitted under the RCC § 22E-404 defense of property.

- This change improves the clarity and proportionality of the revised statutes.
- (8) *The CCRC recommends replacing the words “physically present” with “present.” This change does not substantively change the scope of the offense. The word “physically” is redundant as used in the revised robbery statute.*
- This change improves the clarity of the revised statutes.

RCC § 22E-1202. Assault.

- (1) *The CCRC recommends removing the enhanced offense gradations that require “displaying or using what, in fact, is a dangerous weapon or imitation dangerous weapon.” Instead, this display or use of a dangerous weapon or imitation dangerous weapon is codified as a penalty enhancement in subparagraphs (h)(5)(C), subparagraph (h)(6)(B), and subparagraph (h)(7)(B). This revision improves the clarity of the revised statute and does not substantively change the recommended penalties for the offense.*
 - This change improves the clarity of the revised statute.
- (2) *The CCRC recommends applying a culpable mental state of “recklessly” to the weapon penalty enhancement that applies to second degree assault (subparagraph (h)(5)(B)). With this change, what is now second degree assault prohibits recklessly, with extreme indifference to human life, causing serious bodily injury, and the penalty enhancement requires committing the offense by recklessly displaying or using a dangerous weapon or imitation dangerous weapon. In the previous version of this statute, what was then first degree assault required the culpable mental state of recklessly, with extreme indifference to human life, both for causing serious bodily injury and for the display or use of a dangerous weapon or imitation dangerous weapon. This change ensures that weapon penalty enhancement consistently requires a “recklessly” culpable mental state.*
 - This change improves the clarity, consistency, and proportionality of the revised statute.
- (3) *The CCRC recommends removing the enhanced offense gradations that require that the complainant is a protected person or that the actor commit the offense with the purpose of harming the complainant due to the complainant’s status as a law enforcement officer, public safety employee, or District official. Instead, these situations are codified as penalty enhancements in subparagraphs (h)(5)(A) and (h)(5)(B), and sub-subparagraphs (h)(6)(A)(i), (h)(6)(A)(ii), (h)(7)(A)(i), and (h)(7)(A)(ii). This revision improves the clarity of the revised statute and does not substantively change the recommended penalties for the offense.*
 - This change improves the clarity of the revised statute.
- (4) *The CCRC recommends deleting what was previously subsection (g),⁹⁷ the limitation on justification and excuse defenses to assault on a law enforcement*

⁹⁷ Subsection (g) previously read:

(g) *Limitation on justification and excuse defenses to assault on a law enforcement officer.* For prosecutions brought under this section, there are no justification or excuse defenses under RCC [§§ 22E-XXX – 22E-XXX] for a person to actively oppose the use of physical force by a law enforcement officer when:

- (1) The person is reckless as to the fact that the complainant is a law enforcement officer;
- (2) In fact, the use of force occurs during an arrest, stop, or detention for a legitimate police purpose, regardless of whether the arrest, stop, or detention is lawful; and

officer, and replacing it with the provision in RCC § 22E-403(b)(3). RCC § 22E-403(b)(3) provides an exception to defense of self or others when “The actor is reckless as to the fact that they are protecting themselves or another from lawful conduct.” This is a change both as compared to the prior RCC draft of assault and to current District law, which provides a categorical bar to self-defense against the use of force that is not excessive by a law enforcement officer (LEO).⁹⁸ The new RCC reliance on RCC § 22E-403(b)(3) to limit self-defense against a law enforcement officer allows an actor who otherwise meets the requirements for self-defense to use force to oppose a LEO use of force that either is not lawful or when the actor is not reckless as to the lawfulness. By eliminating the special bar on self-defense against an unlawful arrest, the RCC effectively reverts to the common law rule regarding defense against a law enforcement officer⁹⁹. The CCRC recommends the policy change while noting that a person must still satisfy the requirements of self-defense to avoid liability and that the RCC continues to bar a claim of self-defense whenever an actor is reckless as to the law enforcement officer’s conduct being lawful. The commentary to the RCC assault statute has been updated to reflect that this is a substantive change to current District law.

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(5) *The CCRC recommends deleting the provision in what was previously fifth degree assault for negligently causing bodily injury by discharging a firearm. As the commentary to the RCC assault statute explained previously, this provision was new to District law. Instead, the RCC endangerment with a firearm offense (RCC § 22E-4120) has been revised to include creating a substantial risk of bodily injury to another person and the commentary to RCC § 22E-4120 has been amended to clarify that causing bodily injury satisfies the risk requirement. The RCC endangerment with a firearm offense requires a higher culpable mental state of “knowingly” for discharging a projectile from a firearm and for creating the substantial risk of bodily injury. Under the updated RCC assault statute, negligently discharging a firearm and negligently causing bodily injury is no longer sufficient for liability as it was under the previous version of fifth degree assault. However, an individual that negligently discharges a firearm may have liability for negligent discharge of a firearm (RCC § 22E-4106) or liability for*

(3) The law enforcement officer uses only the amount of physical force that appears reasonably necessary.

⁹⁸ Current D.C. Code § 22-405 and § 22-405.01 provide that it is: “neither justifiable nor excusable cause for a person to use force to resist an arrest when such an arrest is made by an individual he or she has reason to believe is a law enforcement officer, whether or not such arrest is lawful.”

⁹⁹ As explained by the DCCA in *McDonald v. United States*, “The legislative history indicates that Congress intended to adopt ‘the modern rule’ in recognition that it is no longer necessary for a citizen to resist what he suspects may be an illegal arrest since criminal procedural rights (such as prompt presentment, Fed. R. Crim. Proc. 5(b) & (c)) as well as civil remedies under the Civil Rights Act of 1871, 42 U.S.C. § 1983) are readily available. H.R.Rep. No. 907 at 71–72.” *McDonald v. United States*, 496 A.2d 274, 276 (D.C. 1985).

knowingly possessing it under several RCC weapons offenses, subject to the limitation on convictions for multiple related weapons offenses in RCC § 22E-4119.

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(6) *The CCRC recommends codifying an exclusion from liability in what is now subsection (e): “An actor does not commit an offense under this section when, in fact, the actor’s conduct is specifically permitted by a District statute or regulation.” This exclusion resolves any apparent conflict within District laws. For example, Title 22, Health, of the current D.C. Municipal Regulations, has regulations that specifically refer to immunity from assault liability that clearly will satisfy this exclusion from liability.¹⁰⁰*

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(7) *The CCRC recommends codifying an effective consent defense for first degree and second degree of the revised assault statute in paragraph (f)(1) and for third degree and fourth degree in paragraph (f)(2). In previous compilations of draft statutes for the RCC, RCC § 22E-409¹⁰¹ codified a general effective consent defense for several RCC offenses against persons, including assault. In this update, however, the RCC deletes the general defense in RCC § 22E-409 and instead codifies specific effective consent defenses in the offenses.*

¹⁰⁰ For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

¹⁰¹ In relevant part, the defense in RCC § 22E-409 stated:

(a) *Defense.* Except as provided in subsection (b) of this section, it is a defense to an offense in Subtitle II of this title that:

(1) The complainant or a person with legal authority over the complainant gave effective consent to the actor, or the actor reasonably believed that the complainant or a person with legal authority over the complainant gave effective consent to the actor, for the conduct charged to constitute the offense or for the result thereof; and

(2) Either:

(A) The conduct charged to constitute the offense did not create a substantial risk of, or cause, death or a protracted loss or impairment of the function of a bodily member or organ; or

(B) The result was a reasonably foreseeable hazard of:

(i) The complainant’s occupation;

(ii) A medical procedure, otherwise permitted under District and federal civil law, by a licensed health professional or a person acting at the direction of a licensed health professional; or

(iii) Participation in a lawful contest or sport.

The new defenses in paragraphs (f)(1) and (f)(2) are generally consistent with the previous effective consent defense in RCC § 22E-409 with a few main differences. The defenses continue to exclude an actor that is a “person with legal authority over the complainant” from availing themselves of the defense so that such an actor must use the RCC parent defense or RCC guardian defense in RCC § 22E-408. The revised defenses still apply if the actor reasonably believes that the actor has the effective consent of the complainant or a “person with legal authority over the complainant,” as that term is defined in RCC § 22E-701.¹⁰² However, the defenses no longer apply if the actor “in fact” has the complainant’s effective consent but does not have any subjective awareness of this fact. Attempt liability addresses the rare situation when the actor actually has effective consent, but mistakenly believes that he or she does not.¹⁰³ The revised consent defenses specify whether the complainant or a “person with legal authority over the complainant” must give the required effective consent based upon the age of the complainant and the age of the actor.

The previous effective consent defense in RCC § 22E-409 applied, in part, if the “conduct charged to constitute the offense did not create a substantial risk of, or cause, death or a protracted loss or impairment of the function of a bodily member or organ.” The new defenses continue to recognize these limitations by permitting a defense for first degree and second degree assault—which require permanent, disabling injuries or “serious bodily injury,” as that term is defined in RCC § 22E-701¹⁰⁴—only when the injury is “caused by a lawful cosmetic or medical procedure.” The defense to third degree and fourth degree assault—which require only “bodily injury” or “significant bodily injury” as those terms are defined in the RCC¹⁰⁵—allows the complainant or a person with legal

¹⁰² RCC § 22E-701 defines “person with legal authority over the complainant” as:

- (A) When the complainant is under 18 years of age, the parent, or a person acting in the place of a parent per civil law, who is responsible for the health, welfare, and supervision of the complainant, or someone acting with the effective consent of such a parent or such a person; or
- (B) When the complainant is an incapacitated individual, the court-appointed guardian to the complainant, or someone acting with the effective consent of such a guardian.

¹⁰³ It is an unusual scenario where an actor actually has effective consent but mistakenly believes he or she does not, and commits a crime. However, in such a situation, there may be attempt liability under the RCC general provision for attempt in RCC § 22E-301, which includes that the actor “would have come dangerously close to completing that offense if the situation was as the [actor] perceived it to be.”

¹⁰⁴ RCC § 22E-701 defines “serious bodily injury” as “a bodily injury or significant bodily injury that involves: (A) A substantial risk of death; (B) Protracted and obvious disfigurement; (C) Protracted loss or impairment of the function of a bodily member or organ; or (D) Protracted loss of consciousness.”

¹⁰⁵ RCC § 22E-701 defines “bodily injury” as “physical pain, physical injury, illness, or impairment of physical condition.” RCC § 22E-701 defines “significant bodily injury” as “a bodily injury that, to prevent long-term physical damage or to abate severe pain, requires hospitalization or immediate medical treatment beyond what a layperson can personally administer. In addition, 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; a burn of at least second degree severity; a brief loss of consciousness; a traumatic brain injury; and a contusion, petechia, or other bodily injury to the neck or head sustained during strangulation or suffocation.”

authority over the complainant to give effective consent to the injury without any such restriction as to the cause.

For the comparatively low-level “bodily injury” or “significant bodily injury” required in third degree or fourth degree of the revised assault statute, the new defenses continue to provide a defense when the actor inflicts the injury in a lawful sport or occupation when the injury is a “reasonably foreseeable hazard” of those activities. However, the new defenses also apply when the actor inflicts the injury as a “reasonably foreseeable hazard” of “other concerted activity.” This change clarifies that informal activities such as sparring, playing “catch” with a baseball, or helping someone repair their car all are within the scope of the defense when the other defense requirements are satisfied. The “or other concerted activity” tracks the language in the Model Penal Code¹⁰⁶ and several other jurisdictions.¹⁰⁷

The commentary to the RCC assault statute discusses the revised defenses in detail.

- This change improves the clarity, consistency, and proportionality of the revised statutes.
- (8) *USAO, App. C at 542-543, recommends increasing the maximum possible penalty for a Class 6 felony from 12 years¹⁰⁸ to 15 years. Specific to the RCC assault statute, USAO states that first degree assault is “comparable to” aggravated assault while armed under current D.C. Code §§ 22-404.01 and 22-4502, which has a maximum possible penalty of 30 years, and aggravated assault “with other enhancements.” USAO states that it “does not believe that the maximum penalt[y]” for first degree assault should be lowered from 15 years’ incarceration to 12 years’ incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*
- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;¹⁰⁹ 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;¹¹⁰ 5) relative ordering of related RCC offenses;¹¹¹ and 6) national data on sentencing and time

¹⁰⁶ See Model Penal Code § 2.11.

¹⁰⁷ See, e.g., Del. Code Ann. tit. 11, § 452.

¹⁰⁸ In its comments, USAO states that an RCC Class 6 felony has a maximum possible penalty of 10 years. However, per First Draft of Report #52, a RCC Class 6 felony has a maximum possible penalty of 12 years.

¹⁰⁹ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

¹¹⁰ CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

¹¹¹ CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.

served.¹¹² Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.

- The CCRC notes that notwithstanding the extremely high 45 year statutorily authorized penalty for aggravated assault while armed under current D.C. Code §§ 22-404.01 and 22-4502,¹¹³ actual practice in the District has been sharply different. Court data for 2018-2019 shows that the 97.5% quantile of all sentences for aggravated assault, including aggravated assault while armed, was 144 months (12 years).¹¹⁴ The CCRC recommendation here is generally consistent with current practice.

(9) *USAO, App. C at 541-542, recommends increasing the maximum possible penalty for a Class 7 felony from 8 years to 10 years. Specific to the RCC assault statute, USAO states that second degree assault is “comparable to” aggravated assault under current D.C. Code § 22-404.01, which has a maximum possible penalty of 10 years, and assault with significant bodily injury while armed under current D.C. Code §§ 22-404(a)(2) and 22-4502, which has a maximum possible penalty of 30 years. USAO states that it “does not believe that the maximum penalt[y]” for second degree assault should be lowered from 10 years’ incarceration to 8 years’ incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;¹¹⁵ 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;¹¹⁶ 5) relative ordering of related RCC offenses;¹¹⁷ and 6) national data on sentencing and time served.¹¹⁸ Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the extremely high 33 year statutorily authorized penalty for significant bodily injury assault while armed under current D.C. Code §§ 22-404.01 and 22-4502,¹¹⁹ actual

¹¹² See Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

¹¹³ Note that D.C. Code 22-4502 provides up to an additional 30 years and a mandatory minimum of 5 years for commission of aggravated assault while armed—on the first offense.

¹¹⁴ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

¹¹⁵ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

¹¹⁶ CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

¹¹⁷ CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.

¹¹⁸ See Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

¹¹⁹ Note that D.C. Code 22-4502 provides up to an additional 30 years and a mandatory minimum of 5 years for commission of felony assault while armed—on the first offense.

practice in the District has been sharply different. Court data for 2018-2019 shows that the 97.5% quantile of all sentences for felony assault, including significant bodily injury assault while armed, was 66 months (6.5 years).¹²⁰ The CCRC recommendation here is generally consistent with current practice.

¹²⁰ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

RCC § 22E-1203. Menacing.

(1) *The CCRC recommends striking the separate menacing statute and instead codifying provisions covering menacing conduct in the RCC criminal threats statute. Second degree menacing is now unenhanced first degree criminal threats. First degree menacing is now first degree criminal threats with a penalty enhancement for use or display of a weapon. For further details, please see the entries for RCC § 22E-1204.*

- This change eliminates unnecessary overlap and improves the consistency and logical ordering of the revised statutes.

RCC § 22E-1204. Criminal Threats.

- (1) *The CCRC recommends striking the separate menacing statute and instead codifying provisions covering menacing conduct as first degree criminal threats. Second degree menacing in the prior draft is now unenhanced first degree criminal threats. First degree menacing is now first degree criminal threats with a penalty enhancement for use or display of a weapon.*
 - This approach is more consistent with the approach in other offenses in Subtitle II that have a weapons enhancement instead of a weapons grade.
 - This change eliminates unnecessary overlap and improves the consistency and logical ordering of the revised statutes.
- (2) *The CCRC recommends three offense gradations instead of two offense gradations, punishing threats to murder, maim, rape, or kidnap more severely than threats to injure or molest.*
 - This change improves the consistency and proportionality of the revised statutes.
- (3) *The CCRC recommends striking the \$500 threshold for a threat to commit a property offense.*
 - This change eliminates a gap in liability.
- (4) *The CCRC recommends striking the phrase “anytime in the future or if any condition is met.” First degree threats (previously Menacing) requires a threat to immediately cause a criminal harm. Where the word “immediately” does not appear, it is not required. Specifying in this statute that the threat may be conditioned or a future date or event may lead to confusion about how to interpret other RCC statutes (e.g., robbery, sexual assault) that include threatening as an element but do not include the same phrase.*
 - This change clarifies the revised statute and does not change its meaning.

RCC § 22E-1205. Offensive Physical Contact.

- (1) *The CCRC recommends removing the enhanced offense gradations that require that the complainant is a protected person or that the actor commit the offense with the purpose of harming the complainant due to the complainant’s status as a law enforcement officer, public safety employee, or District official. Instead, these situations are codified as penalty enhancements in subparagraphs (d)(3)(A) and (d)(3)(B). This revision improves the clarity of the revised statute and does not change the one class increase for this enhancement that was in the previous RCC draft.*
- This change improves the clarity of the revised statute.
- (2) *The CCRC recommends deleting what was previously subsection (d),¹²¹ the limitation on justification and excuse defenses to offensive physical contact against a law enforcement officer, and replacing it with the provision in RCC § 22E-403(b)(3). RCC § 22E-403(b)(3) provides an exception to defense of self or others when “The actor is reckless as to the fact that they are protecting themselves or another from lawful conduct.” This is a change both as compared to the prior RCC draft of offensive physical contact and to current District law, which provides a categorical bar to self-defense against the use of force that is not excessive by a law enforcement officer (LEO).¹²²~~[OBJ]~~ The new RCC reliance on RCC § 22E-403(b)(3) to limit self-defense against a law enforcement officer allows an actor who otherwise meets the requirements for self-defense to use force to oppose a LEO use of force that either is not lawful or when the actor is not reckless as to the lawfulness. By eliminating the special bar on self-defense against an unlawful arrest, the RCC effectively reverts to the common law rule regarding defense against a law enforcement officer¹²³~~[OBJ]~~. The CCRC recommends*

¹²¹ Subsection (d) previously read:

(d) *Limitation on justification and excuse defenses to offensive physical contact against a law enforcement officer.* For prosecutions brought under this section there are no justification or excuse defenses under RCC [§§ 22E-XXX – 22E-XXX] for a person to actively oppose the use of physical force by a law enforcement officer when:

- (1) The person is reckless as to the fact that the complainant is a law enforcement officer;
- (2) In fact, the use of force occurs during an arrest, stop, or detention for a legitimate police purpose, regardless of whether the arrest, stop, or detention is lawful; and
- (3) The law enforcement officer uses only the amount of physical force that appears reasonably necessary.

¹²² Current D.C. Code § 22-405 and § 22-405.01 provide that it is: “neither justifiable nor excusable cause for a person to use force to resist an arrest when such an arrest is made by an individual he or she has reason to believe is a law enforcement officer, whether or not such arrest is lawful.”

¹²³ As explained by the DCCA in *McDonald v. United States*, “The legislative history indicates that Congress intended to adopt ‘the modern rule’ in recognition that it is no longer necessary for a citizen to resist what he suspects may be an illegal arrest since criminal procedural rights (such as prompt presentment, Fed. R. Crim. Proc. 5(b) & (c)) as well as civil remedies under the Civil Rights Act of 1871, 42 U.S.C. § 1983) are readily available. H.R.Rep. No. 907 at 71–72.” *McDonald v. United States*, 496 A.2d 274, 276 (D.C. 1985).

- the policy change while noting that a person must still satisfy the requirements of self-defense to avoid liability and that the RCC continues to bar a claim of self-defense whenever an actor is reckless as to the law enforcement officer's conduct being lawful. The commentary to the RCC offensive physical contact statute has been updated to reflect that this is a substantive change to current District law.*
- This change improves the clarity, consistency, and proportionality of the revised statutes.
- (3) *The CCRC recommends revising paragraph (b)(1) of what is now second degree offensive physical contact to require that the actor causes "the complainant to come into physical contact with any person or any object or substance" as opposed to "causes physical contact with the complainant." The revised language clarifies that causing physical contact between the complainant and any person's body, including the complainant's body, can satisfy the offense, as well as the actor causing the complainant to come into contact with an object or substance, e.g., dumping juice on the complainant's head. The revised wording is also consistent with first degree of the revised statute, which requires that the actor cause the complainant "to come into physical contact with bodily fluid or excrement."*
- This change improves the clarity and consistency of the revised statute.
- (4) *The CCRC recommends codifying an exclusion from liability in what is now subsection (c): "An actor does not commit an offense under this section when, in fact, the actor's conduct is specifically permitted by a District statute or regulation." This exclusion resolves any apparent conflict within District laws. For example, Title 22, Health, of the current D.C. Municipal Regulations, has regulations that specifically refer to immunity from assault liability that clearly will satisfy this exclusion from liability.¹²⁴*
- This change improves the clarity, consistency, and proportionality of the revised statutes.
- (5) *The CCRC recommends codifying an effective consent defense for the offensive physical contact offense in subsection (d). In previous compilations of draft statutes for the RCC, RCC § 22E-409¹²⁵ codified a general effective consent*

¹²⁴ For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

¹²⁵ In relevant part, the defense in RCC § 22E-409 stated:

- (b) *Defense.* Except as provided in subsection (b) of this section, it is a defense to an offense in Subtitle II of this title that:
- (1) The complainant or a person with legal authority over the complainant gave effective consent to the actor, or the actor reasonably believed that the complainant or a person with legal authority over the complainant gave effective consent to the actor, for the conduct charged to constitute the offense or for the result thereof; and

defense for several RCC offenses against persons, including assault. In this update, however, the RCC deletes the general defense in RCC § 22E-409 and instead codifies specific effective consent defenses in the offenses.

The new defense in subsection (d) is generally consistent with the previous effective consent defense in RCC § 22E-409 with a few main differences. The defense continues to exclude an actor that is a “person with legal authority over the complainant” from availing themselves of the defense so that such an actor must use the RCC parent defense or RCC guardian defense in RCC § 22E-408. The revised defense still applies if the actor reasonably believes that the actor has the effective consent of the complainant or a “person with legal authority over the complainant,” as that term is defined in RCC § 22E-701.¹²⁶ However, the defense no longer applies if the actor “in fact” has the complainant’s effective consent but does not have any subjective awareness of this fact. Attempt liability addresses the rare situation when the actor actually has effective consent, but mistakenly believes that he or she does not.¹²⁷ The updated effective consent defense specifies whether the complainant or a “person with legal authority over the complainant” must give the required effective consent based upon the age of the complainant and the age of the actor.

The previous effective consent defense in RCC § 22E-409 applied, in part, if the “conduct charged to constitute the offense did not create a substantial risk of, or cause, death or a protracted loss or impairment of the function of a bodily member or organ.” Such a limitation is unnecessary in a defense that is specific to the RCC offensive physical contact statute. Given the comparatively less serious physical contact that the offense prohibits, the defense allows the complainant or a person with legal authority over the complainant to give

(2) Either:

- (A) The conduct charged to constitute the offense did not create a substantial risk of, or cause, death or a protracted loss or impairment of the function of a bodily member or organ; or
- (B) The result was a reasonably foreseeable hazard of:
 - (i) The complainant’s occupation;
 - (ii) A medical procedure, otherwise permitted under District and federal civil law, by a licensed health professional or a person acting at the direction of a licensed health professional; or
 - (iii) Participation in a lawful contest or sport.

¹²⁶ RCC § 22E-701 defines “person with legal authority over the complainant” as:

(A) When the complainant is under 18 years of age, the parent, or a person acting in the place of a parent per civil law, who is responsible for the health, welfare, and supervision of the complainant, or someone acting with the effective consent of such a parent or such a person; or

(B) When the complainant is an incapacitated individual, the court-appointed guardian to the complainant, or someone acting with the effective consent of such a guardian.

¹²⁷ It is an unusual scenario where an actor actually has effective consent but mistakenly believes he or she does not, and commits a crime. However, in such a situation, there may be attempt liability under the RCC general provision for attempt in RCC § 22E-301, which includes that the actor “would have come dangerously close to completing that offense if the situation was as the [actor] perceived it to be.”

effective consent to the physical contact. In the alternative, the new defense continues to provide a defense when the actor inflicts the physical contact in a lawful sport or occupation when the physical contact is a “reasonably foreseeable hazard” of those activities. However, the new defense also applies when the actor inflicts the physical contact as a “reasonably foreseeable hazard” of “other concerted activity.” This change clarifies that informal activities such as sparring, playing “catch” with a baseball, or helping someone repair their car all are within the scope of the defense when the other defense requirements are satisfied. The phrase “or other concerted activity” tracks the language in the Model Penal Code¹²⁸ and several other jurisdictions.¹²⁹

The commentary to the RCC assault statute discusses the revised defenses in detail.

- This change improves the clarity, consistency, and proportionality of the revised statutes.

¹²⁸ See Model Penal Code § 2.11.

¹²⁹ See, e.g., Del. Code Ann. tit. 11, § 452.

RCC § 22E-1301. Sexual Assault.

(1) *OAG, App. C at 469, recommends clarifying in the commentary for first degree and third degree sexual assault that “an actor who uses a weapon to cause the complainant to engage in or submit to a sexual act has threatened the complainant and would, therefore, have liability under (a)(2)(B)” and the equivalent provision in third degree sexual assault for threatening to kill, kidnap, or cause bodily injury to any person, or to commit a sexual act against any person. In an earlier RCC draft, first degree and third degree sexual assault specified “by using a weapon” as a distinct basis of liability, but the language has since been deleted.¹³⁰ OAG states that it does not object to the deletion of the language from the statutory text.*

- The RCC incorporates this recommendation by revising the commentary to state that:

The use or threatened use of a weapon is sufficient for first degree or third degree of the revised sexual assault statute if it causes bodily injury to the complainant, accompanies physical force that moves or immobilizes the complainant, or if it constitutes a specified threat, provided the other requirements of the offense are met. If the use or threatened use of a weapon does not satisfy the requirements for liability for first degree or third degree sexual assault, there may be liability for second degree or fourth degree sexual assault for an express or implied coercive threat (subparagraphs (b)(2)(A) and (d)(2)(A)), provided the other requirements of the offense are met.

This change improves the clarity of the revised statute.

This change improves the clarity of the revised statute.

(2) *The CCRC recommends replacing “any person” with “the complainant” in subparagraphs (a)(2)(A) and (c)(2)(A). With this revision, subparagraphs (a)(2)(A) and (c)(2)(A) prohibit causing bodily injury to, moving, or immobilizing “the complainant” instead of “any person.” Causing bodily injury to, moving, or immobilizing a third party may be sufficient for a threat under first degree or third degree of the revised sexual assault statute, provided the other requirements of the offense are met. This is consistent with the current D.C. Code first degree and third degree sexual abuse statutes, which prohibit the use of “force” against the complainant,¹³¹ currently defined to include “the use of such physical strength*

¹³⁰ App. D1 at 148.

¹³¹ D.C. Code §§ 22-3002(a)(1) (“(a) A person shall be imprisoned for any term of years or for life, and in addition, may be fined not more than the amount set forth in § 22-3571.01, if that person engages in or causes another person to engage in or submit to a sexual act in the following manner: (1) By using force against that other person.”); 22-3004(1) (“A person shall be imprisoned for not more than 10 years and may be fined not more than the amount set forth in § 22-3571.01, if that person engages in or causes sexual contact with or by another person in the following manner: (1) By using force against that other person.”).

*or violence as is sufficient to overcome, restrain, or injure a person*¹³² and *“the use of a threat of harm sufficient to coerce or compel submission by the victim.”*¹³³ The previous version of the RCC sexual assault offense used *“any person”* in subparagraphs (a)(2)(A) and (c)(2)(A) to account for the breadth of *“the use of a threat of harm”* provision in the current D.C. Code definition of *“force,”* but the proportionality of the statute is improved if actual harm is limited to the complainant, and threats of harm extend to third parties. The commentary does not classify this as a change to law.

- This change improves the clarity, consistency, and proportionality of the revised statute.

(3) *The CCRC recommends deleting “using physical force” from “By using physical force that causes bodily injury” in subparagraphs (a)(2)(A) and (c)(2)(A). With this revision, subparagraphs (a)(2)(A) and (c)(2)(A) prohibit “By causing bodily injury” to another person. The current D.C. Code first degree and third degree sexual abuse statutes prohibit “By using force” against the complainant¹³⁴ and define “force” as “the use or threatened use of a weapon; the use of such physical strength or violence as is sufficient to . . . injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim.”¹³⁵ The current D.C. Code definition of “force” includes injury that the actor directly causes with his or her body, as well as indirect means, such as firing a gun or throwing an object at the complainant. Deleting “By using physical force” from the bodily injury provision in first degree and third degree of the RCC sexual assault statute clarifies that “causing bodily injury,” by any means, is sufficient for liability, provided that the other requirements of the offense are met. The commentary to this offense has been updated to reflect that this is a clarificatory change in law. The commentary to this offense has been updated to reflect that this is a possible change to law.*

- This change improves the clarity, consistency, and proportionality of the revised statute.

(4) *The CCRC recommends in subparagraphs (a)(2)(A) and (c)(2)(A) deleting “overcomes” and replacing “restrains” with “moves or immobilizes.” With this revision, subparagraphs (a)(2)(A) and (c)(2)(A) prohibit “by using physical force that moves or immobilizes” another person. The term “overcomes” may erroneously imply that the complainant must be actively opposing the use of force. The RCC instead covers conduct such as pushing by the word “moves” in the updated language. The term “restrains” may erroneously imply that non-physical control is included. The RCC covers conduct such as a hug or hold,*

¹³² D.C. Code § 22-3001(5).

¹³³ D.C. Code § 22-3001(5).

¹³⁴ D.C. Code §§ 22-3002(a)(1) (“A person shall be imprisoned for any term of years or for life, and in addition, may be fined not more than the amount set forth in § 22-3571.01, if that person engages in or causes another person to engage in or submit to a sexual act in the following manner: (1) By using force against that other person.”); 22-3004(1) (“A person shall be imprisoned for not more than 10 years and may be fined not more than the amount set forth in § 22-3571.01, if that person engages in or causes sexual contact with or by another person in the following manner: (1) By using force against that other person.”).

¹³⁵ D.C. Code § 22-3001(5).

instead, by the word “immobilizes.” This language clarifies that first degree and third degree of the revised sexual assault statute prohibit certain use of physical force that falls short of causing “bodily injury,” as defined in RCC § 22E-701.¹³⁶ It is consistent and proportionate to include this forceful conduct in first degree and third degree sexual assault.

- This change improves the clarity, consistency, and proportionality of the revised statute, and removes a possible gap in liability.
- (5) *The CCRC recommends replacing “threatening, explicitly or implicitly” with “communicating, explicitly or implicitly, that the actor will cause” in subparagraphs (a)(2)(B) and (c)(2)(B). With this revision, subparagraphs (a)(2)(B) and (c)(2)(B) prohibit “communicating, explicitly or implicitly, that the actor will cause” another person to suffer a specified harm. The term “threatening” may erroneously be interpreted to require proof of the criminal threats offense. Also, while superficially intuitive, “threatens” is unclear as to the meaning. The updated RCC sexual assault offense, like the RCC criminal threats offense and other provisions, clarifies that a “communication” of the specified sort is sufficient for liability when it is causal—i.e. the complainant engages in the sex act or sex contact because of the communication. The commentary to this offense has been updated to reflect that this is a clarificatory change to law.*
- This change improves the clarity, consistency, and proportionality of the revised statute.
- (6) *The CCRC recommends requiring that the actor threatens to cause another person to suffer “death” in subparagraphs (a)(2)(B) and (c)(2)(B). The previous version of this offense required a threat to “kill.”*
- This change improves the clarity and consistency of the revised statute.
- (7) *The CCRC recommends requiring that the actor communicates that they will cause another person to suffer a “confinement” in sub-subparagraphs (a)(2)(B)(i), (a)(2)(B)(ii), (c)(2)(B)(i), and (c)(2)(B)(ii). The previous version of this offense required a threat to “kidnap.” “Kidnapping” is a specific offense under the RCC that requires confinement with intent to inflict an additional harm on the complainant. Substituting the word “confines” for “kidnap” does not substantively alter the scope of the threats provision of the revised sexual assault offense, but more clearly communicates that threats of confinement are sufficient for sexual assault liability, without reference to the specific elements of the RCC kidnapping offense. The commentary to this offense has been updated to reflect that this is a clarificatory change to law.*
- This change improves the clarity, consistency, and proportionality of the revised statute.
- (8) *The CCRC recommends replacing “any person” with “the complainant” in sub-subparagraphs (a)(2)(B)(i) and (c)(2)(B)(i) and with “another person” in sub-subparagraphs (a)(2)(B)(ii) and (c)(2)(B)(ii). With this change, first degree and third degree of the revised sexual assault statute exclude the actor threatening to*

¹³⁶ “Bodily injury” is defined in RCC § 22E-701 as “physical pain, physical injury, illness, or impairment of physical condition.”

harm himself or herself. The current D.C. Code first degree¹³⁷ and third degree¹³⁸ sexual abuse statutes prohibit the actor threatening subject “any person” to death, bodily injury, or kidnapping. It is unclear whether “any person” would include the actor threatening to harm himself or herself and there is no DCCA case law on this issue. An actor that threatens to harm himself or herself may have liability for second degree or fourth degree sexual assault for a coercive threat provided the other requirements of the offense are met. The commentary to the revised sexual assault statute has been updated to reflect that this is a possible change in law.

- This change improves the clarity, consistency, and proportionality of the revised statute.

(9) *The CCRC recommends differentiating the prohibited communications of harm against the complainant and the communications of harm against a third party, and adding a communication about commission of a “sexual contact.” The previous version of the revised statute prohibited the same threats for the complainant or a third party—threats to kill, kidnap, cause bodily injury to, or commit a sexual act. Now, sub-subparagraphs (a)(2)(B)(i) and (c)(2)(B)(i) prohibit threats of bodily injury, confinement, or death against the complainant, and sub-subparagraphs (a)(2)(B)(ii) and (c)(2)(B)(ii) prohibit those same threats against a third party, as well as threats of a “sexual act” or “sexual contact” against a third party. Including threats to inflict a sexual act or sexual contact against the complainant in first degree and third degree of the revised sexual assault statute appears circular and may erroneously elevate every sexual assault into first degree or third degree, which is inconsistent with the current D.C. Code sexual abuse statutes and the RCC sexual assault statute, which distinguish the gradations, in part, based on the type of threat. USAO previously recommended adding a threat of a sexual contact to first degree and third degree of the revised statute because a “threat to commit any unwanted sexual contact can be a very serious threat, and should be a basis for liability.”¹³⁹ A threat of a “sexual contact” against a third person is consistent with the severity of the other specified threats in first degree and third degree of the revised sexual assault statute. The commentary to the revised sexual assault statute has been updated to reflect that this is a possible change in law.*

- This change improves the clarity, consistency, and proportionality of the revised statute.

(10) *The CCRC recommends revising the intoxication provisions in first degree and third degree of the revised sexual assault statute to include “willingness” as well as “unwillingness” to engage in the sexual act or sexual contact. With this change, sub-subparagraphs (a)(2)(C)(i) and (c)(2)(C)(i) require “With intent to impair the complainant’s ability to express willingness or unwillingness to engage in” the sexual act or sexual contact, and sub-subparagraphs (a)(2)(C)(ii)(III) and (c)(2)(C)(ii)(III) require “Substantially incapable of communicating willingness*

¹³⁷ D.C. Code § 22-3002(a)(2).

¹³⁸ D.C. Code § 22-3004(2).

¹³⁹ App. D1 at 151.

or unwillingness to engage in the” sexual act or sexual contact. The revised language focuses on inability to communicate in the context of sexual activity, not inability to decline sexual activity, physically resist, or otherwise communicate unwillingness. The commentary to this offense has been updated to reflect that this is part of a possible change to law.

- This change improves the clarity and consistency of the revised statute.

(11) *The CCRC recommends revising subparagraphs (b)(2)(A) and (d)(2)(A) to read “By making a coercive threat, explicit or implicit” as opposed to “By a coercive threat, express or implied.” The revised language is clearer and consistent with subparagraphs (a)(2)(A), (a)(2)(B), (a)(2)(C), (c)(2)(A), (c)(2)(B), and (c)(2)(C), which prohibit, in relevant part, “By causing . . .,” “By communicating . . .,” and “By administering”*

- This change improves the clarity of the revised statute.

(12) *The CCRC recommends deleting “paralyzed” from sub-subparagraphs (b)(2)(B)(i) and (d)(2)(B)(i) of second degree and fourth degree sexual assault. With this change, second degree and fourth degree sexual assault prohibit a sexual act or sexual contact with a complainant that is “asleep, unconscious, or passing in and out of consciousness,” as well as with an incapacitated complainant (sub-subparagraphs (b)(2)(B)(ii) and (d)(2)(B)(ii)), and with a complainant that is “incapable of communicating willingness or unwillingness to engage in” the sexual act or sexual contact (sub-subparagraphs (b)(2)(B)(iii) and (d)(2)(B)(iii)). The current D.C. Code second degree and fourth degree sexual abuse statutes include complainants that are “incapable of appraising the nature of the conduct”¹⁴⁰ and “incapable of communicating unwillingness to engage in”¹⁴¹ the sexual act or sexual contact. This language is not statutorily defined, and there is no DCCA case law on point.¹⁴² The previous version of the RCC sexual assault statute added “paralyzed” to second degree and fourth degree sexual assault in an attempt to clarify the scope of these provisions. However, “paralyzed” appears to include within second degree and fourth degree of the RCC sexual assault statute individuals that are able to understand the nature of sexual activity and, through the use technology or other means, are physically able to communicate consent. Retaining “paralyzed” in the RCC sexual assault statute may categorically criminalize persons with certain disabilities engaging in consensual sexual activity. An individual that is paralyzed and is unable to communicate willingness or unwillingness is still protected under sub-subparagraphs (b)(2)(B)(iii) and (d)(2)(B)(iii) of second degree and fourth degree sexual assault when “incapable of communicating willingness or unwillingness to engage” in the sexual act or sexual contact. The commentary to this offense has been updated to reflect that sub-subparagraph (b)(2)(B)(iii) and sub-*

¹⁴⁰ D.C. Code §§ 22-3003(2)(A); 22-3005(2)(A).

¹⁴¹ D.C. Code §§ 22-3003(2)(C); 22-3005(2)(C).

¹⁴² In *In re M.S.*, the DCCA stated in dicta that “incapable of appraising the nature of the conduct” for “an adult victim . . . might involve proof of the victim’s intoxication or general mental incapacity.” In *In re M.S.*, 171 A.3d 155, 164 (D.C. 2017) (citing the underlying facts of *Thomas v. United States*, 59 A.3d 1252, 1255 (D.C. 2013)).

subparagraph (d)(2)(B)(iii) include paralyzed individuals who are able to appraise the nature of the sexual activity or of understanding the right to give or withhold consent under sub-subparagraph (b)(2)(B)(ii).

- This change improves the clarity and consistency of the revised statute.

(13) *The CCRC recommends revising sub-subparagraphs (b)(2)(B)(iii) and (d)(2)(B)(iii) to include “willingness” as well as “unwillingness” to engage in the sexual act or sexual contact. With this change, sub-subparagraphs (b)(2)(B)(iii) and (d)(2)(B)(iii) read “Incapable of communicating willingness or unwillingness to engage in the” sexual act or sexual contact. The current D.C. Code second degree¹⁴³ and fourth degree¹⁴⁴ sexual abuse statutes include complainants that are “[i]ncapable of communicating unwillingness to engage in” the sexual act or sexual contact. This language is not statutorily defined, and there is no DCCA case law on point. The revised language clarifies that the relevant determination is whether the complainant is incapable of communicating in the context of sexual activity, not whether the complainant specifically unable to decline sexual activity, physically resist, or otherwise communicate unwillingness. The commentary to this offense has been updated to reflect that this is a clarificatory change in law.*

- This change improves the clarity and consistency of the revised statute.

(14) *PDS, App. C at 485, recommends deleting paragraph (e)(2) from the effective consent affirmative defense: “The actor’s conduct does not inflict significant bodily injury or serious bodily injury or involve the use of a dangerous weapon.” PDS states that “[w]hile the infliction of any injury will carry great weight for a jury’s consideration of whether a complainant gave effective consent to sexual conduct, the RCC should not legislate specific parameters for consent” and that “[c]onsent is an expansive and fact-driven determination that is already amply defined in RCC § 22E-701.” In addition, PDS states that “as drafted, it is not clear how to consider effective consent when the parties argue that the sexual contact was consensual but that there was a separate assault or use or display of a weapon following the consensual sexual conduct.” PDS states that if the inclusion of paragraph (e)(2) “is driven by the fact that an individual cannot consent to being threatened with a weapon or to an assault that causes significant bodily injury or serious bodily injury, that limitation is unnecessary” because “[a]n actor who also causes significant bodily injury or who displays a weapon will also be charged with assault and weapon offenses for which there is no defense of consent.”*

- The RCC incorporates this recommendation by deleting what was previously paragraph (e)(2) from the revised statute. In the context of sexual activity, a complainant can consent to conduct, such as temporary asphyxiation, that creates a risk of, or actually causes, significant bodily injury, serious bodily injury, or death. Similarly, a complainant can consent to conduct that involves the use of a dangerous weapon because

¹⁴³ D.C. Code § 22-3003(2)(C).

¹⁴⁴ D.C. Code § 22-3005(2)(C).

objects used in a sexual context may otherwise constitute a “dangerous weapon” as defined in RCC § 22E-701. However, an actor may have liability under the RCC sexual assault if the actor’s conduct goes beyond the complainant’s effective consent, and may have liability under another RCC offense against persons or an RCC weapons offense if the resulting harm (e.g., death, serious bodily injury) is one that cannot be consented to in the RCC. For example, if the complainant gives effective consent to being slapped during sex, but in doing so the actor causes the complainant serious bodily injury, there would be no liability for sexual assault, but there may be liability under the RCC assault statute (RCC § 22E-1202) if the other elements of that offense are met and there is no applicable defense. Similarly, if the complainant gives effective consent to the actor choking the complainant during sex but in doing so the actor causes death, there would be no liability for sexual assault, but there may be liability for an RCC homicide offense. These changes more clearly recognize that sexual offenses cannot be committed where there is effective consent while, for many other offenses, criminal liability exists even where there is effective consent. The commentary to the RCC sexual assault statute has been updated to include this discussion.

- This change improves the clarity and consistency of the revised statute and reduces unnecessary overlap.

(15) *The CCRC recommends deleting what was previously paragraph (e)(3) from the effective consent affirmative defense: “The actor is not at least 4 years older than a complainant who is under 16 years of age.” The current D.C. Code consent defense to the general sexual abuse statutes does not have such an age requirement,¹⁴⁵ although the DCCA has held that the defense is not available when the defendant is an adult at least four years older than a complainant under 16 years of age.¹⁴⁶ However, it is unclear if the DCCA holding is still good law,¹⁴⁷*

¹⁴⁵ D.C. Code § 22-3007 (“Consent by the victim is a defense to a prosecution under §§ 22-3002 to 22-3006 [first degree through fourth degree sexual abuse and misdemeanor sexual abuse], prosecuted alone or in conjunction with charges under § 22-3018 or §§ 22-401 and 22-403.”).

¹⁴⁶ In *Davis v. United States*, the DCCA held that “if the complainant in a misdemeanor sexual abuse (or other general sexual assault) prosecution was a child [complainant under the age of 16 years] at the time of the alleged offense, an adult defendant who is at least four years older than the complainant may not assert a ‘consent’ defense [under D.C. Code § 22-3007].” *Davis v. United States*, 873 A.2d 1101, 1104 n.4, 1106 (D.C. 2005). The DCCA applied the current D.C. Code definition of “child” in D.C. Code § 22-3001, *Davis*, 873 A.2d at 1104 n.4, but did not provide a definition of “adult.”

¹⁴⁷ In *Davis v. United States*, the DCCA held that “if the complainant in a misdemeanor sexual abuse (or other general sexual assault) prosecution was a child [complainant under the age of 16 years] at the time of the alleged offense, an adult defendant who is at least four years older than the complainant may not assert a ‘consent’ defense [under D.C. Code § 22-3007].” *Davis v. United States*, 873 A.2d 1101, 1104 n.4, 1106 (D.C. 2005).

It is unclear, however, whether the holding in *Davis* is still good law. After *Davis*, the DCCA judicially narrowed the consent defense in D.C. Code § 22-3007 to consent to the use of force, as opposed to consent to sexual activity more broadly. See *Hatch v. United States*, 35 A.3d 1115 (D.C. 2011). The DCCA has not had occasion since *Hatch* to determine how the narrowed consent defense applies to complainants under the age of 16 years. It is unclear whether the DCCA would categorically hold that a complainant under the age of 16 years cannot consent to the use of force in a sexual encounter with a defendant that is at

and by codifying this requirement, the previous version of the RCC effective consent defense conflated consent to the use of force with consent to sexual activity. Striking the age requirement allows an effective consent affirmative defense to the use of force when the complainant is under 16 years of age and the actor is at least four years older. If the defense is successful, there is no liability for forceful sexual assault, but there would still be liability for RCC sexual abuse of a minor, which does not require force, and relies on the ages and relationship between the parties to impose liability. For example, if a 20 year old actor has sex with a 15 year old complainant and the complainant gives effective consent to being tied up during sex, there is no liability for sexual assault, but there would be liability for second degree sexual abuse of a minor. In practice, the definition of “consent” in RCC § 22E-701 may preclude a complainant sufficiently under the age of 16 years from giving consent to the use of force by an actor that is at least four years older because the definition excludes consent given by a person who “is legally incompetent to authorize the conduct charged to constitute the offense or to the result thereof” or “because of youth . . . is believed by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct.” While the RCC provides no bright-line as to what age may render a youth unable to give consent under this provision, the flexible standard would allow for sex assault (not just sexual abuse) charges in some cases. The commentary to the RCC sexual assault statute has been updated to reflect that this is a possible change in law.

- This change improves the clarity, consistency, and proportionality of the revised statute.

(16) *PDS recommends deleting what was previously paragraph (e)(4) from the effective consent affirmative defense—“The actor is not in a position of trust with or authority over the complainant, is not at least 18 years of age, and is not at least 4 years older than the complainant who is under 18 years of age.” PDS states that “[c]onsent should be a defense to [the RCC sexual assault statute] when the complainant is age 16 or older but the actor is more than 4 years older than the complainant and is in a significant relationship with the defendant.” PDS states that by “precluding a defense of consent [in this situation], a defendant will be limited to presenting evidence that refutes the element of force or coercion but will not be able to present the complete factual scenario that shows a consensual relationship.” PDS states that given the seriousness of the sexual assault offense and penalty, “defendants should be permitted to present a defense of consent when the complainant is legally capable of consent but where the circumstances of the relationship bar consent” and that “[p]rohibiting the use of a consent defense in these instances would create potentially disparate*

least four years older, even though under current District law such a complainant cannot consent to the sexual activity. See, e.g., *Davis*, 873 A.2d at 1105 & n.8 (stating “[Current D.C. Code § 22-3011] preserves the longstanding rule that a child is legally incapable of consenting to sexual conduct with an adult” and noting that the current D.C. Code child sexual abuse statutes “[b]y adopting the four-year age differential as an element . . . do[] modify the traditional rule to allow *bona fide* consent of a child victim to be a potential defense where the defendant is less than four years older than the child.”).

sentences where individuals are subjected to long terms of incarceration and lifelong collateral consequences for conduct that a jury would consider to be consensual if presented with a complete view of the circumstances.” PDS states that “the jury would still evaluate where there was in fact effective consent and would convict the defendant of RCC § 22E-1302, sexual abuse of a minor, where consent is not a defense.”

- The RCC incorporates this recommendation by deleting this requirement from the sexual assault effective consent affirmative defense. Striking the position of trust requirement allows an effective consent affirmative defense to the use of force when the complainant is 16 or 17 years of age and the actor is at least four years older and in a position of trust with or authority over the complainant. If the defense is successful, there is no liability for forceful sexual assault, but there would still be liability for RCC sexual abuse of a minor (third or sixth degree), which does not require force, and relies on the ages and relationship between the parties to impose liability.
- This change improves the clarity, consistency, and proportionality of the revised statute.

(17) *OAG, App. C at 469-471, recommends redrafting the effective consent affirmative defense in subsection (e) so that “what qualifies as an affirmative defense” is not included in the “same paragraph level as what excludes an actor from utilizing an affirmative defense.” OAG states that the current drafting, with paragraph (e)(1) written in the positive, and paragraphs (e)(2), (e)(3), and (e)(4) written in the negative, may be confusing to the reader. Specifically, OAG recommends drafting subsection (e) to read:*

Affirmative defense. (1) It is an affirmative defense to liability under this section that the actor, in fact, has the complainant’s effective consent to the actor’s conduct, or the actor reasonably believes that the actor has the complainant’s effective consent to the actor’s conduct.

(2) The affirmative defense is not available when, in fact:

(A) The actor’s conduct inflicts significant bodily injury or serious bodily injury, or involves the use of a dangerous weapon;

(B) The actor is at least 4 years older than a complainant who is under 16 years of age; or

(C) The actor is in a position of trust with or authority over the complainant, is not at least 18 years of age, and is not at least 4 years older than the complainant who is under 18 years of age7).

- The RCC does not incorporate this recommendation because, as is discussed above, the effective consent affirmative defense no longer has these specific age requirements.

(18) *The CCRC recommends deleting that the actor “in fact” has the complainant’s effective consent from the effective consent affirmative defense and limiting the affirmative defense to when the actor “reasonably believes” that the actor has the complainant’s effective consent. It is an unusual scenario where an actor actually has effective consent but mistakenly believes he or she does not, and commits a crime. However, in such a situation, there may be attempt liability*

under the RCC general provision for attempt in RCC § 22E-301, which includes that the actor “would have come dangerously close to completing that offense if the situation was as the [actor] perceived it to be.” The commentary to the RCC sexual assault statute has been updated to include this discussion.

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(19) *USAO, App. C at 509-510, reiterates its recommendation that a sex offense recidivist penalty enhancement should apply to all sex offenses. USAO states that the general repeat offender enhancement in RCC § 22E-606 “only applies to prior convictions, and does not account for multiple victims within the same case (emphasis in original).” In its previous recommendation, USAO recommended a sex offense recidivist penalty enhancement 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 equivalent offense]; 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 equivalent offense], involving 2 or more victims.”¹⁴⁸ The CCRC previously stated, App. D1 at 170, that this recommendation “significantly expand[s] the scope of the current D.C. Code sexual abuse aggravators, which do not contain an aggravator for only one prior conviction, and require crimes to be committed ‘against’ 2 or more victims.” USAO states that “[i]t is unclear” how its recommendation would expand the current D.C. Code sex offense recidivist enhancement¹⁴⁹:*

“For [the current sex offense recidivist penalty] enhancement to apply, the defendant must have been found guilty of committing at least one offense involving at least one victim in the current case; if there is no finding of guilt on the underlying offense, there could be no finding of guilt on the enhancement. At the time of a finding of guilt in the current case, the defendant therefore ‘is’ guilty of committing a sex offense in the current case. If the defendant has one prior conviction for a sex offense, the defendant ‘has been’ found guilty of a sex offense in a prior case. Thus, at the time of a finding of guilt in the current case, the defendant “is or has been” found guilty of committing sex offenses against 2 or more victims. Moreover, if there are two victims in a single case, then, if the defendant is found guilty of committing offenses against both victims, the defendant ‘is guilty’ of committing sex offenses against 2 or more victims.”

In addition, USAO references the CCRC’s discussion of court data on page 167 of App. D1, where the CCRC noted that based on the limited available statistical evidence, between 2009 and 2015, there were only five instances where an aggravating factor for a sex offense resulted in a sentence higher

¹⁴⁸ App. D1 at 170.

¹⁴⁹ The current D.C. Code sex offense recidivist enhancement states: “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.” D.C. Code § 22-3020(a)(5).

*than the otherwise-authorized statutory maximum, and all of those instances involved an aggravator for a significant relationship, not priors, or multiple victims. USAO states, with additional discussion, that “[j]ust because an aggravator may not raise a sentence above the otherwise-authorized statutory maximum . . . does not mean that it is an irrelevant aggravator.”*¹⁵⁰

- The RCC does not incorporate this recommendation because it would change current law in a way that leads to inconsistencies with other RCC offenses of similar seriousness and may authorize disproportionate penalties. As the CCRC previously noted in App. D1, 170-171, the plain language of the current recidivist enhancement in D.C. Code § 20-3020(a)(5) is unclear and there is no case law clarifying the issue.¹⁵¹ The RCC general recidivist enhancement

¹⁵⁰ USAO states:

“The CCRC also notes that, based on the limited available statistical evidence, between 2009 and 2015, there were only five instances where an aggravating factor for a sex offense resulted in a sentence higher than the otherwise-authorized statutory maximum, and all of those instances involved an aggravator for a significant relationship, not priors or multiple victims. (App. D1 at 167.) Just because an aggravator may not raise a sentence above the otherwise-authorized statutory maximum, however, does not mean that it is an irrelevant aggravator. First, even if an aggravator results in no change to a sentence, it can help represent more fully the nature of the defendant’s conduct. Second, the CCRC noted that the aggravators did not result in a sentence higher than the otherwise-authorized statutory maximum, but did not note (and, indeed, likely does not have access to information regarding) whether the aggravators resulted in a sentence higher than the top of the otherwise-authorized sentencing guidelines range. An aggravator has the effect of both increasing the statutory maximum, and increasing the top of the sentencing guidelines range. A sentence may, therefore, be increased above the otherwise-applicable top of the sentencing guidelines range, even if is below the otherwise-authorized statutory maximum. Third, even if the aggravator does not result in a sentence that exceeds either the otherwise-authorized statutory maximum or otherwise-authorized top of the sentencing guidelines range, it allows USAO to request a higher sentence, which may ultimately result in the judge imposing a higher sentence than the judge would have imposed otherwise. For example, a judge who may have sentenced the defendant to the mid-range of a sentencing guideline range may, after considering the aggravator, sentence the defendant to the top of the sentencing guideline range. This nuance would be difficult to observe in statistical court data.”

¹⁵¹ In its previous recommendation, USAO recommended codifying a sex offense recidivist penalty enhancement when: “(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 equivalent offense].” This recommendation would allow a recidivist enhancement for a single prior conviction, regardless of the identity of the complainant in that case. However, the current D.C. Code sex offense recidivist aggravator applies if the defendant “is or has been found guilty of committing sex offenses *against 2 or more victims*” (D.C. Code § 22-3020(a)(5) (emphasis added)). It does not appear that one prior conviction would be sufficient under this language since it refers to multiple offenses (plural) against two or more victims (plural, indicating different people). Even if D.C. Code § 22-3020(a)(5) were interpreted so that one prior

provides a uniform penalty enhancement for an actor with certain prior convictions. It would be inconsistent with other revised and D.C. Code offenses to provide a recidivist penalty based on the number of victims in an instant case—multiple counts may be brought in such cases, resulting in multiple punishments that can be run consecutively. There is no apparent rationale for singling out sex assaults for this unique kind of enhancement based on prior conduct. Regarding the utility to USAO of an offense-specific recidivist enhancement even when it is not necessary to raise the otherwise applicable statutory minimum, the CCRC notes that the government may present such facts at sentencing where a general recidivist enhancement is charged and even if there is no statutory enhancement the court may take such facts into account and choose to depart from the voluntary sentencing guidelines or otherwise adjust the penalty.

(20) USAO, App. C at 543, recommends increasing the maximum possible penalty for a Class 5 felony from 18 years to 20 years. Specific to the RCC sexual assault statute, USAO states that second degree sexual assault is “comparable to” second degree sexual abuse under current D.C. Code § 22-3003, which has a maximum possible penalty of 20 years. USAO states that it “does not believe that the maximum penalt[y]” for second degree sexual assault should be lowered from 20 years’ incarceration to 18 years’ incarceration. USAO does not state

conviction is sufficient, the current aggravator requires that the sex offenses be “against 2 or more victims,” which suggests that a single prior conviction must be against a different complainant than in the instant case or it does not count. The USAO language recommendation, in contrast, appears to expand the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement for a single prior conviction, regardless of the identity of the complainant.

In its previous recommendation, USAO also recommended including a sex offense recidivist penalty enhancement when: “(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 equivalent offense], involving 2 or more victims.” In parsing the current sex offense recidivist aggravator in D.C. Code § 22-3020(a)(5), USAO states that the finding of guilt in the instant case satisfies the “is guilty of” language and that a prior conviction for a sex offense satisfies the “has been found guilty of” language. USAO states that “Thus, at the time of a finding of guilt in the current case, the defendant ‘is or has been’ found guilty of committing sex offenses against 2 or more victims.” However, this analysis risks rendering the “against 2 or more victims” requirement in the current aggravator surplusage. As the CCRC has noted, under the current aggravator it appears that a prior conviction will only be counted if it is against a different complainant than in the instant case. Another interpretation, not precluded by the plain language, is that for a prior to count, it must involve two or more victims—although this interpretation would exclude many prior sex offenses. The USAO recommendation appears to expand the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement regardless of the identity of complainants.

Finally, in parsing the current D.C. Code sex offense recidivist aggravator, USAO states that “if there are two victims in a single case, then, if the defendant is found guilty of committing offenses against both victims, the defendant ‘is guilty’ of committing sex offenses against 2 or more victims.” While the CCRC would agree that a single case involving two or more findings of guilt against each of two or more complainants appears to satisfy the requirement, a single case with two complainants and but lacking multiple findings of guilt against each, may not satisfy this requirement. D.C. Code § 22-3020(a)(5) (emphasis added). Consequently, the USAO recommendation potentially expands the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement based solely on the number of complainants in a single case.

specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;¹⁵² 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;¹⁵³ 5) relative ordering of related RCC offenses;¹⁵⁴ and 6) national data on sentencing and time served.¹⁵⁵ Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the 20 year statutorily authorized penalty for second degree sexual abuse, actual practice in the District has been sharply different. Court data for 2010-2019 shows that the 97.5% quantile of all sentences for all types of second degree sexual abuse distinguished by the court, including enhancements, was 84 months (7 years).¹⁵⁶ The CCRC recommendation here appears to fully encompass current practice.

(21) USAO, App. C at 543-544, recommends increasing the maximum possible penalty for a Class 4 felony from 24 years to 30 years. Specific to the RCC sexual assault statute, USAO states that first degree sexual assault is “comparable to” first degree sexual abuse under current D.C. Code § 22-3002, which has a maximum possible penalty of 30 years, “unless certain conditions are met that could increase the maximum.” USAO states that it “does not believe that the maximum penalt[y]” for second degree sexual assault should be lowered from 30 years’ incarceration to 24 years’ incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;¹⁵⁷ 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;¹⁵⁸ 5) relative ordering

¹⁵² CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

¹⁵³ CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

¹⁵⁴ CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.

¹⁵⁵ See Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

¹⁵⁶ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

¹⁵⁷ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

¹⁵⁸ CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

of related RCC offenses;¹⁵⁹ and 6) national data on sentencing and time served.¹⁶⁰ Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.

- The CCRC notes that notwithstanding the 30 year statutorily authorized penalty for non-aggravated first degree sexual abuse, actual practice in the District has been somewhat different. Court data for 2010-2019 shows that the 97.5% quantile of sentences for first degree sexual abuse without an aggravator enhancement, was 300 months (25 years).¹⁶¹ The CCRC recommendation here is generally consistent with current practice.

(22) USAO, App. C at 543-544, recommends increasing the maximum possible penalty for a Class 4 felony from 24 years to 30 years. Specific to the RCC sexual assault statute, USAO states that enhanced second degree sexual assault is “comparable to” second degree sexual abuse with enhancements under current D.C. Code §§ 22-3003 and 22-3020, which has a maximum possible penalty of 30 years. USAO states that it “does not believe that the maximum penalt[y]” for enhanced second degree sexual assault should be lowered from 30 years’ incarceration to 24 years’ incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;¹⁶² 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;¹⁶³ 5) relative ordering of related RCC offenses;¹⁶⁴ and 6) national data on sentencing and time served.¹⁶⁵ Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the 30 year statutorily authorized penalty for second degree sexual abuse with enhancements, actual practice in the District has been sharply different. Court data for 2010-2019 shows that the 97.5% quantile of all sentences for all types of second degree sexual abuse distinguished by the court, including enhancements, was 84

¹⁵⁹ CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.

¹⁶⁰ See Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

¹⁶¹ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

¹⁶² CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

¹⁶³ CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

¹⁶⁴ CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.

¹⁶⁵ See Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

months (7 years).¹⁶⁶ The CCRC recommendation here appears to fully encompass current practice.

(23) *USAO, App. C at 544-545, recommends increasing the maximum possible penalty for a Class 3 felony from 36 years to 40 years. Specific to the RCC sexual assault statute, USAO states that enhanced first degree sexual assault is “comparable to” first degree sexual abuse with enhancements under current D.C. Code §§ 22-3002 and 22-3020, “which has a maximum of life imprisonment.” USAO states that it “does not believe that the maximum penalt[y]” for enhanced first degree sexual assault should be lowered to 36 years’ incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;¹⁶⁷ 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;¹⁶⁸ 5) relative ordering of related RCC offenses;¹⁶⁹ and 6) national data on sentencing and time served.¹⁷⁰ Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the life imprisonment statutorily authorized penalty for aggravated first degree sexual abuse, actual practice in the District has been somewhat different. Court data for 2010-2019 shows that the 97.5% quantile of sentences for all first degree sexual abuse with or without an aggravator enhancement, was 444 months (37 years).¹⁷¹ The CCRC recommendation here is generally consistent with current practice.

(24) *The CCRC recommends deleting current D.C. Code § 22-3019: “No actor is immune from prosecution under any section of this subchapter because of marriage, domestic partnership, or cohabitation with the victim; provided, that marriage or the domestic partnership of the parties may be asserted as an affirmative defense in prosecution under this subchapter where it is expressly so provided.” The revised sexual assault statute and other RCC Chapter 13 statutes account for liability changes based on marriage or domestic partnership in the plain language of the statutes and D.C. Code 22-3019 is deleted as unnecessary.*

- This change improves the clarity of the revised statutes.

¹⁶⁶ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

¹⁶⁷ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

¹⁶⁸ CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

¹⁶⁹ CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.

¹⁷⁰ See Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

¹⁷¹ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

RCC § 22E-1302. Sexual Abuse of a Minor.

- (1) *PDS, App. C at 486-487, recommends amending the reasonable mistake of age affirmative defense to include situations where the actor reasonably believes the complainant knows that another person has made an oral or written statement about the complainant's age and the complainant does not object to or contradict the statement. With this change, subparagraphs (g)(2)(B) and (g)(3)(B) would be rewritten as:*

“(B) Such reasonable belief is based on an oral or written statement about the complainant's age made to the actor:

(i) by the complainant; or

(ii)(I) by another person;

(II) the actor reasonably believed the complainant knew the statement had been made to the actor; and

(III) the complainant did not object to or correct the statement.”

PDS states that the “importance that the actor's reasonable, but mistaken, belief about the complainant's age be based on a representation by the complainant is preserved by the requirement that the actor reasonably believed the complainant knew of the statement and assented to it.” PDS states that the “proposed expansion” of the affirmative defense is “modest.” PDS notes that the RCC sexual abuse of a minor offense retains strict liability for the age of the complainant even though the American Law Institute's most recent draft of its equivalent offense required recklessness for the complainant's age and there is “general reluctance in American jurisprudence to allow a criminal conviction based on strict liability.” To illustrate the proposed revision, PDS poses a series of hypotheticals.¹⁷²

- The RCC does not incorporate this recommendation because it is inconsistent with the requirements for liability in the RCC sexual abuse of a minor statute. The RCC sexual abuse of a minor statute is intended to protect complainants who, primarily because of their young age, are not able to consent to sexual activity with older parties. The proposed expansion would make these younger complainants responsible for objecting to or correcting a third party's statement concerning the complainant's age, which is inconsistent with their protected status under the offense. In addition, the proposed recommendation does not require that the complainant actually knew that the statement had

¹⁷² In the first hypothetical, which PDS states is covered by the affirmative defense as currently drafted, the defendant meets the complainant at a bar and asks “You're 21?,” to which the complainant states yes. In the second hypothetical, the defendant meets the complainant at a bar and asks “You're 21?” The complainant's friend, who is standing next to the complainant answers, “Yes, we're here celebrating her 21st birthday.” The complainant smiles, but says nothing. PDS states that this second hypothetical should be covered by the affirmative defense and would be under its revision. In the third hypothetical, the defendant meets the complainant at a bar and says “You look to 21 to me,” and the complainant smiles but says nothing. PDS states that this third scenario would not be covered under its proposed revision.

been made and it is unclear how a complainant can object to or correct a statement in such a situation. Regardless, it is inconsistent with the scope of the offense to require a young complainant to object to or correct statements third parties make about the complainant's age.

- (2) *USAO, App. C at 508, repeats its previous objections to the affirmative defense for reasonable mistake of age.*
- The CCRC does not incorporate this recommendation because it may result in disproportionate outcomes. The CCRC addressed these prior objections in App. D1, 175-177 and repeats those comments here.
- (3) *The CCRC recommends codifying two subparagraphs for penalty enhancements— subparagraph (h)(7), specific to first degree, second degree, fourth degree, and fifth degree sexual abuse of a minor, and subparagraph (h)(8), specific to third degree and sixth degree sexual abuse of a minor. The previous draft of this offense codified the enhanced penalties for all degrees of the offense under one subparagraph and did not as clearly distinguish between third degree and sixth degree and the other gradations of the offense. This change makes clear that only one offense-specific penalty enhancement applies to any gradation of the offense. It is not a substantive change from the previous draft.*
- This change improves the clarity of the revised statutes.
- (4) *USAO, App. C at 510, recommends replacing the “knowingly” culpable mental state with “recklessly” for the fact that the actor is in a position of trust with or authority over the complainant. With this change, paragraphs (c)(2) and (f)(2) of the offense and the penalty enhancement in subparagraph (h)(7)(D) would require that the actor is reckless as to the fact that the actor is in a position of trust with or authority over the complainant. USAO states that the RCC sexual assault statute penalty enhancements require a “recklessly” culpable mental state for the fact that the actor is in a position of trust with or authority over the complainant and that the mental states “should align, and should, at most, require that the defendant be reckless as to the relationship.”*
- The RCC does not incorporate this recommendation because the different culpable mental states improve the proportionality of the RCC sexual assault and RCC sexual abuse of a minor statute. In the RCC sexual assault statute, the fact that the actor is in a “position of trust with or authority over” the complainant is a penalty enhancement, and increases the penalty for an actor that has already committed the crime of sexual assault. A comparatively lower culpable mental state of recklessness is proportionate and consistent with several of the other sexual assault penalty enhancements, such as using a dangerous weapon. In contrast, in third degree and sixth degree of the RCC sexual abuse of a minor statute, the fact that the actor is in a “position of trust with or authority” over the complainant criminalizes what is otherwise legal conduct. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal

principle,¹⁷³ although recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.¹⁷⁴ Given the heightened responsibility that comes with being a person in a position of trust with or authority over a complainant, as well as the expansive scope of the definition, a “knowingly” culpable mental state is proportionate. The “knowingly” culpable mental state improves the proportionality of the revised statute.

- (5) *USAO, App. C at 508-509, reiterates its recommendation that the sex offense aggravators in current D.C. Code § 22-3020¹⁷⁵ apply to all RCC sex offenses. USAO acknowledges that the RCC partially incorporated this recommendation in the RCC sexual abuse of a minor statute. In addition, USAO references the CCRC’s discussion of court data on page 167 of App. D1, where the CCRC noted that based on the limited available statistical evidence, between 2009 and 2015, there were only five instances where an aggravating factor for a sex offense resulted in a sentence higher than the otherwise-authorized statutory maximum, and all of those instances involved an aggravator for a significant relationship, not priors, or multiple victims. USAO states, with additional discussion, that “[j]ust because an aggravator may not raise a sentence above the otherwise-authorized statutory maximum . . . does not mean that it is an irrelevant aggravator.* ¹⁷⁶

¹⁷³ *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

¹⁷⁴ *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) (“There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.”).

¹⁷⁵ D.C. Code § 22-3020(a) (“Any person who is found guilty of an offense under this subchapter may receive a penalty up to 1 1/2 times the maximum penalty prescribed for the particular offense, and may receive a sentence of more than 30 years up to, and including life imprisonment without possibility of release for first degree sexual abuse or first degree child sexual abuse, if any of the following aggravating circumstances exists: (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.”).

¹⁷⁶ USAO states:

“The CCRC also notes that, based on the limited available statistical evidence, between 2009 and 2015, there were only five instances where an aggravating factor for a sex offense resulted in a sentence higher than the otherwise-authorized statutory maximum, and all of those instances involved an aggravator for a significant relationship, not priors or multiple victims. (App. D1 at 167.) Just because an aggravator may not raise a sentence above the otherwise-authorized statutory maximum, however, does not mean that it is an irrelevant aggravator. First, even if an aggravator results in no change to a sentence, it can help represent more fully the nature of the defendant’s conduct. Second, the CCRC noted that the aggravators did not result in a sentence higher than the otherwise-authorized statutory maximum, but did not note (and, indeed, likely does not have access to information regarding) whether the aggravators resulted

- The RCC does not incorporate this recommendation because it is inconsistent with the requirements for liability in the RCC sexual abuse of a minor statute. The RCC sexual abuse of a minor statute codifies as penalty enhancements all the current D.C. Code sex offense aggravators,¹⁷⁷ with two exceptions: 1) the current D.C. Code sex offense recidivist aggravator, discussed below;¹⁷⁸ and 2) the current D.C. Code aggravator for a complainant under 12 years of age.¹⁷⁹ It is unnecessary to codify a penalty enhancement for a complainant under the age of 12 years because first degree and fourth degree of the RCC sexual abuse of a minor offense require as an element that the complainant is under the age of 12 years. First degree and fourth degree are the most serious gradations of the offense for a “sexual act” and a “sexual contact,” respectively, and proportionately penalize this conduct.
- (6) *USAO, App. C at 509-510, reiterates its recommendation that a sex offense recidivist penalty enhancement should apply to all sex offenses. USAO states that the general repeat offender enhancement in RCC § 22E-606 “only applies to prior convictions, and does not account for multiple victims within the same case (emphasis in original).” In its previous recommendation, USAO recommended a sex offense recidivist penalty enhancement 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 equivalent offense]; or (2) The offender, in fact, is or has been found guilty of committing a District of Columbia sexual*

in a sentence higher than the top of the otherwise-authorized sentencing guidelines range. An aggravator has the effect of both increasing the statutory maximum, and increasing the top of the sentencing guidelines range. A sentence may, therefore, be increased above the otherwise-applicable top of the sentencing guidelines range, even if is below the otherwise-authorized statutory maximum. Third, even if the aggravator does not result in a sentence that exceeds either the otherwise-authorized statutory maximum or otherwise-authorized top of the sentencing guidelines range, it allows USAO to request a higher sentence, which may ultimately result in the judge imposing a higher sentence than the judge would have imposed otherwise. For example, a judge who may have sentenced the defendant to the mid-range of a sentencing guideline range may, after considering the aggravator, sentence the defendant to the top of the sentencing guideline range. This nuance would be difficult to observe in statistical court data.”

¹⁷⁷ For all gradations of the RCC sexual abuse of a minor statute, these penalty enhancements are: 1) the actor causing the sexual act or sexual contact by displaying or using a dangerous weapon or imitation dangerous weapon; 2) the actor “act[ing]” with one or more accomplices that are “physically present” at the time of the sexual act or sexual contact; and 3) the actor causing serious bodily injury to the complainant immediately before, during, or immediately after the sexual act or sexual contact. In addition, for first degree, second degree, fourth degree, and fifth degree of the RCC sexual abuse of a minor statute, it is a penalty enhancement that the actor knows that he or she is in a “position of trust with or authority” over the complainant. This “position of trust with or authority over” penalty enhancement does not apply to third degree and sixth degree of the offense because those gradations require this as an element of the offense.

¹⁷⁸ D.C. Code § 22-3020(a)(5).

¹⁷⁹ D.C. Code § 22-3020(a)(1).

offense defined in Chapter 13 of this Title [or an equivalent offense], involving 2 or more victims.”¹⁸⁰ The CCRC previously stated, App. D1 at 170, that this recommendation “significantly expand[s] the scope of the current D.C. Code sexual abuse aggravators, which do not contain an aggravator for only one prior conviction, and require crimes to be committed ‘against’ 2 or more victims.” USAO states that “[i]t is unclear” how its recommendation would expand the current D.C. Code sex offense recidivist enhancement¹⁸¹:

“For [the current sex offense recidivist penalty] enhancement to apply, the defendant must have been found guilty of committing at least one offense involving at least one victim in the current case; if there is no finding of guilt on the underlying offense, there could be no finding of guilt on the enhancement. At the time of a finding of guilt in the current case, the defendant therefore ‘is’ guilty of committing a sex offense in the current case. If the defendant has one prior conviction for a sex offense, the defendant ‘has been’ found guilty of a sex offense in a prior case. Thus, at the time of a finding of guilt in the current case, the defendant “is or has been” found guilty of committing sex offenses against 2 or more victims. Moreover, if there are two victims in a single case, then, if the defendant is found guilty of committing offenses against both victims, the defendant ‘is guilty’ of committing sex offenses against 2 or more victims.”

In addition, USAO references the CCRC’s discussion of court data on page 167 of App. D1, where the CCRC noted that based on the limited available statistical evidence, between 2009 and 2015, there were only five instances where an aggravating factor for a sex offense resulted in a sentence higher than the otherwise-authorized statutory maximum, and all of those instances involved an aggravator for a significant relationship, not priors, or multiple victims. USAO states, with additional discussion, that “[j]ust because an aggravator may not raise a sentence above the otherwise-authorized statutory maximum . . . does not mean that it is an irrelevant aggravator.”¹⁸²

¹⁸⁰ App. D1 at 170.

¹⁸¹ The current D.C. Code sex offense recidivist enhancement states: “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.” D.C. Code § 22-3020(a)(5).

¹⁸² USAO states:

“The CCRC also notes that, based on the limited available statistical evidence, between 2009 and 2015, there were only five instances where an aggravating factor for a sex offense resulted in a sentence higher than the otherwise-authorized statutory maximum, and all of those instances involved an aggravator for a significant relationship, not priors or multiple victims. (App. D1 at 167.) Just because an aggravator may not raise a sentence above the otherwise-authorized statutory maximum, however, does not mean that it is an irrelevant aggravator. First, even if an aggravator results in no change to a sentence, it can help represent more fully the nature of the defendant’s conduct. Second, the CCRC noted that the aggravators did not result in a sentence higher than the

- The RCC does not incorporate this recommendation because it would change current law in a way that leads to inconsistencies with other RCC offenses of similar seriousness and may authorize disproportionate penalties. As the CCRC previously noted in App. D1, 170-171, the plain language of the current recidivist enhancement in D.C. Code § 20-3020(a)(5) is unclear and there is no case law clarifying the issue.¹⁸³

otherwise-authorized statutory maximum, but did not note (and, indeed, likely does not have access to information regarding) whether the aggravators resulted in a sentence higher than the top of the otherwise-authorized sentencing guidelines range. An aggravator has the effect of both increasing the statutory maximum, and increasing the top of the sentencing guidelines range. A sentence may, therefore, be increased above the otherwise-applicable top of the sentencing guidelines range, even if is below the otherwise-authorized statutory maximum. Third, even if the aggravator does not result in a sentence that exceeds either the otherwise-authorized statutory maximum or otherwise-authorized top of the sentencing guidelines range, it allows USAO to request a higher sentence, which may ultimately result in the judge imposing a higher sentence than the judge would have imposed otherwise. For example, a judge who may have sentenced the defendant to the mid-range of a sentencing guideline range may, after considering the aggravator, sentence the defendant to the top of the sentencing guideline range. This nuance would be difficult to observe in statistical court data.”

¹⁸³ In its previous recommendation, USAO recommended codifying a sex offense recidivist penalty enhancement when: “(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 equivalent offense].” This recommendation would allow a recidivist enhancement for a single prior conviction, regardless of the identity of the complainant in that case. However, the current D.C. Code sex offense recidivist aggravator applies if the defendant “is or has been found guilty of committing sex offenses *against 2 or more victims*” (D.C. Code § 22-3020(a)(5) (emphasis added)). It does not appear that one prior conviction would be sufficient under this language since it refers to multiple offenses (plural) against two or more victims (plural, indicating different people). Even if D.C. Code § 22-3020(a)(5) were interpreted so that one prior conviction is sufficient, the current aggravator requires that the sex offenses be “against 2 or more victims,” which suggests that a single prior conviction must be against a different complainant than in the instant case or it does not count. The USAO language recommendation, in contrast, appears to expand the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement for a single prior conviction, regardless of the identity of the complainant.

In its previous recommendation, USAO also recommended including a sex offense recidivist penalty enhancement when: “(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 equivalent offense], involving 2 or more victims.” In parsing the current sex offense recidivist aggravator in D.C. Code § 22-3020(a)(5), USAO states that the finding of guilt in the instant case satisfies the “is guilty of” language and that a prior conviction for a sex offense satisfies the “has been found guilty of” language. USAO states that “Thus, at the time of a finding of guilt in the current case, the defendant ‘is or has been’ found guilty of committing sex offenses against 2 or more victims.” However, this analysis risks rendering the “against 2 or more victims” requirement in the current aggravator surplusage. As the CCRC has noted, under the current aggravator it appears that a prior conviction will only be counted if it is against a different complainant than in the instant case. Another interpretation, not precluded by the plain language, is that for a prior to count, it must involve two or more victims—although this interpretation would exclude many prior sex offenses. The USAO recommendation appears to expand the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement regardless of the identity of complainants.

The RCC general recidivist enhancement provides a uniform penalty enhancement for an actor with certain prior convictions. It would be inconsistent with other revised and D.C. Code offenses to provide a recidivist penalty based on the number of victims in an instant case—multiple counts may be brought in such cases, resulting in multiple punishments that can be run consecutively. There is no apparent rationale for singling out sex assaults for this unique kind of enhancement based on prior conduct. Regarding the utility to USAO of an offense-specific recidivist enhancement even when it is not necessary to raise the otherwise applicable statutory minimum, the CCRC notes that the government may present such facts at sentencing where a general recidivist enhancement is charged and even if there is no statutory enhancement the court may take such facts into account and choose to depart from the voluntary sentencing guidelines or otherwise adjust the penalty.

(7) *USAO, App. C at 544-545, recommends increasing the maximum possible penalty for a Class 3 felony from 36 years to 40 years. Specific to the RCC sexual abuse of a minor statute, USAO states that enhanced first degree sexual abuse of a minor is “comparable to” first degree child sexual abuse under current D.C. Code §§ 22-3008 and 22-3020 when the complainant is under 12 years old, with enhancements “which has a maximum of life imprisonment.” USAO states that it “does not believe that the maximum penalt[y]” for enhanced first degree sexual abuse of a minor should be lowered to 36 years’ incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;¹⁸⁴ 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;¹⁸⁵ 5) relative ordering

Finally, in parsing the current D.C. Code sex offense recidivist aggravator, USAO states that “if there are two victims in a single case, then, if the defendant is found guilty of committing offenses against both victims, the defendant ‘is guilty’ of committing sex offenses against 2 or more victims.” While the CCRC would agree that a single case involving two or more findings of guilt against each of two or more complainants appears to satisfy the requirement, a single case with two complainants and but lacking multiple findings of guilt against each, may not satisfy this requirement. D.C. Code § 22-3020(a)(5) (emphasis added). Consequently, the USAO recommendation potentially expands the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement based solely on the number of complainants in a single case.

¹⁸⁴ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

¹⁸⁵ CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

of related RCC offenses;¹⁸⁶ and 6) national data on sentencing and time served.¹⁸⁷ Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.

- The CCRC notes that notwithstanding the life imprisonment statutorily authorized penalty for enhanced first degree child sexual abuse, actual practice in the District has been somewhat different. Court data for 2010-2019 shows that the 97.5% quantile of sentences for all first degree child sexual abuse, with or without an aggravator enhancement, was 244 months (20.3 years).¹⁸⁸ The CCRC recommendation here fully encompasses current practice.

(8) *USAO, App. C at 543-544, recommends increasing the maximum possible penalty for a Class 4 felony from 24 years to 30 years. Specific to the RCC sexual abuse of a minor statute, USAO states that first degree sexual abuse of a minor is “comparable to” first degree child sexual abuse under current D.C. Code §§ 22-3008 and 22-3020 when the complainant is under 12 years old, “which has a maximum of life imprisonment.” USAO states that it “does not believe that the maximum penalt[y]” for first degree sexual abuse of a minor should be lowered to 24 years’ incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed*

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;¹⁸⁹ 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;¹⁹⁰ 5) relative ordering of related RCC offenses;¹⁹¹ and 6) national data on sentencing and time served.¹⁹² Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the life imprisonment statutorily authorized penalty for enhanced first degree child sexual abuse, actual practice in the District has been somewhat different. Court data for 2010-2019 shows that the 97.5% quantile of sentences for all first degree child sexual abuse, with or without an aggravator enhancement, was 244 months

¹⁸⁶ CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.

¹⁸⁷ See Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

¹⁸⁸ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

¹⁸⁹ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

¹⁹⁰ CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

¹⁹¹ CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.

¹⁹² See Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

(20.3 years).¹⁹³ The CCRC recommendation here fully encompasses current practice.

(9) *USAO, App. C at 543-544, recommends increasing the maximum possible penalty for a Class 4 felony from 24 years to 30 years. Specific to the RCC sexual abuse of a minor statute, USAO states that enhanced second degree sexual abuse of a minor is “comparable to” first degree child sexual abuse under current D.C. Code §§ 22-3008 and 22-3020 when the complainant is over 12 years old, with enhancements “which has a maximum of life imprisonment.” USAO states that it “does not believe that the maximum penal[t]y” for first degree sexual abuse of a minor should be lowered to 24 years’ incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed*

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;¹⁹⁴ 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;¹⁹⁵ 5) relative ordering of related RCC offenses;¹⁹⁶ and 6) national data on sentencing and time served.¹⁹⁷ Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the life imprisonment statutorily authorized penalty for enhanced first degree child sexual abuse, actual practice in the District has been somewhat different. Court data for 2010-2019 shows that the 97.5% quantile of sentences for all first degree child sexual abuse, with or without an aggravator enhancement, was 244 months (20.3 years).¹⁹⁸ The CCRC recommendation here fully encompasses current practice.

(10) *USAO, App. C at 552, recommends increasing the penalty classification of enhanced second degree sexual abuse of a minor from a Class 4 felony (carrying a 24 year maximum imprisonment penalty) to a Class 3 felony, the same classification as enhanced first degree sexual abuse of a minor. USAO states that “the only distinction” between first degree and second degree of the RCC sexual abuse of a minor statute is the age of the complainant—first degree requires that the complainant is under 12 years of age and second degree requires that the complainant is under 16 years of age. USAO states that “it is logical to distinguish” between unenhanced first degree sexual abuse of a minor (a Class 4*

¹⁹³ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

¹⁹⁴ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

¹⁹⁵ CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

¹⁹⁶ CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.

¹⁹⁷ See Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

¹⁹⁸ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

felony) and unenhanced second degree sexual abuse of a minor (a Class 5 felony). However, USAO states that “an enhancement applies, among other situations, to a situation where the actor is in a position of trust with or authority over the complainant” and that “[i]f this relationship exists . . . the defendant should be equally culpable” regardless of the age of the complainant. USAO gives as an example “if a defendant engages in sexual intercourse with his biological daughter, the defendant should be equally culpable regardless of whether the victim was 11 years old or 13 years old” because “[i]n both situations, the defendant exploited his position of trust and authority over his child, and likely used that trust or authority as a way to cajole” the complainant into engaging in sexual intercourse. USAO states that classifying enhanced second degree sexual abuse of a minor as a Class 3 felony would put this offense and enhanced first degree sexual abuse of a minor “at the same level” as enhanced first degree sexual assault (a Class 3 felony). USAO states that “child sexual abuse often does not require the use of force, so it is appropriate to place the most serious versions of forced assault and non-forced abuse of a child at the same gradation.” USAO states that a “perpetrator often uses various forms of grooming to induce” the minor complainant’s submission to the sexual activity and “[n]on-forced abuse of a child can often result in significant emotional distress, both when the child is under 12 or over 12, and should be penalized accordingly.”

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;¹⁹⁹ 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;²⁰⁰ 5) relative ordering of related RCC offenses;²⁰¹ and 6) national data on sentencing and time served.²⁰² Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the life imprisonment statutorily authorized penalty for enhanced first degree child sexual abuse, actual practice in the District has been somewhat different. Court data for 2010-2019 shows that the 97.5% quantile of sentences for all first degree child sexual abuse, with or without an aggravator enhancement, was 244 months (20.3 years).²⁰³ The CCRC recommendation here fully encompasses current practice.

¹⁹⁹ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

²⁰⁰ CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

²⁰¹ CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.

²⁰² See Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

²⁰³ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

(11) *USAO, App. C at 543, recommends increasing the maximum possible penalty for a Class 5 felony from 18 years to 20 years. Specific to the RCC sexual abuse of a minor statute, USAO states that second degree sexual abuse of a minor is “comparable to” first degree child sexual abuse under current D.C. Code § 22-3008 when the complainant is over 12 years of age, which has a maximum possible penalty of 30 years. USAO states that it “does not believe that the maximum penalt[y]” for second degree abuse of a minor should be lowered from 20 years’ incarceration to 18 years’ incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;²⁰⁴ 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;²⁰⁵ 5) relative ordering of related RCC offenses;²⁰⁶ and 6) national data on sentencing and time served.²⁰⁷ Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the 30 year statutorily authorized penalty for unenhanced first degree child sexual abuse, actual practice in the District has been somewhat different. Court data for 2010-2019 shows that the 97.5% quantile of sentences for all first degree child sexual abuse, with or without an aggravator enhancement, was 244 months (20.3 years).²⁰⁸ Similarly, the 95% quantile of sentences for all first degree child sexual abuse, with or without an aggravator enhancement, was 223 months (18.5 years).²⁰⁹ The CCRC recommendation here is generally consistent with current practice.

(12) *USAO, App. C at 542-543, recommends increasing the maximum possible penalty for a Class 6 felony from 12 years²¹⁰ to 15 years. Specific to the RCC sexual abuse of a minor statute, USAO states that third degree sexual abuse of a minor is “comparable to” first degree sexual abuse of a minor under current D.C. Code § 22-3009.01, which has a maximum possible penalty of 15 years. USAO states that it “does not believe that the maximum penalt[y]” for first degree assault should be lowered from 15 years’ incarceration to 12 years’*

²⁰⁴ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

²⁰⁵ CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

²⁰⁶ CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.

²⁰⁷ See Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

²⁰⁸ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

²⁰⁹ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

²¹⁰ In its comments, USAO states that an RCC Class 6 felony has a maximum possible penalty of 10 years. However, per First Draft of Report #52, a RCC Class 6 felony has a maximum possible penalty of 12 years.

incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;²¹¹ 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;²¹² 5) relative ordering of related RCC offenses;²¹³ and 6) national data on sentencing and time served.²¹⁴ Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the 15 year statutorily authorized penalty for first degree sexual abuse of a minor, actual practice in the District has been somewhat different. Court data for 2010-2019 shows that the 97.5% quantile of sentences for all first degree sexual abuse of a minor, with or without an aggravator enhancement, was 158 months (13.2 years).²¹⁵ The CCRC recommendation here is generally consistent with current practice.

(13) *USAO, App. C at 542-543, recommends increasing the maximum possible penalty for a Class 6 felony from 12 years²¹⁶ to 15 years. Specific to the RCC sexual abuse of a minor statute, USAO states that fourth degree sexual abuse of a minor is “comparable to” second degree sexual abuse of a child under current D.C. Code §§ 22-3009 and 22-3020 when the complainant is under 12 years of age, which has a maximum possible penalty of 15 years. USAO states that it “does not believe that the maximum penalt[y]” for fourth degree sexual abuse of a minor should be lowered from 15 years’ incarceration to 12 years’ incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data

²¹¹ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

²¹² CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

²¹³ CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.

²¹⁴ See Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

²¹⁵ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

²¹⁶ In its comments, USAO states that an RCC Class 6 felony has a maximum possible penalty of 10 years. However, per First Draft of Report #52, a RCC Class 6 felony has a maximum possible penalty of 12 years.

from recent years on actual sentences imposed for comparable offenses;²¹⁷ 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;²¹⁸ 5) relative ordering of related RCC offenses;²¹⁹ and 6) national data on sentencing and time served.²²⁰ Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.

- The CCRC notes that notwithstanding the 15 year statutorily authorized penalty for enhanced second degree sexual abuse of a child, actual practice in the District has been somewhat different. Court data for 2010-2019 shows that the 97.5% quantile of sentences for all second degree sexual abuse of a child, with or without an aggravator enhancement, was 120 months (10 years).²²¹ The CCRC recommendation here is generally consistent with current practice.

(14) *USAO, App. C at 541-542, recommends increasing the maximum possible penalty for a Class 7 felony from 8 years to 10 years. Specific to the RCC sexual abuse of a minor statute, USAO states that fifth degree sexual abuse of a minor is “comparable to” second degree child sexual abuse when the complainant is over 12 years old under current D.C. Code § 22-3009, which has a maximum possible penalty of 10 years. USAO states that it “does not believe that the maximum penalt[y]” for fifth degree sexual abuse of a minor should be lowered from 10 years’ incarceration to 8 years’ incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;²²² 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;²²³ 5) relative ordering of related RCC offenses;²²⁴ and 6) national data on sentencing and time served.²²⁵ Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.

²¹⁷ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

²¹⁸ CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

²¹⁹ CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.

²²⁰ See Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

²²¹ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

²²² CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

²²³ CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

²²⁴ CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.

²²⁵ See Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

- The CCRC notes that notwithstanding the 10 year statutorily authorized penalty for unenhanced second degree child sexual abuse, actual practice in the District has been somewhat different. Court data for 2010-2019 shows that the 97.5% quantile of sentences for all unenhanced second degree sexual abuse of a child was 88.8 months (7.3 years).²²⁶ The CCRC recommendation here is generally consistent with current practice.

(15) *The CCRC recommends deleting current D.C. Code § 22-3019: "No actor is immune from prosecution under any section of this subchapter because of marriage, domestic partnership, or cohabitation with the victim; provided, that marriage or the domestic partnership of the parties may be asserted as an affirmative defense in prosecution under this subchapter where it is expressly so provided." The revised sexual abuse of a minor statute and other RCC Chapter 13 statutes account for liability changes based on marriage or domestic partnership in the plain language of the statutes and D.C. Code 22-3019 is deleted as unnecessary.*

- This change improves the clarity of the revised statutes.

²²⁶ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

RCC § 22E-1303. Sexual Abuse by Exploitation.

- (1) *The CCRC recommends revising subparagraphs (a)(2)(A) and (b)(2)(A) to require that the actor is a “coach, not including a coach who is a secondary student” instead of simply a “coach.” The current D.C. Code sexual abuse of a secondary education student statutes require that the actor is a “coach” in a secondary school and that certain secondary education students be under the age of 20 years.²²⁷ In both current law and the previous version of the RCC sexual abuse by exploitation statute, whether an actor is a “coach” is the basis of criminalizing otherwise consensual conduct with a complainant that is over the age of 18 years, but under the age of 20 years. Requiring that a coach is not also a secondary school student ensures that the relationship between the actor and the complainant rises to the level of coerciveness necessary to make otherwise consensual sexual activity criminal. The commentary to this offense has been updated to reflect that this is a possible change in law.*
 - This revision improves the clarity, consistency, and proportionality of the revised statute.
- (2) *The CCRC recommends adding “working as an employee, contract employee, or volunteer” to subparagraphs (a)(2)(A) and (b)(2)(A). The current D.C. Code sexual abuse of a secondary education student statutes list the prohibited actors in a secondary school and do not specify if the actors must be employees, or if contract employees or volunteers are sufficient. There is no DCCA case law on this issue. The RCC statute instead specifies that the actor must be “working as an employee, contract employee, or volunteer,” which is consistent with the requirement in (a)(2)(D) and (b)(2)(D) of the RCC sexual abuse by exploitation statute for wards, patients, clients, and prisoners, and subsection (G) of the RCC definition of “position of trust with or authority over” (RCC § 22E-701). The commentary to this offense has been updated to reflect that this is a possible change in law.*
 - This revision improves the clarity, consistency, and proportionality of the revised statute and removes a possible gap in liability.
- (3) *OAG, App. D at 471, recommends clarifying in the commentary that the circumstances in D.C. Code § 14-309, pertaining to when specified religious leaders may not be examined in court proceedings, are irrelevant for the purposes of determining which religious leaders are subject to the RCC offense. OAG recommends that the commentary be redrafted to state for both first degree and second degree that “The actor is, or purports to be, a healthcare provider, a health professional; or a religious leader described in D.C. Code § 14-309, regardless of whether the religious leader hears confessions or receives other communications.”*
 - The RCC incorporates this recommendation by revising a sentence in the explanatory note and the discussion of District law to read: “A ‘religious leader described in D.C. Code § 14-309’ is a ‘priest, clergyman, rabbi, or

²²⁷ D.C. Code §§ 22-3009.03; 22-3009.04.

other duly licensed, ordained, or consecrated minister of a religion authorized to perform a marriage ceremony in the District of Columbia or duly accredited practitioner of Christian Science,' regardless of whether the religious leader hears confessions or receives other communications."

This does not further change current District law.

(4) *PDS, App. C at 488, recommends revising what were previously subparagraphs (a)(2)(D) and (b)(2)(D) so that the complainant must be a ward, patient, client, or prisoner at the same institution as the actor. Specifically, PDS recommends revising these subparagraphs to require "and recklessly disregards that the complainant is a ward, patient, client, or prisoner at that institution," as opposed to "at such an institution." PDS gives as a hypothetical a defendant that works at the D.C. Jail and engages in an otherwise consensual sexual act with her fiancée who has earned a weekend pass from the psychiatric treatment facility to which he has been confined. PDS states that this would violate first degree of the RCC sexual abuse by exploitation offense. PDS states that the "crux of this offense is the inherent coerciveness given the actor's employment position in relation to the position of the complainant as a person who is not free to leave the actor's place of employment" and that "the element should be rewritten to more clearly require that relationship between the actor and the complainant." The commentary to the RCC sexual assault statute has been updated to reflect this is a possible change in law.*

- The RCC incorporates this recommendation by requiring in what is now sub-subparagraphs (a)(2)(D)(i)(I), (a)(2)(D)(i)(II), (a)(2)(D)(i)(III), (b)(2)(D)(i)(I), (b)(2)(D)(i)(II), and (b)(2)(D)(i)(III) refer to "that institution"—the same institution as the actor. This change improves the clarity, consistency, and proportionality of the revised statute.

(5) *The CCRC recommends adding "as an employee, contract employee, or volunteer at or for" a specified institution so that sub-subparagraphs (a)(2)(D)(i) and (b)(2)(D)(i) read "works as an employee, contract employee, or volunteer at or for" a specified institution. The current D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes include "[a]ny staff member, employee, contract employee, consultant, or volunteer at a" specified institution.²²⁸ There is no DCCA case law interpreting this language. The RCC statute retains "employee," "contract employee," and "volunteer" from the current D.C. Code statutes, and deletes "staff member" as duplicative with an "employee" or "contract employee." It is unclear how a "consultant" differs from an "employee" or "contract employee." However, to the extent that a "consultant" is not an "employee, contract employee, or volunteer at or for" a specified institution, the consultant may not be in a position of authority over a complainant such that otherwise consensual sexual activity is inherently coercive and criminalized. Sexual activity between such a consultant and a complainant at an institution may be prohibited under the RCC sexual assault statute (RCC § 22E-1301) if there is a coercive threat or the complainant is incapacitated. The*

²²⁸ D.C. Code §§ 22-3013; 22-3014.

commentary to the RCC sexual assault statute has been updated to reflect this is a clarificatory change in law.

- This change improves the clarity, consistency, and proportionality of the revised statute.
- (6) *The CCRC recommends deleting “other” from sub-subparagraphs (a)(2)(D)(i) and (b)(2)(D)(i) of the revised statute so that they refer to an “institution housing persons who are not free to leave at will,” as opposed to “other institution housing persons who are not free to leave at will.” “Other” may erroneously suggest here that the preceding list of specified institutions, such as a hospital, must be an institution where people are not free to leave. The current D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes refer to “other institution,” but do not have the additional requirement that persons not be free to leave.²²⁹ D.C. Code §§ 22-3013; 22-3014 (“Any staff member, employee, contract employee, consultant, or volunteer at a hospital, treatment facility, detention or correctional facility, group home, or other institution . . .”).*
- This change improves the clarity and consistency of the revised statute.
- (7) *The CCRC recommends replacing “transports . . . persons at such an institution” in the previous version of the revised statute with the requirement that the complainant is “In transport to or from that institution” (sub-subparagraphs (a)(2)(D)(ii)(III) and (b)(2)(D)(ii)(III)). The previous drafting was unclear and potentially narrowed the offense to transportation “at” the institution, i.e. in an elevator or parking garage. The current D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes clearly include transportation to or from specified institutions: “anyone who is an ambulance driver or attendant, a bus driver or attendant, or person who participates in the transportation of a ward, patient, client, or prisoner to and from such institutions.”²³⁰ Transportation “at” an institution would still be covered under the other provisions of the RCC offense if the complainant is a “ward, patient, client, or prisoner at that institution” or “awaiting admission to that institution” and the other requirements of the offense are met.*
- This change improves the clarity and consistency of the revised statute.
- (8) *The CCRC recommends adding as sub-subparagraphs (a)(2)(D)(ii)(II) and (b)(2)(D)(II) that the complainant is “Awaiting admission to that institution”—the same institution as where the actor is an employee, contract employee, or volunteer. The current D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes prohibit “[a]ny staff member, employee, contract employee, consultant, or volunteer at a hospital, treatment facility, detention or correctional facility, group home, or other institution” from engaging in sexual activity with a “ward, patient, client, or prisoner.”²³¹ There is no DCCA case law interpreting this provision and it is unclear whether it extends to a complainant that is*

²²⁹ D.C. Code §§ 22-3013 and 22-3014 (“Any staff member, employee, contract employee, consultant, or volunteer at a hospital, treatment facility, detention or correctional facility, group home, or other institution . . .”).

²³⁰ D.C. Code §§ 22-3013; 22-3014.

²³¹ D.C. Code §§ 22-3013; 22-3014.

awaiting admission to one of the specified institutions. A complainant that is awaiting admission at a specified institution has a similar vulnerability as a ward, patient, client, or prisoner that has been admitted to a specified institution. The commentary to the RCC sexual assault statute has been updated to reflect this is a possible change in law.

- This change improves the clarity, consistency, and proportionality of the revised statute.

(9) *The CCRC recommends adding as subparagraphs (a)(2)(E) and (b)(2)(E) that “The actor knowingly works as a law enforcement officer, and recklessly disregards that the complainant is in official custody or on probation or parole.” RCC § 22E-701 defines “official custody” to include detention following arrests and other interactions with law enforcement officers, as well custody for purposes incidental to these types of detention. The current D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes prohibit “any official custodian of a ward, patient, client, or prisoner” from engaging in sexual activity with a “ward, patient, client, or prisoner.”²³² The current D.C. Code does not define “official custodian,” but does have an extensive definition of “official custody”²³³ that is substantively similar to the RCC definition. The term “official custody” was deleted from the D.C. Code sexual abuse of a ward, patient, client or prisoner statutes in 2007.²³⁴ The legislative history does not discuss why the definition of*

²³² D.C. Code §§ 22-3013; 22-3014.

²³³ D.C. Code § 22-3001(6) (defining “official custody” as “(A) Detention following arrest for an offense; following surrender in lieu of arrest for an offense; following a charge or conviction of an offense, or an allegation or finding of juvenile delinquency; following commitment as a material witness; following or pending civil commitment proceedings, or pending extradition, deportation, or exclusion; (B) Custody for purposes incidental to any detention described in subparagraph (A) of this paragraph, including transportation, medical diagnosis or treatment, court appearance, work, and recreation; or (C) Probation or parole.”).

²³⁴ Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482) (2006 Omnibus Act). The original D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes required that the victim be in the “official custody” of certain institutions and under the “supervisory or disciplinary authority” of the defendant. The original D.C. Code first degree sexual abuse of a ward statute was:

Whoever engages in a sexual act with another person or causes another person to engage in or submit to a sexual act when that other person:

- (1) Is in official custody, or is a ward or resident, on a permanent or temporary basis, of a hospital, treatment facility, or other institution; and
- (2) Is under the supervisory or disciplinary authority of the actor shall be imprisoned for not more than 10 years and, in addition, may be fined in an amount not to exceed \$100,000.

The original D.C. Code second degree sexual abuse of a ward, patient, client, or prisoner statute was the same, differing only in penalty and requiring a “sexual contact” instead of a “sexual act.” The legislative history for the 2006 Omnibus Act stated that the “supervisory or disciplinary authority” requirement created problems “successfully prosecuting persons who take advantage of inmates, group home residents, and persons with mental retardation.” See Statement of Robert J. Spagnoletti, Attorney for the District of Columbia, at the May 31, 2005 Public Hearing on B16-247 the Omnibus Public Safety Act of 2005, B16-172 the Criminal Code Reform Commission

“official custody” was left in the D.C. Code. The legislative history does state that the current D.C. Code sexual abuse of a ward statutes were intended to “expand the list of individuals who are prohibited from engaging in sexual relations when the person provides care to a patient or other vulnerable population.”²³⁵ It is unclear whether the current D.C. Code definition of “official custody” is intended to apply to “official custodian” in the current D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes. To the extent that it does not, deleting the definition of “official custody” narrows, rather than expands, the scope of the current D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes as they pertain to individuals in the custody of law enforcement officers or on probation or parole. Resolving this ambiguity, the RCC sexual abuse by exploitation statute codifies as a discrete basis of liability a complainant that is in “official custody” of a “law enforcement officer,” as those terms are defined in RCC § 22E-701, or a complainant that is on probation or parole. Law enforcement officers have a position of authority over complainants that are in “official custody,” such as detention following an arrest, or on probation or parole such that otherwise consensual sexual activity is inherently coercive and criminalized. The RCC sexual abuse by exploitation statute applies a “knowingly” culpable mental state to the fact that the actor is a “law enforcement officer” and a “recklessly” culpable mental state to the fact that the complainant is in “official custody” or on probation or parole, which is consistent with the culpable mental state requirements required for the status of the actor and the complainant in other parts of the statute. The commentary to the definition of “official custody” in RCC § 22E-701 discusses the RCC definition in detail. The commentary to this RCC offense has been updated to reflect that this is a possible change in law.

- This change improves the clarity, consistency, and proportionality of the revised statute and removes a possible gap in liability.

(10) *USAO, App. C at 508, repeats its previous objections to the reasonable mistake of age affirmative defense in the RCC sexual abuse of a minor offense (RCC § 22E-1302) and to the “recklessly” culpable mental state for the age of a secondary education student in the RCC sexual abuse by exploitation statute. However, USAO recommends that, if the RCC retains the affirmative defense, a similar affirmative defense should apply to the age of a secondary education student, as opposed to requiring recklessness for this element. USAO does not recommend specific language for such an affirmative defense. USAO states that, unlike the reasonable mistake of age affirmative defense, a requirement of recklessness has “no limitations on what that recklessness must be based on, and*

Establishment Act of 2005, and B16-130 the Criminal Code Modernization Amendment Act of 2005 at 23. The 2006 Omnibus Public Safety Amendment Act deleted the requirements of “official custody” and “supervisory or disciplinary authority.” It expanded the sexual abuse of a ward statutes to their current D.C. Code versions, including adding the language, “any *official custodian* of a ward, patient, client, or prisoner,” but did not define the term “official custodian.”

²³⁵ Chairman of the Council of the District of Columbia Committee of the Judiciary, Phil Mendelson, “Report on Bill 16-247, the ‘Omnibus Public Safety Act of 2006,’” (April 28, 2006) at 11.

no minimum age of a complainant to which it would apply.” USAO acknowledges that the RCC sexual abuse of a minor offense is a “more serious offense that carries more serious penalties” than the RCC sexual abuse by exploitation offense, but states that “the same logic should apply to sex offenses involving minors.” USAO states that “[e]ven when less serious conduct is involved, the government has identical concerns about rape shield laws being implicated, and in reality, creating a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws.” USAO states that “[t]his evidence would be argued to be ‘relevant’ in the same way for all of the child sexual abuse provisions, and complainants should be treated the same and have the same protections regardless of the perceived gravity of the offense.”

- The RCC does not incorporate USAO’s recommendation because the “recklessly” culpable mental state improves the proportionality of the revised statute. The RCC sexual abuse by exploitation offense criminalizes consensual sexual activity with students under the age of 20 years, and uniquely does so for persons 16 years of age or older (the age of consent in current District law for sexual conduct) solely because of the school-based relationship between the actor and the complainant. A “recklessly” culpable mental state for the age of the complainant, as opposed to a narrow reasonable mistake of age affirmative defense, is proportionate given the comparatively older age of the complainant. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle,²³⁶ but recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.²³⁷ The “recklessly” culpable mental state does not “create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,”²³⁸ which the

²³⁶ *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

²³⁷ *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) (“There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.

²³⁸ USAO lists several examples of “evidence that is known to the defendant” that it states would be admissible under the RCC sexual assault penalty enhancements to prove that the defendant was not reckless as to the age of the complainant, but would not be allowed by the current rape shield statute: “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.” USAO, App. C at 314. However, under the current D.C. Code and RCC rape shield statutes, it appears that this evidence would largely be excluded. To the extent that this evidence is opinion or reputation evidence of the complainant’s “past sexual behavior,” it is excluded under the current and RCC rape shield statutes. See D.C. Code § 22-3021(a); RCC § 22E-1311(a). To the extent that this evidence is evidence of the complainant’s “past sexual behavior” and is not reputation or opinion evidence, it is not admissible unless certain procedural requirements are met and it fits it within specific narrow categories. These narrow categories are: 1) evidence that is “constitutionally required to be admitted” (D.C. Code 22-3022(a)(1); RCC § 22E-1311(b)(1)(A)); 2) evidence of past sexual behavior with persons other than the actor, offered by the actor, on the issue of whether or not the actor is the source of semen or bodily injury (D.C. Code §

RCC does not substantively change in any manner, or “extremely prejudicial, and otherwise inadmissible, evidence not specially covered by the Rape Shield Act.”²³⁹ Requiring recklessness as to the age of the secondary education student is not inconsistent with robust rape shield laws as, for example, the current D.C. Code sex trafficking of children statute²⁴⁰ already combines a recklessness requirement for the age of the complainant with a Rape Shield law.²⁴¹ In addition, the CCRC notes that the American Law Institute’s most recent draft revised sexual abuse of a minor statute requires recklessness as to the age of the complainant, including a complainant under the age of 12 years, and also has a Rape Shield provision.²⁴²

(11) *USAO, App. C at 508-509, reiterates its recommendation that the current sex offense aggravators in D.C. Code § 22-3020²⁴³ should apply to all RCC sex offenses. Currently, the RCC sexual assault statute has several penalty enhancements and, based upon a previous USAO recommendation, the RCC sexual abuse of a minor statute shares several of them. USAO states that the complainant’s young age should be an enhancement to other RCC sex offenses because “although [these other sex offenses] may involve less serious sexual acts,” they should still be punished more severely with a younger complainant than with an older complainant. USAO states that “[t]his same logic also applies to an enhancement for the defendant being in a position of trust or authority over the complainant” and that this should be an enhancement for all other RCC sex offenses that could involve minors because “it is more serious and egregious to*

22-3022(a)(2)(A); RCC § 22E-1311(b)(2)(B)(i)); or 3) evidence of past sexual behavior with the actor where the consent of the complainant is at issue and is offered by the actor on the issue of consent (D.C. Code § 22-3022(a)(3)); RCC § 22E-1311(b)(1)(B)(ii) (requiring the RCC defined term “effective consent.”). Whether the actor was reckless as to the complainant’s age may not categorically fit into these specific categories. The current rape shield statutes and the RCC define “past sexual behavior” as “sexual behavior other than the sexual behavior with respect to which” certain sex offenses is alleged. D.C. Code § 22-3021(b); RCC § 22E-1311.

²³⁹ USAO lists several examples of “extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act” that it states would be admissible under the RCC sexual assault penalty enhancements: “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.”

²⁴⁰ D.C. Code § 22-1834.

²⁴¹ D.C. Code § 22-1839.

²⁴² American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.8; 213.11.

²⁴³ D.C. Code § 22-3020(a) (“Any person who is found guilty of an offense under this subchapter may receive a penalty up to 1 1/2 times the maximum penalty prescribed for the particular offense, and may receive a sentence of more than 30 years up to, and including life imprisonment without possibility of release for first degree sexual abuse or first degree child sexual abuse, if any of the following aggravating circumstances exists: (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.”).

engage in sexual conduct when this relationship exists.” USAO states that “if a defendant acts with one or more accomplices for any sex offense, this behavior should be subject to an enhancement” for both minor complainants and adult complainants. USAO gives as an example, “if a group of doctors commit a sex offense against a patient, or if a group of prison guards commit a sex offense against an inmate, they should be more severely punished than a single defendant who commits that offense alone.”

- The RCC does not incorporate this recommendation because it is unnecessary and may authorize disproportionate penalties for this offense. The RCC sexual abuse by exploitation statute is limited to sexual conduct that occurs without force, threats, coercion, or an intoxicated or incapacitated complainant, as required by the RCC sexual assault offense (RCC § 22E-1301). Other RCC Chapter 13 statutes separately address sexual conduct that involves underage persons in the circumstances described by the D.C. Code § 22-3020 enhancements—e.g., infliction of serious bodily injury, use or threat with a deadly weapon—and those separate statutes provide more severe penalties. If the RCC sexual assault penalty enhancements applied to the RCC sexual abuse by exploitation offense, similar conduct could receive significantly different penalties. For example, if a prison guard uses a dangerous weapon, such as a firearm, to coerce an inmate into having sex with the prison guard, that behavior is more proportionately charged as sexual assault than sexual abuse by exploitation. Or, for example, if a 30-year old prison guard engages in sexual activity with inmate that is under the age of 16 years, the RCC sexual abuse of a minor statute applies and is a more serious offense than sexual abuse by exploitation. The RCC also provides a separate, standardized recidivist enhancement (discussed below). The only enhancement under current D.C. Code § 22-3020 that is not reflected in the RCC sexual abuse by exploitation offense or another RCC Chapter 13 statute is an enhancement for commission of the offense with an accomplice. If, as hypothesized by USAO, a group of doctors or group of prison guards committed a sex offense “against” a complainant without force and without violating the RCC sexual assault statute, this conduct is more proportionately charged as RCC sexual abuse by exploitation and an accomplice penalty enhancement is unnecessary. Notably, CCRC analysis of court data for the relevant statutes (D.C. Code § 22-3009.03; D.C. Code § 22-3013; D.C. Code § 22-3015) shows that in actual practice, for 2010-2019, no convictions for these offenses had any of the enhancements listed in D.C. Code § 22-3020 and the penalties were at most about 2 years.²⁴⁴ Additional enhancements here are unnecessary and would be disproportionate.

(12) *USAO, App. C at 509-510, reiterates its recommendation that a sex offense recidivist penalty enhancement should apply to all sex offenses. USAO states that the general repeat offender enhancement in RCC § 22E-606 “only applies to*

²⁴⁴ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

prior convictions, and does not account for multiple victims within the same case (emphasis in original).” In its previous recommendation, USAO recommended a sex offense recidivist penalty enhancement 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 equivalent offense]; 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 equivalent offense], involving 2 or more victims.”²⁴⁵ The CCRC previously stated, App. D1 at 170, that this recommendation “significantly expand[s] the scope of the current D.C. Code sexual abuse aggravators, which do not contain an aggravator for only one prior conviction, and require crimes to be committed ‘against’ 2 or more victims.” USAO states that “[i]t is unclear” how its recommendation would expand the current D.C. Code sex offense recidivist enhancement²⁴⁶:

“For [the current sex offense recidivist penalty] enhancement to apply, the defendant must have been found guilty of committing at least one offense involving at least one victim in the current case; if there is no finding of guilt on the underlying offense, there could be no finding of guilt on the enhancement. At the time of a finding of guilt in the current case, the defendant therefore ‘is’ guilty of committing a sex offense in the current case. If the defendant has one prior conviction for a sex offense, the defendant ‘has been’ found guilty of a sex offense in a prior case. Thus, at the time of a finding of guilt in the current case, the defendant “is or has been” found guilty of committing sex offenses against 2 or more victims. Moreover, if there are two victims in a single case, then, if the defendant is found guilty of committing offenses against both victims, the defendant ‘is guilty’ of committing sex offenses against 2 or more victims.”

In addition, USAO references the CCRC’s discussion of court data on page 167 of App. D1, where the CCRC noted that based on the limited available statistical evidence, between 2009 and 2015, there were only five instances where an aggravating factor for a sex offense resulted in a sentence higher than the otherwise-authorized statutory maximum, and all of those instances involved an aggravator for a significant relationship, not priors, or multiple victims. USAO states, with additional discussion, that “[j]ust because an aggravator may not raise a sentence above the otherwise-authorized statutory maximum . . . does not mean that it is an irrelevant aggravator.”²⁴⁷

²⁴⁵ App. D1 at 170.

²⁴⁶ The current D.C. Code sex offense recidivist enhancement states: “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.” D.C. Code § 22-3020(a)(5).

²⁴⁷ USAO states:

“The CCRC also notes that, based on the limited available statistical evidence, between 2009 and 2015, there were only five instances where an aggravating factor for a sex offense resulted in a sentence higher than the otherwise-authorized statutory maximum, and all of those instances involved an aggravator

- The RCC does not incorporate this recommendation because it would change current law in a way that leads to inconsistencies with other RCC offenses of similar seriousness and may authorize disproportionate penalties. As the CCRC previously noted in App. D1, 170-171, the plain language of the current recidivist enhancement in D.C. Code § 20-3020(a)(5) is unclear and there is no case law clarifying the issue.²⁴⁸ The RCC general recidivist enhancement provides a

for a significant relationship, not priors or multiple victims. (App. D1 at 167.) Just because an aggravator may not raise a sentence above the otherwise-authorized statutory maximum, however, does not mean that it is an irrelevant aggravator. First, even if an aggravator results in no change to a sentence, it can help represent more fully the nature of the defendant’s conduct. Second, the CCRC noted that the aggravators did not result in a sentence higher than the otherwise-authorized statutory maximum, but did not note (and, indeed, likely does not have access to information regarding) whether the aggravators resulted in a sentence higher than the top of the otherwise-authorized sentencing guidelines range. An aggravator has the effect of both increasing the statutory maximum, and increasing the top of the sentencing guidelines range. A sentence may, therefore, be increased above the otherwise-applicable top of the sentencing guidelines range, even if is below the otherwise-authorized statutory maximum. Third, even if the aggravator does not result in a sentence that exceeds either the otherwise-authorized statutory maximum or otherwise-authorized top of the sentencing guidelines range, it allows USAO to request a higher sentence, which may ultimately result in the judge imposing a higher sentence than the judge would have imposed otherwise. For example, a judge who may have sentenced the defendant to the mid-range of a sentencing guideline range may, after considering the aggravator, sentence the defendant to the top of the sentencing guideline range. This nuance would be difficult to observe in statistical court data.”

²⁴⁸ In its previous recommendation, USAO recommended codifying a sex offense recidivist penalty enhancement when: “(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 equivalent offense].” This recommendation would allow a recidivist enhancement for a single prior conviction, regardless of the identity of the complainant in that case. However, the current D.C. Code sex offense recidivist aggravator applies if the defendant “is or has been found guilty of committing sex offenses *against 2 or more victims*” (D.C. Code § 22-3020(a)(5) (emphasis added)). It does not appear that one prior conviction would be sufficient under this language since it refers to multiple offenses (plural) against two or more victims (plural, indicating different people). Even if D.C. Code § 22-3020(a)(5) were interpreted so that one prior conviction is sufficient, the current aggravator requires that the sex offenses be “against 2 or more victims,” which suggests that a single prior conviction must be against a different complainant than in the instant case or it does not count. The USAO language recommendation, in contrast, appears to expand the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement for a single prior conviction, regardless of the identity of the complainant.

In its previous recommendation, USAO also recommended including a sex offense recidivist penalty enhancement when: “(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 equivalent offense], involving 2 or more victims.” In parsing the current sex offense recidivist aggravator in D.C. Code § 22-3020(a)(5), USAO states that the finding of guilt in the instant case satisfies the “is guilty of” language and that a prior conviction for a sex offense satisfies the “has been found guilty of” language. USAO states that “Thus, at

uniform penalty enhancement for an actor with certain prior convictions. It would be inconsistent with other revised and D.C. Code offenses to provide a recidivist penalty based on the number of victims in an instant case—multiple counts may be brought in such cases, resulting in multiple punishments that can be run consecutively. There is no apparent rationale for singling out sex assaults for this unique kind of enhancement based on prior conduct. Regarding the utility to USAO of an offense-specific recidivist enhancement even when it is not necessary to raise the otherwise applicable statutory minimum, the CCRC notes that the government may present such facts at sentencing where a general recidivist enhancement is charged and even if there is no statutory enhancement the court may take such facts into account and choose to depart from the voluntary sentencing guidelines or otherwise adjust the penalty.

(13) USAO, App. C at 541-542, recommends increasing the maximum possible penalty for a Class 7 felony from 8 years to 10 years. Specific to the RCC sexual abuse by exploitation statute, USAO states that first degree sexual abuse by exploitation is “comparable to” first degree sexual abuse of a secondary education student under current D.C. Code § 22-3009.03, first degree sexual abuse of a ward, patient, client, or prisoner under current D.C. Code § 22-3013, and first degree sexual abuse of a patient or client under current D.C. Code § 22-3015, all of which have a maximum possible penalty of 10 years. USAO states that it “does not believe that the maximum penalt[y]” for first degree sexual abuse by exploitation should be lowered from 10 years’ incarceration to 8 years’ incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.

the time of a finding of guilt in the current case, the defendant ‘is or has been’ found guilty of committing sex offenses against 2 or more victims.” However, this analysis risks rendering the “against 2 or more victims” requirement in the current aggravator surplusage. As the CCRC has noted, under the current aggravator it appears that a prior conviction will only be counted if it is against a different complainant than in the instant case. Another interpretation, not precluded by the plain language, is that for a prior to count, it must involve two or more victims—although this interpretation would exclude many prior sex offenses. The USAO recommendation appears to expand the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement regardless of the identity of complainants.

Finally, in parsing the current D.C. Code sex offense recidivist aggravator, USAO states that “if there are two victims in a single case, then, if the defendant is found guilty of committing offenses against both victims, the defendant ‘is guilty’ of committing sex offenses against 2 or more victims.” While the CCRC would agree that a single case involving two or more findings of guilt against each of two or more complainants appears to satisfy the requirement, a single case with two complainants and but lacking multiple findings of guilt against each, may not satisfy this requirement. D.C. Code § 22-3020(a)(5) (emphasis added). Consequently, the USAO recommendation potentially expands the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement based solely on the number of complainants in a single case.

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;²⁴⁹ 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;²⁵⁰ 5) relative ordering of related RCC offenses;²⁵¹ and 6) national data on sentencing and time served.²⁵² Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the 10 year statutorily authorized penalty for these various offenses (D.C. Code § 22-3009.03; D.C. Code § 22-3013; D.C. Code § 22-3015), actual practice in the District has been sharply different. Court data for 2010-2019 shows that the 97.5% quantile of sentences for all of these offenses, including enhancements, was 24 months (2 years).²⁵³ The CCRC recommendation here wholly encompasses current practice.

(14) *The CCRC recommends deleting current D.C. Code § 22-3019: "No actor is immune from prosecution under any section of this subchapter because of marriage, domestic partnership, or cohabitation with the victim; provided, that marriage or the domestic partnership of the parties may be asserted as an affirmative defense in prosecution under this subchapter where it is expressly so provided." The revised sexual abuse by exploitation statute and other RCC Chapter 13 statutes account for liability changes based on marriage or domestic partnership in the plain language of the statutes and D.C. Code 22-3019 is deleted as unnecessary.*

- This change improves the clarity of the revised statutes.

²⁴⁹ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

²⁵⁰ CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

²⁵¹ CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.

²⁵² See Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

²⁵³ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

RCC § 22E-1304. Sexually Suggestive Conduct with a Minor.

- (1) *USAO, App. C at 511, recommends revising the Commentary to clarify that a defendant who purposely touches his or her own genitalia, including masturbation, falls within the scope of subparagraph (a)(2)(A). USAO does not recommend specific language. USAO states that the RCC clarified in the Commentary for human trafficking offenses that masturbation can qualify as a sexual act or sexual contact.*
 - The RCC incorporates this recommendation by stating in the explanatory note and the commentary to this offense: “To the extent that conduct commonly understood as masturbation meets the RCC definitions of “sexual act” or “sexual contact,” or is a sexual or sexualized display of the genitals, pubic area, or anus, that conduct falls under subparagraph (a)(2)(A) and sub-subparagraphs (a)(2)(A)(i), (a)(2)(A)(ii), and (a)(2)(A)(iii), provided the other requirements of the offense are met.”
- (2) *USAO, App. C at 508, repeats its previous objections to the reasonable mistake of age affirmative defense in the RCC sexual abuse of a minor offense (RCC § 22E-1302) and to the “recklessly” culpable mental state for the age of the complainant in the RCC sexually suggestive conduct with a minor statute. However, USAO recommends that, if the RCC retains the affirmative defense, a similar affirmative defense should apply to the age of the complainant in the RCC sexually suggestive conduct with a minor statute, as opposed to requiring recklessness for this element. USAO does not recommend specific language for such an affirmative defense. USAO states that, unlike the reasonable mistake of age affirmative defense, a requirement of recklessness has “no limitations on what that recklessness must be based on, and no minimum age of a complainant to which it would apply.” USAO acknowledges that the RCC sexual abuse of a minor offense is a “more serious offense that carries more serious penalties” than the RCC sexually suggestive conduct with a minor offense, but states that “the same logic should apply to sex offenses involving minors.” USAO states that “[e]ven when less serious conduct is involved, the government has identical concerns about rape shield laws being implicated, and in reality, creating a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws.” USAO states that “[t]his evidence would be argued to be ‘relevant’ in the same way for all of the child sexual abuse provisions, and complainants should be treated the same and have the same protections regardless of the perceived gravity of the offense.”*
 - The RCC does not incorporate USAO’s recommendation because the “recklessly” culpable mental state improves the proportionality of the revised statute. The RCC sexually suggestive conduct with a minor offense criminalizes a wide range of conduct that does not require the actor to engage in a “sexual act” or “sexual contact” with the complainant and, but for the complainant’s age, often would be perfectly legal

conduct.²⁵⁴ A “recklessly” culpable mental state for the age of the complainant, as opposed to a narrow reasonable mistake of age affirmative defense, is proportionate given the broad scope and comparatively less serious prohibited conduct. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle,²⁵⁵ but recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.²⁵⁶ The “recklessly” culpable mental state does not “create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,”²⁵⁷ which the RCC does not substantively change in any manner, or “extremely prejudicial, and otherwise inadmissible, evidence not specially covered by the Rape Shield Act.”²⁵⁸ Requiring recklessness as to the age of the secondary education student is not inconsistent with robust rape shield laws as, for example, the current D.C. Code sex trafficking of children statute²⁵⁹ already combines a recklessness requirement for the age

²⁵⁴ Depending on the facts, an offensive physical contact (RCC § 22E-1205) or indecent exposure (RCC § 22E-4206) charge may be brought.

²⁵⁵ *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

²⁵⁶ *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) (“There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.

²⁵⁷ USAO lists several examples of “evidence that is known to the defendant” that it states would be admissible under the RCC sexual assault penalty enhancements to prove that the defendant was not reckless as to the age of the complainant, but would not be allowed by the current rape shield statute: “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.” USAO, App. C at 314. However, under the current D.C. Code and RCC rape shield statutes, it appears that this evidence would largely be excluded. To the extent that this evidence is opinion or reputation evidence of the complainant’s “past sexual behavior,” it is excluded under the current and RCC rape shield statutes. See D.C. Code § 22-3021(a); RCC § 22E-1311(a). To the extent that this evidence is evidence of the complainant’s “past sexual behavior” and is not reputation or opinion evidence, it is not admissible unless certain procedural requirements are met and it fits it within specific narrow categories. These narrow categories are: 1) evidence that is “constitutionally required to be admitted” (D.C. Code 22-3022(a)(1); RCC § 22E-1311(b)(1)(A)); 2) evidence of past sexual behavior with persons other than the actor, offered by the actor, on the issue of whether or not the actor is the source of semen or bodily injury (D.C. Code § 22-3022(a)(2)(A); RCC § 22E-1311(b)(2)(B)(i)); or 3) evidence of past sexual behavior with the actor where the consent of the complainant is at issue and is offered by the actor on the issue of consent (D.C. Code § 22-3022(a)(3)); RCC § 22E-1311(b)(1)(B)(ii) (requiring the RCC defined term “effective consent.”). Whether the actor was reckless as to the complainant’s age may not categorically fit into these specific categories. The current rape shield statutes and the RCC define “past sexual behavior” as “sexual behavior other than the sexual behavior with respect to which” certain sex offenses is alleged. D.C. Code § 22-3021(b); RCC § 22E-1311.

²⁵⁸ USAO lists several examples of “extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act” that it states would be admissible under the RCC sexual assault penalty enhancements: “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.”

²⁵⁹ D.C. Code § 22-1834.

of the complainant with a Rape Shield law.²⁶⁰ In addition, the CCRC notes that the American Law Institute’s most recent draft revised sexual abuse of a minor statute requires recklessness as to the age of the complainant, including a complainant under the age of 12 years, and also has a Rape Shield provision.²⁶¹

(3) *USAO, App. C at 508-509, reiterates its recommendation that the current sex offense aggravators in D.C. Code § 22-3020²⁶² should apply to all RCC sex offenses. Currently, the RCC sexual assault statute has several penalty enhancements and, based upon a previous USAO recommendation, the RCC sexual abuse of a minor statute shares several of them. USAO states that the complainant’s young age should be an enhancement to other RCC sex offenses because “although [these other sex offenses] may involve less serious sexual acts,” they should still be punished more severely with a younger complainant than with an older complainant. USAO gives as an example that “it should be . . . more severely punished to engage in sexually suggestive conduct with a 9-year old child than . . . with a 15 year old child.” USAO states that “[t]his same logic also applies to an enhancement for the defendant being in a position of trust or authority over the complainant” and that this should be an enhancement for all other RCC sex offenses that could involve minors because “it is more serious and egregious to engage in sexual conduct when this relationship exists.” USAO gives as an example “a defendant who is a child’s biological parent who engages in sexually suggestive conduct . . . should be subject to a higher penalty than a defendant who engages in [this offense] where there is no significant relationship.” USAO states that “if a defendant acts with one or more accomplices for any sex offense, this behavior should be subject to an enhancement” for both minor complainants and adult complainants.*

- The RCC does not incorporate this recommendation because it is unnecessary and may authorize disproportionate penalties. The RCC sexually suggestive conduct statute is limited to comparatively less serious sexual conduct, such as kissing or removing clothing, that occurs without force, threats, coercion, or an intoxicated or incapacitated complainant, as required by the RCC sexual assault offense (RCC § 22E-1301). Other RCC Chapter 13 statutes separately address sexual conduct that involves underage persons in the circumstances described by the D.C. Code § 22-

²⁶⁰ D.C. Code § 22–1839.

²⁶¹ American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.8; 213.11.

²⁶² D.C. Code § 22-3020(a) (“Any person who is found guilty of an offense under this subchapter may receive a penalty up to 1 1/2 times the maximum penalty prescribed for the particular offense, and may receive a sentence of more than 30 years up to, and including life imprisonment without possibility of release for first degree sexual abuse or first degree child sexual abuse, if any of the following aggravating circumstances exists: (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.”).

3020 enhancements—e.g., infliction of serious bodily injury, use or threat with a deadly weapon—and those separate statutes provide more severe penalties. If the RCC sexual assault penalty enhancements applied to the RCC sexually suggestive conduct offense, similar conduct could receive significantly different penalties. For example, if a 20 year old defendant uses a dangerous weapon, such as a firearm, to coerce a complainant under the age of 16 years into kissing the defendant, that behavior may be more proportionately charged as attempted sexual assault or attempted sexual abuse of a minor. The RCC also provides a separate, standardized recidivist enhancement (discussed below). The only enhancement under current D.C. Code § 22-3020 that is not reflected in another RCC Chapter 13 statute is an enhancement for commission of the offense with an accomplice, and enhancement appears to be unnecessary. Notably, CCRC analysis of court data for the Misdemeanor sexual abuse of a child or minor statute shows that in actual practice, for 2010-2019, few convictions for these offenses had any of the enhancements listed in D.C. Code § 22-3020 (<25%) and the penalties were at most about 6 months (not exceeding the regular statutory maximum without any enhancements).²⁶³ Additional enhancements here are unnecessary and would be disproportionate.

- (4) *USAO, App. C at 509-510, reiterates its recommendation that a sex offense recidivist penalty enhancement should apply to all sex offenses. USAO states that the general repeat offender enhancement in RCC § 22E-606 “only applies to prior convictions, and does not account for multiple victims within the same case (emphasis in original).” In its previous recommendation, USAO recommended a sex offense recidivist penalty enhancement 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 equivalent offense]; 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 equivalent offense], involving 2 or more victims.”*²⁶⁴ *The CCRC previously stated, App. D1 at 170, that this recommendation “significantly expand[s] the scope of the current D.C. Code sexual abuse aggravators, which do not contain an aggravator for only one prior conviction, and require crimes to be committed ‘against’ 2 or more victims.” USAO states that “[i]t is unclear” how its recommendation would expand the current D.C. Code sex offense recidivist enhancement*²⁶⁵:

“For [the current sex offense recidivist penalty] enhancement to apply, the defendant must have been found guilty of committing at least one offense involving at least one victim in the current case; if

²⁶³ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

²⁶⁴ App. D1 at 170.

²⁶⁵ The current D.C. Code sex offense recidivist enhancement states: “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.” D.C. Code § 22-3020(a)(5).

there is no finding of guilt on the underlying offense, there could be no finding of guilt on the enhancement. At the time of a finding of guilt in the current case, the defendant therefore 'is' guilty of committing a sex offense in the current case. If the defendant has one prior conviction for a sex offense, the defendant 'has been' found guilty of a sex offense in a prior case. Thus, at the time of a finding of guilt in the current case, the defendant "is or has been" found guilty of committing sex offenses against 2 or more victims. Moreover, if there are two victims in a single case, then, if the defendant is found guilty of committing offenses against both victims, the defendant 'is guilty' of committing sex offenses against 2 or more victims."

In addition, USAO references the CCRC's discussion of court data on page 167 of App. D1, where the CCRC noted that based on the limited available statistical evidence, between 2009 and 2015, there were only five instances where an aggravating factor for a sex offense resulted in a sentence higher than the otherwise-authorized statutory maximum, and all of those instances involved an aggravator for a significant relationship, not priors, or multiple victims. USAO states, with additional discussion, that "[j]ust because an aggravator may not raise a sentence above the otherwise-authorized statutory maximum . . . does not mean that it is an irrelevant aggravator."²⁶⁶

²⁶⁶ USAO states:

“The CCRC also notes that, based on the limited available statistical evidence, between 2009 and 2015, there were only five instances where an aggravating factor for a sex offense resulted in a sentence higher than the otherwise-authorized statutory maximum, and all of those instances involved an aggravator for a significant relationship, not priors or multiple victims. (App. D1 at 167.) Just because an aggravator may not raise a sentence above the otherwise-authorized statutory maximum, however, does not mean that it is an irrelevant aggravator. First, even if an aggravator results in no change to a sentence, it can help represent more fully the nature of the defendant's conduct. Second, the CCRC noted that the aggravators did not result in a sentence higher than the otherwise-authorized statutory maximum, but did not note (and, indeed, likely does not have access to information regarding) whether the aggravators resulted in a sentence higher than the top of the otherwise-authorized sentencing guidelines range. An aggravator has the effect of both increasing the statutory maximum, and increasing the top of the sentencing guidelines range. A sentence may, therefore, be increased above the otherwise-applicable top of the sentencing guidelines range, even if is below the otherwise-authorized statutory maximum. Third, even if the aggravator does not result in a sentence that exceeds either the otherwise-authorized statutory maximum or otherwise-authorized top of the sentencing guidelines range, it allows USAO to request a higher sentence, which may ultimately result in the judge imposing a higher sentence than the judge would have imposed otherwise. For example, a judge who may have sentenced the defendant to the mid-range of a sentencing guideline range may, after considering the aggravator, sentence the defendant to the top of the sentencing guideline range. This nuance would be difficult to observe in statistical court data.”

- The RCC does not incorporate this recommendation because it would change current law in a way that leads to inconsistencies with other RCC offenses of similar seriousness and may authorize disproportionate penalties. As the CCRC previously noted in App. D1, 170-171, the plain language of the current recidivist enhancement in D.C. Code § 20-3020(a)(5) is unclear and there is no case law clarifying the issue.²⁶⁷ The RCC general recidivist enhancement provides a uniform penalty enhancement for an actor with certain prior convictions. It would be inconsistent with other revised and D.C. Code offenses to provide a recidivist penalty based on the number of victims in an instant case—multiple counts may be brought in such cases, resulting in multiple punishments that can be run consecutively. There is no apparent rationale for singling out sex assaults for this unique kind of enhancement based on prior conduct.

²⁶⁷ In its previous recommendation, USAO recommended codifying a sex offense recidivist penalty enhancement when: “(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 equivalent offense].” This recommendation would allow a recidivist enhancement for a single prior conviction, regardless of the identity of the complainant in that case. However, the current D.C. Code sex offense recidivist aggravator applies if the defendant “is or has been found guilty of committing sex offenses *against 2 or more victims*” (D.C. Code § 22-3020(a)(5) (emphasis added)). It does not appear that one prior conviction would be sufficient under this language since it refers to multiple offenses (plural) against two or more victims (plural, indicating different people). Even if D.C. Code § 22-3020(a)(5) were interpreted so that one prior conviction is sufficient, the current aggravator requires that the sex offenses be “against 2 or more victims,” which suggests that a single prior conviction must be against a different complainant than in the instant case or it does not count. The USAO language recommendation, in contrast, appears to expand the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement for a single prior conviction, regardless of the identity of the complainant.

In its previous recommendation, USAO also recommended including a sex offense recidivist penalty enhancement when: “(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 equivalent offense], involving 2 or more victims.” In parsing the current sex offense recidivist aggravator in D.C. Code § 22-3020(a)(5), USAO states that the finding of guilt in the instant case satisfies the “is guilty of” language and that a prior conviction for a sex offense satisfies the “has been found guilty of” language. USAO states that “Thus, at the time of a finding of guilt in the current case, the defendant ‘is or has been’ found guilty of committing sex offenses against 2 or more victims.” However, this analysis risks rendering the “against 2 or more victims” requirement in the current aggravator surplusage. As the CCRC has noted, under the current aggravator it appears that a prior conviction will only be counted if it is against a different complainant than in the instant case. Another interpretation, not precluded by the plain language, is that for a prior to count, it must involve two or more victims—although this interpretation would exclude many prior sex offenses. The USAO recommendation appears to expand the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement regardless of the identity of complainants.

Finally, in parsing the current D.C. Code sex offense recidivist aggravator, USAO states that “if there are two victims in a single case, then, if the defendant is found guilty of committing offenses against both victims, the defendant ‘is guilty’ of committing sex offenses against 2 or more victims.” While the CCRC would agree that a single case involving two or more findings of guilt against each of two or more complainants appears to satisfy the requirement, a single case with two complainants and but lacking multiple findings of guilt against each, may not satisfy this requirement. D.C. Code § 22-3020(a)(5) (emphasis added). Consequently, the USAO recommendation potentially expands the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement based solely on the number of complainants in a single case.

Regarding the utility to USAO of an offense-specific recidivist enhancement even when it is not necessary to raise the otherwise applicable statutory minimum, the CCRC notes that the government may present such facts at sentencing where a general recidivist enhancement is charged and even if there is no statutory enhancement the court may take such facts into account and choose to depart from the voluntary sentencing guidelines or otherwise adjust the penalty.

- (5) *The CCRC recommends deleting current D.C. Code § 22-3019: "No actor is immune from prosecution under any section of this subchapter because of marriage, domestic partnership, or cohabitation with the victim; provided, that marriage or the domestic partnership of the parties may be asserted as an affirmative defense in prosecution under this subchapter where it is expressly so provided." The revised sexually suggestive conduct with a minor statute and other RCC Chapter 13 statutes account for liability changes based on marriage or domestic partnership in the plain language of the statutes and D.C. Code 22-3019 is deleted as unnecessary.*
- This change improves the clarity of the revised statutes.

RCC § 22E-1305. Enticing a Minor into Sexual Conduct.

(1) *USAO, App. C at 511, recommends reinstating a deleted provision: “Persuades or entices, or attempts to persuade or entice, the complainant to go to another location and plans to cause the complainant to engage in or submit to a sexual act or sexual contact at that location.” In App D1, page 203, the CCRC stated that it deleted this provision because it overlaps with either the RCC kidnapping offense or the RCC attempted kidnapping offense. USAO states, however, that “[f]or most enticing cases . . . there would be no overlap in liability, and this deletion would, in fact, create a gap in liability” because the RCC kidnapping offense “requires that the defendant actually move the complainant” and in enticing cases a defendant “rarely” moves a complainant. USAO states that “the point of enticing is that the defendant ‘enticed’ the complainant to move on the complaint’s own volition.” In addition, USAO states that the RCC kidnapping offense requires that either the defendant lack the complainant’s effective consent or that a person with legal authority over the complainant would not have provided effective consent for the complainant to be moved. USAO states that the RCC definition of “effective consent” does not have an exception for a child “so a child could provide effective consent [and was] likely groomed by the defendant to provide that effective consent.” USAO states that a person with legal authority over the complainant “may have provided the defendant with authority to move the complainant to a particular location, but not permission to engage in sexual conduct with the complainant.” USAO states that “there are also situations where a person with legal authority over the complainant may have provided the defendant with permission to engage in sexual conduct with the complainant, or may even be the person engaging in sexual conduct with the complainant.”*

- The RCC does not incorporate this recommendation because reinstating the deleted provision would create unnecessary overlap between the RCC enticing offense and the RCC kidnapping and attempted kidnapping offenses. If the defendant entices the complainant and moves the complainant, and the other requirements of the RCC kidnapping offense (RCC § 22E-1401) are met, there is liability for kidnapping. If the defendant does not move the complainant, there may be liability for attempted kidnapping under the general RCC attempt statute (RCC § 22E-301). In addition, if the enticing does not satisfy either the RCC kidnapping or attempted kidnapping offenses, there would still be liability under the RCC enticing offense if the defendant “command[ed], request[ed], or trie[d] to persuade the complainant” to engage in or submit to a sexual act or sexual contact. Deleting the provision does not create a gap in liability, but distinguishes between conduct that is more proportionately charged as kidnapping, attempted kidnapping, or enticing, as those offenses are drafted in the RCC. The RCC kidnapping and RCC attempted kidnapping offenses have higher penalties than the RCC enticing statute and providing separate liability in the RCC enticing statute for moving or attempting to move the complainant risks disproportionate penalties for similar conduct.

- The RCC first degree kidnapping offense provides liability for moving or confining a person with intent to commit a sex offense, regardless of the minor’s effective consent, when the actor is 18 years of age or older and reckless as to the fact that the complainant is under 16 years of age and four years younger than the actor and a person with legal authority over the complainant who is acting consistent with that authority has not given effective consent to the confinement or movement. First degree kidnapping liability also exists for moving or confining a person with intent to commit a sex offense without the complainant’s effective consent. Notably, under the RCC definition of “consent,”²⁶⁸ a minor, particularly a minor that has been “groomed,” may not be able to give “effective consent” to conduct that constitutes enticing. In addition, even if a minor under age 16 and a person with legal authority over the minor did give effective consent to movement, which precluded liability for kidnapping, the defendant would still have liability under the RCC enticing statute for soliciting, “command[ing], request[ing], or tr[ying] to persuade the complainant,” to engage in or submit to a sexual act or sexual contact that constitutes sexual abuse of a minor.²⁶⁹ Deleting the provision does not create a gap in liability, but distinguishes between conduct that is more proportionately charged as kidnapping, attempted kidnapping, or enticing, as those offenses are drafted in the RCC.
- USAO states correctly that if a person with legal authority over the complainant gives effective consent to the defendant to confine or move the complainant, but not to the sexual conduct, there may be no liability for kidnapping or attempted kidnapping under the RCC. However, depending on the facts of the case, there would still be liability under the RCC enticing statute.²⁷⁰ In addition, due to the RCC definition of

²⁶⁸ RCC § 22E-701 defines “effective consent” as “consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception.” The definition does not explicitly reference the age of the complainant, but the RCC definition of “consent” does. RCC § 22E-701 defines “consent” in relevant part to exclude consent “given by a person who . . . [b]ecause of youth . . . is believed by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct to constitute the offense or to the result thereof.” Consequently, the RCC definition of “consent” may exclude a minor that gives consent, especially if that minor has been “groomed.”

²⁶⁹ As an example consider a 40 year-old defendant that asks a 15-year old complainant to come to the defendant’s house to engage in a sexual act. If the complainant consents and the consent satisfies the RCC definition of “effective consent,” there would be no liability for kidnapping under the RCC. However, there would be liability under the RCC enticing statute for the defendant trying to persuade the complainant to engage in a sexual act. In addition, depending on the facts of the case, the defendant may instead have liability for attempted sexual abuse of a minor.

²⁷⁰ As an example consider a 40 year-old defendant that asks the parent of a 15-year old complainant if the complainant can come to the defendant’s house to mow the lawn. The parent consents, and only later, when the complainant is at the defendant’s house, does the defendant decide to ask the complainant to engage in a sexual act. The defendant would not have liability for kidnapping under the RCC. However, there would be liability under the RCC enticing statute for the defendant trying to persuade the complainant

“effective consent,” if the defendant obtained consent to move or confine the complainant by deception as to the purpose of the movement or confinement, there would be no “effective consent,” and there may still be liability under the RCC kidnapping or RCC attempted kidnapping offenses.²⁷¹ Deleting the provision does not create a gap in liability, but distinguishes between conduct that is more proportionately charged as kidnapping, attempted kidnapping, or enticing, as those offenses are drafted in the RCC.

- USAO states that there are “situations where a person with legal authority over the complainant may have provided the defendant with permission to engage in sexual conduct with the complainant.” It is unnecessary to reinstate the deleted provision to provide liability in this situation. Depending on the facts of the case, a person with legal authority over a minor complainant that gives effective consent to the defendant to engage in a sexual act or sexual contact with the complainant may have liability for arranging for sexual conduct with a minor or person incapable of consenting (RCC § 22E-1306), or liability as an accomplice to a sex offense or attempted sex offense under the RCC general accomplice liability provision (RCC § 22E-210). The RCC kidnapping statute also provides liability where the complainant is under 16 and four years younger and, “A person with legal authority over the complainant *who is acting consistent with that authority* has not given effective consent to the confinement or movement” (emphasis added).
- USAO states that there are “situations where a person with legal authority over the complainant . . . may even be the person engaging in sexual conduct with the complainant.” It is unnecessary to reinstate the deleted provision to provide liability in this situation. Depending on the facts of the case, the RCC sex offenses would provide liability for the actor’s conduct.

(2) *USAO, App. C at 508, repeats its previous objections to the reasonable mistake of age affirmative defense in the RCC sexual abuse of a minor offense (RCC § 22E-1302) and to the “recklessly” culpable mental state for the age of the complainant in the RCC enticing a minor into sexual conduct statute. However, USAO recommends that, if the RCC retains the affirmative defense, a similar affirmative defense should apply to the age of the complainant in the RCC*

to engage in a sexual act. In addition, depending on the facts of the case, the defendant may instead have liability for attempted sexual abuse of a minor.

²⁷¹ RCC § 22E-701 defines “effective consent” as “consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception” and also defines “deception.” A defendant that obtains the consent of a person with legal authority over a minor complainant to move or confine the complainant by lying about or misrepresenting the defendant’s purpose would likely not have obtained that person’s effective consent. For example, if the defendant asks the parent of a minor for consent to take the minor to a museum, but is secretly intending to engage in sexual activity with that minor, there may still be liability for kidnapping or attempted kidnapping under the RCC.

enticing a minor into sexual conduct statute, as opposed to requiring recklessness for this element. USAO does not recommend specific language for such an affirmative defense. USAO states that, unlike the reasonable mistake of age affirmative defense, a requirement of recklessness has “no limitations on what that recklessness must be based on, and no minimum age of a complainant to which it would apply.” USAO acknowledges that the RCC sexual abuse of a minor offense is a “more serious offense that carries more serious penalties” than the RCC enticing a minor into sexual conduct offense, but states that “the same logic should apply to sex offenses involving minors.” USAO states that “[e]ven when less serious conduct is involved, the government has identical concerns about rape shield laws being implicated, and in reality, creating a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws.” USAO states that “[t]his evidence would be argued to be ‘relevant’ in the same way for all of the child sexual abuse provisions, and complainants should be treated the same and have the same protections regardless of the perceived gravity of the offense.”

- The RCC does not incorporate USAO’s recommendation because the “recklessly” culpable mental state improves the proportionality of the revised statute. The RCC enticing statute criminalizes commanding, requesting, or trying to persuade a complainant to engage in or submit to a sexual act or sexual contact, and can be committed without the actor seeing the complainant, such as over the internet. The age of the complainant is the sole fact making otherwise legal conduct a crime. A “recklessly” culpable mental state for the age of the complainant, as opposed to a narrow reasonable mistake of age affirmative defense, is proportionate given the inchoate nature of the offense and the fact that liability turns on the complainant’s age. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle,²⁷² but recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.²⁷³ The “recklessly” culpable mental state does not “create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,”²⁷⁴ which the RCC does not substantively change in any

²⁷² *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

²⁷³ *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) (“There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.

²⁷⁴ USAO lists several examples of “evidence that is known to the defendant” that it states would be admissible under the RCC sexual assault penalty enhancements to prove that the defendant was not reckless as to the age of the complainant, but would not be allowed by the current rape shield statute: “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.” USAO, App. C at 314. However, under the current D.C. Code and RCC rape shield statutes, it appears that this evidence would largely be excluded. To the extent that this evidence is opinion or reputation evidence of the complainant’s “past sexual behavior,” it is excluded under the current and RCC rape shield statutes. See

manner, or “extremely prejudicial, and otherwise inadmissible, evidence not specially covered by the Rape Shield Act.”²⁷⁵ Requiring recklessness as to the age of the secondary education student is not inconsistent with robust rape shield laws as, for example, the current D.C. Code sex trafficking of children statute²⁷⁶ already combines a recklessness requirement for the age of the complainant with a Rape Shield law.²⁷⁷ In addition, the CCRC notes that the American Law Institute’s most recent draft revised sexual abuse of a minor statute requires recklessness as to the age of the complainant, including a complainant under the age of 12 years, and also has a Rape Shield provision.²⁷⁸

- (3) *The CCRC recommends amending the commentary for enticing to note that the RCC offense replaces the indecent sexual proposal to a minor offense in current D.C. Code § 22-1312 (“It is unlawful for a person to make an obscene or indecent sexual proposal to a minor.”). The offense has a maximum term of imprisonment of 90 days.²⁷⁹ The current D.C. Code indecent sexual proposal to a minor offense appears to overlap²⁸⁰ with the current D.C. Code enticing a minor*

D.C. Code § 22-3021(a); RCC § 22E-1311(a). To the extent that this evidence is evidence of the complainant’s “past sexual behavior” and is not reputation or opinion evidence, it is not admissible unless certain procedural requirements are met and it fits it within specific narrow categories. These narrow categories are: 1) evidence that is “constitutionally required to be admitted” (D.C. Code 22-3022(a)(1); RCC § 22E-1311(b)(1)(A)); 2) evidence of past sexual behavior with persons other than the actor, offered by the actor, on the issue of whether or not the actor is the source of semen or bodily injury (D.C. Code § 22-3022(a)(2)(A); RCC § 22E-1311(b)(2)(B)(i)); or 3) evidence of past sexual behavior with the actor where the consent of the complainant is at issue and is offered by the actor on the issue of consent (D.C. Code § 22-3022(a)(3)); RCC § 22E-1311(b)(1)(B)(ii) (requiring the RCC defined term “effective consent.”). Whether the actor was reckless as to the complainant’s age may not categorically fit into these specific categories. The current rape shield statutes and the RCC define “past sexual behavior” as “sexual behavior other than the sexual behavior with respect to which” certain sex offenses is alleged. D.C. Code § 22-3021(b); RCC § 22E-1311.

²⁷⁵ USAO lists several examples of “extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act” that it states would be admissible under the RCC sexual assault penalty enhancements: “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.”

²⁷⁶ D.C. Code § 22-1834.

²⁷⁷ D.C. Code § 22-1839.

²⁷⁸ American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.8; 213.11.

²⁷⁹ D.C. Code § 22-1312.

²⁸⁰ The DCCA has not interpreted the current D.C. Code indecent sexual proposal to a minor offense. However, the DCCA did interpret an earlier, substantively similar, version of the offense that prohibited making “any lewd, obscene, or indecent sexual proposal.” The DCCA stated that in this earlier version, a “sexual proposal . . . connotes virtually the same conduct or speech-conduct as a sexual solicitation; the term clearly implies a personal importunity addressed to a particular individual to do some sexual act.... [G]iven the nature of the common law offense of solicitation, it is appropriate to construe the sexual proposal clause . . . as limited to solicitations to commit lewd, obscene or indecent sexual acts which if accomplished would be punishable as a crime.” *Pinckney v. United States*, 906 A.2d 301, 307 (D.C. 2006) (quoting *District of Columbia v. Garcia*, 335 A.2d 217, 219 (D.C. 1975)).

offense, which prohibits, in relevant part, enticing certain complainants under the age of 18 years to engage in a sexual act or sexual contact.²⁸¹ The current D.C. Code enticing offense has a maximum term of imprisonment of five years, and it is disproportionate to penalize the same conduct under a separate 90 day offense. To the extent that the current D.C. Code indecent sexual proposal to a minor offense does not overlap with the current D.C. Code enticing a minor offense, it may criminalize non-obscene speech to a minor in a content-based manner that raises both vagueness and First Amendment issues. The commentary to the RCC enticing offense has been updated to reflect that this is a substantive change to current District law.

- This change improves the clarity, consistency, and proportionality of the revised statutes.

- (4) *The CCRC recommends reducing the penalty classification for enticing a minor into sexual conduct from a Class 8 felony, with a maximum penalty of five years, to a Class 9 felony, with a maximum penalty of three years. The current D.C. Code enticing statute has a maximum penalty of five years,²⁸² which is lower than the current D.C. Code penalties for sexual abuse of a child²⁸³ and sexual abuse of a minor.²⁸⁴ In the RCC, however, five years is the same as the maximum penalty for sixth degree sexual abuse of a minor (RCC § 22E-1302(f)). It is disproportionate for an inchoate offense like an enticing a minor to have the same penalty as a completed offense. In addition, a higher maximum penalty for enticing a minor is unnecessary to proportionately penalize the prohibited conduct. The RCC enticing statute requires a “knowingly” culpable mental state. If an actor “purposely” solicits a minor for a sexual act or sexual contact and satisfies the requirements of the RCC solicitation statute (RCC § 22E-302), the*

It seems likely that the DCCA would similarly interpret the prohibition in current D.C. Code § 22-1312 on making “an obscene or indecent sexual proposal” to a minor as limited to solicitations to commit lewd, obscene or indecent sexual acts which if accomplished would be punishable as a crime. The earlier version of the offense differed from the current D.C. Code version of the offense only in that it: 1) included “any lewd, obscene, or indecent sexual proposal,” as opposed to any “obscene or indecent sexual proposal” in the current D.C. Code offense; and 2) did not require that the proposal be “to a minor” like the current D.C. Code offense. Under this interpretation, there is substantial overlap with the current D.C. Code enticing a minor statute, which prohibits soliciting certain minors to engage in a “sexual act” or “sexual contact.”

²⁸¹ D.C. Code § 22-3010(a) (“Whoever, being at least 4 years older than a child or being in a significant relationship with a minor . . . (2) seduces, entices, allures, convinces, or persuades or attempts to seduce, entice, allure, convince, or persuade a child or minor to engage in a sexual act or contact shall be imprisoned for not more than 5 years or may be fined not more than the amount set forth in § 22-3571.01, or both.”).

²⁸² D.C. Code § 22-3010.

²⁸³ The current D.C. Code first degree sexual abuse of a child statute has a maximum possible penalty of 30 years unless certain aggravators and conditions are met. D.C. Code § 22-3008. The current D.C. Code second degree sexual abuse of a child statute has a maximum possible penalty of ten years. D.C. Code § 22-3009.

²⁸⁴ The current D.C. Code first degree sexual abuse of a minor statute has a maximum possible penalty of 15 years. D.C. Code § 22-3009.01. The current D.C. Code second degree sexual abuse of a minor statute has a maximum possible penalty of 7.5 years. D.C. Code § 22-3009.02.

*penalties are generally significantly higher than the 3 year maximum penalty for the RCC enticing offense. Court data for 2010-2019 shows that the 97.5% quantile of sentences for the enticing statute, including enhancements, was 35.4 months, with the 97.5% quantile of actual time to serve 28.1 months.*²⁸⁵

- This change improves the proportionality of the revised statute.
- (5) *USAO, App. C at 508-509, reiterates its recommendation that the current sex offense aggravators in D.C. Code § 22-3020²⁸⁶ should apply to all RCC sex offenses. Currently, the RCC sexual assault statute has several penalty enhancements and, based upon a previous USAO recommendation, the RCC sexual abuse of a minor statute shares several of them. USAO states that the complainant’s young age should be an enhancement to other RCC sex offenses because “although [these other sex offenses] may involve less serious sexual acts,” they should still be punished more severely with a younger complainant than with an older complainant. USAO gives as an example that “it should be . . . more severely punished to engage in sexually suggestive conduct with a 9-year old child than . . . with a 15 year old child” and states that “[t]his logic applies similarly to other sex offenses that necessarily involve minors,” such as enticing. USAO states that “[t]his same logic also applies to an enhancement for the defendant being in a position of trust or authority over the complainant” and that this should be an enhancement for all other RCC sex offenses that could involve minors because “it is more serious and egregious to engage in sexual conduct when this relationship exists.” USAO gives as an example “a defendant who is a child’s biological parent who engages in sexually suggestive conduct . . . should be subject to a higher penalty than a defendant who engages in [this offense] where there is no significant relationship.” USAO states that “if a defendant acts with one or more accomplices for any sex offense, this behavior should be subject to an enhancement” for both minor complainants and adult complainants.*
- The RCC does not incorporate this recommendation because it is unnecessary and may authorize disproportionate penalties. The RCC enticing statute is limited to comparatively less serious sexual conduct of commanding, requesting, or trying to persuade a minor complainant to engage in or submit to a sexual act or sexual contact, without force, threats, coercion, or an intoxicated or incapacitated complainant, as required by the RCC sexual assault offense (RCC § 22E-1301). Other

²⁸⁵ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

²⁸⁶ D.C. Code § 22-3020(a) (“Any person who is found guilty of an offense under this subchapter may receive a penalty up to 1 1/2 times the maximum penalty prescribed for the particular offense, and may receive a sentence of more than 30 years up to, and including life imprisonment without possibility of release for first degree sexual abuse or first degree child sexual abuse, if any of the following aggravating circumstances exists: (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.”).

RCC Chapter 13 statutes separately address sexual conduct that involves underage persons in the circumstances described by the D.C. Code § 22-3020 enhancements—e.g., infliction of serious bodily injury, use or threat with a deadly weapon—and those separate statutes provide more severe penalties. The RCC enticing statute uses language identical to the general RCC solicitation statute (RCC § 22E-302) (“commands, requests, or tries to persuade”), but requires a lower culpable mental (“knowingly”) than does solicitation (“purposely”). If an actor “purposely” solicits a minor and satisfies the requirements of the general RCC solicitation statute, applying the general RCC solicitation statute to the RCC sexual abuse of a minor statute generally results in higher penalties than the RCC enticing offense²⁸⁷ and grades based on circumstances like those addressed in D.C. Code § 22-3020—e.g., the under 12 age of the complainant or whether the actor is in a “position of trust with or authority over” the complainant. If the RCC sexual assault penalty enhancements applied to the RCC enticing statute, similar conduct could receive significantly different penalties. The RCC also provides a separate, standardized recidivist enhancement (discussed below). The only enhancement under current D.C. Code § 22-3020 that is not reflected in the RCC enticing offense or another RCC Chapter 13 statute is an enhancement for commission of the offense with an accomplice, and enhancement appears to be unnecessary. Notably, CCRC analysis of court data for the current enticing statute shows that in actual practice, for 2010-2019, few convictions for these offenses had any of the enhancements listed in D.C. Code § 22-3020 (<25%) and the penalty or penalties that were enhanced still did not exceed the regular statutory maximum without any enhancements.²⁸⁸ Additional enhancements here are unnecessary and would be disproportionate.

- (6) *USAO, App. C at 509-510, reiterates its recommendation that a sex offense recidivist penalty enhancement should apply to all sex offenses. USAO states that the general repeat offender enhancement in RCC § 22E-606 “only applies to prior convictions, and does not account for multiple victims within the same case (emphasis in original).” In its previous recommendation, USAO recommended a sex offense recidivist penalty enhancement when either: “(1) The offender, in fact, has one or more previous convictions for a District of Columbia sexual offense*

²⁸⁷ The penalty under the RCC general solicitation statute is one-half the penalty of the underlying offense, in this case the RCC sexual abuse of a minor statute. Soliciting to commit first degree sexual abuse of a minor has a penalty of 12 years (one-half of the maximum penalty of 24 years for first degree sexual abuse of a minor, per Third Draft of Report #41). Soliciting to commit second degree sexual abuse of a minor has a penalty of 9 years (one-half of the maximum penalty of 18 years for second degree sexual abuse of a minor, per Third Draft of Report #41). Soliciting to commit third degree sexual abuse of a minor has a penalty of 6 years (one-half of the maximum penalty of 12 years for third degree sexual abuse of a minor, per Third Draft of Report #41).

Similarly, per the Third Draft of Report #41, the maximum possible penalty for soliciting to commit fourth degree sexual abuse of a minor is 6 years, the maximum possible penalty for soliciting to commit fifth degree sexual abuse of a minor is 4 years, and the maximum possible penalty for soliciting to commit sixth degree sexual abuse of a minor is 2.5 years.

²⁸⁸ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

defined in Chapter 13 of this Title [or an equivalent offense]; 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 equivalent offense], involving 2 or more victims.”²⁸⁹ The CCRC previously stated, App. D1 at 170, that this recommendation “significantly expand[s] the scope of the current D.C. Code sexual abuse aggravators, which do not contain an aggravator for only one prior conviction, and require crimes to be committed ‘against’ 2 or more victims.” USAO states that “[i]t is unclear” how its recommendation would expand the current D.C. Code sex offense recidivist enhancement²⁹⁰:

“For [the current sex offense recidivist penalty] enhancement to apply, the defendant must have been found guilty of committing at least one offense involving at least one victim in the current case; if there is no finding of guilt on the underlying offense, there could be no finding of guilt on the enhancement. At the time of a finding of guilt in the current case, the defendant therefore ‘is’ guilty of committing a sex offense in the current case. If the defendant has one prior conviction for a sex offense, the defendant ‘has been’ found guilty of a sex offense in a prior case. Thus, at the time of a finding of guilt in the current case, the defendant “is or has been” found guilty of committing sex offenses against 2 or more victims. Moreover, if there are two victims in a single case, then, if the defendant is found guilty of committing offenses against both victims, the defendant ‘is guilty’ of committing sex offenses against 2 or more victims.”

In addition, USAO references the CCRC’s discussion of court data on page 167 of App. D1, where the CCRC noted that based on the limited available statistical evidence, between 2009 and 2015, there were only five instances where an aggravating factor for a sex offense resulted in a sentence higher than the otherwise-authorized statutory maximum, and all of those instances involved an aggravator for a significant relationship, not priors, or multiple victims. USAO states, with additional discussion, that “[j]ust because an aggravator may not raise a sentence above the otherwise-authorized statutory maximum . . . does not mean that it is an irrelevant aggravator.”²⁹¹

²⁸⁹ App. D1 at 170.

²⁹⁰ The current D.C. Code sex offense recidivist enhancement states: “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.” D.C. Code § 22-3020(a)(5).

²⁹¹ USAO states:

“The CCRC also notes that, based on the limited available statistical evidence, between 2009 and 2015, there were only five instances where an aggravating factor for a sex offense resulted in a sentence higher than the otherwise-authorized statutory maximum, and all of those instances involved an aggravator for a significant relationship, not priors or multiple victims. (App. D1 at 167.) Just because an aggravator may not raise a sentence above the otherwise-authorized statutory maximum, however, does not mean that it is an irrelevant aggravator. First, even if an aggravator results in no change to a sentence, it can

- The RCC does not incorporate this recommendation because it would change current law in a way that leads to inconsistencies with other RCC offenses of similar seriousness and may authorize disproportionate penalties. As the CCRC previously noted in App. D1, 170-171, the plain language of the current recidivist enhancement in D.C. Code § 20-3020(a)(5) is unclear and there is no case law clarifying the issue.²⁹² The RCC general recidivist enhancement

help represent more fully the nature of the defendant’s conduct. Second, the CCRC noted that the aggravators did not result in a sentence higher than the otherwise-authorized statutory maximum, but did not note (and, indeed, likely does not have access to information regarding) whether the aggravators resulted in a sentence higher than the top of the otherwise-authorized sentencing guidelines range. An aggravator has the effect of both increasing the statutory maximum, and increasing the top of the sentencing guidelines range. A sentence may, therefore, be increased above the otherwise-applicable top of the sentencing guidelines range, even if is below the otherwise-authorized statutory maximum. Third, even if the aggravator does not result in a sentence that exceeds either the otherwise-authorized statutory maximum or otherwise-authorized top of the sentencing guidelines range, it allows USAO to request a higher sentence, which may ultimately result in the judge imposing a higher sentence than the judge would have imposed otherwise. For example, a judge who may have sentenced the defendant to the mid-range of a sentencing guideline range may, after considering the aggravator, sentence the defendant to the top of the sentencing guideline range. This nuance would be difficult to observe in statistical court data.”

²⁹² In its previous recommendation, USAO recommended codifying a sex offense recidivist penalty enhancement when: “(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 equivalent offense].” This recommendation would allow a recidivist enhancement for a single prior conviction, regardless of the identity of the complainant in that case. However, the current D.C. Code sex offense recidivist aggravator applies if the defendant “is or has been found guilty of committing sex offenses *against 2 or more victims*” (D.C. Code § 22-3020(a)(5) (emphasis added)). It does not appear that one prior conviction would be sufficient under this language since it refers to multiple offenses (plural) against two or more victims (plural, indicating different people). Even if D.C. Code § 22-3020(a)(5) were interpreted so that one prior conviction is sufficient, the current aggravator requires that the sex offenses be “against 2 or more victims,” which suggests that a single prior conviction must be against a different complainant than in the instant case or it does not count. The USAO language recommendation, in contrast, appears to expand the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement for a single prior conviction, regardless of the identity of the complainant.

In its previous recommendation, USAO also recommended including a sex offense recidivist penalty enhancement when: “(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 equivalent offense], involving 2 or more victims.” In parsing the current sex offense recidivist aggravator in D.C. Code § 22-3020(a)(5), USAO states that the finding of guilt in the instant case satisfies the “is guilty of” language and that a prior conviction for a sex offense satisfies the “has been found guilty of” language. USAO states that “Thus, at the time of a finding of guilt in the current case, the defendant ‘is or has been’ found guilty of committing sex offenses against 2 or more victims.” However, this analysis risks rendering the “against 2 or more victims” requirement in the current aggravator surplusage. As the CCRC has noted, under the current aggravator it appears that a prior conviction will only be counted if it is against a different complainant than in the instant case. Another interpretation, not precluded by the plain language, is that for a prior to count,

provides a uniform penalty enhancement for an actor with certain prior convictions. It would be inconsistent with other revised and D.C. Code offenses to provide a recidivist penalty based on the number of victims in an instant case—multiple counts may be brought in such cases, resulting in multiple punishments that can be run consecutively. There is no apparent rationale for singling out sex assaults for this unique kind of enhancement based on prior conduct. Regarding the utility to USAO of an offense-specific recidivist enhancement even when it is not necessary to raise the otherwise applicable statutory minimum, the CCRC notes that the government may present such facts at sentencing where a general recidivist enhancement is charged and even if there is no statutory enhancement the court may take such facts into account and choose to depart from the voluntary sentencing guidelines or otherwise adjust the penalty.

(7) *The CCRC recommends deleting current D.C. Code § 22-3019: "No actor is immune from prosecution under any section of this subchapter because of marriage, domestic partnership, or cohabitation with the victim; provided, that marriage or the domestic partnership of the parties may be asserted as an affirmative defense in prosecution under this subchapter where it is expressly so provided." The revised enticing a minor into sexual conduct statute and other RCC Chapter 13 statutes account for liability changes based on marriage or domestic partnership in the plain language of the statutes and D.C. Code 22-3019 is deleted as unnecessary.*

- This change improves the clarity of the revised statutes.

it must involve two or more victims—although this interpretation would exclude many prior sex offenses. The USAO recommendation appears to expand the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement regardless of the identity of complainants.

Finally, in parsing the current D.C. Code sex offense recidivist aggravator, USAO states that “if there are two victims in a single case, then, if the defendant is found guilty of committing offenses against both victims, the defendant ‘is guilty’ of committing sex offenses against 2 or more victims.” While the CCRC would agree that a single case involving two or more findings of guilt against each of two or more complainants appears to satisfy the requirement, a single case with two complainants and but lacking multiple findings of guilt against each, may not satisfy this requirement. D.C. Code § 22-3020(a)(5) (emphasis added). Consequently, the USAO recommendation potentially expands the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement based solely on the number of complainants in a single case.

RCC § 22E-1306. Arranging for Sexual Conduct with a Minor or Person Incapable of Consenting.

(1) *PDS, App. C at 488, states that the offense as previously drafted, which required that a person with a responsibility under civil law for the health, welfare, or supervision of the complainant “gives effective consent for the complainant to engage in or submit to a sexual act or sexual contact,” is “so broad that it criminalizes responsible parenting.” PDS states that the offense as previously drafted would include a parent who “knowingly gives effective consent for her 17-year-old daughter to engage in or submit to a sexual act or contact with the teenager’s boyfriend when she hands her daughter a package of condoms and lectures her about safe sex.” PDS recommends revising the offense as follows:*

(a) An actor commits arranging for sexual conduct with a minor when that actor:

(1) Knowingly:

(A) As a person with a responsibility under civil law for the health, welfare, or supervision of the complainant;

(B) Gives effective consent for the complainant to engage in or submit to a sexual act or sexual contact with or for the arousal or gratification of another person;

(2) The actor and the other person, in fact, are at least 18 years of age and at least 4 years older than the complainant; and

(3)(A) The actor was reckless as to the fact that the complainant is under 16 years of age; or

(B) The actor:

(i) Was reckless as to the fact that [the] complainant is under 18 years of age; and

(ii) Knows that the other person is in a position of trust with or authority over the complainant.

As compared to the previous RCC version of this offense, the PDS recommendation differs in that it requires that the actor, the third party, and the complainant generally satisfy the same age and age gap requirements as in the RCC sexual abuse of a minor statute (RCC § 22E-1302).²⁹³ PDS states that the phrasing in its recommended subparagraph (a)(1)(B), “with or for the arousal or gratification of another person,” is “to make clear that the conduct of the complainant masturbating for the gratification or arousal

²⁹³ The PDS recommendation has the same age, age gap, and relationship requirements for liability as the RCC sexual abuse of a minor statute with the exception of requiring that the actor or third party be at least 18 years of age when the complainant is under 16 years of age. The RCC sexual abuse of a minor statute does not have an age requirement for the actor when the complainant is under 16 years of age.

of another person is criminalized by this element.”

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

complainant because it would be inconsistent with the other requirements of the offense. The RCC offense requires that the actor have a responsibility under civil law for a minor complainant. Requiring that the actor be at least 18 years of age and at least four years older than the complainant would exclude some parents, relatives, and caretakers from the offense solely because of their ages.

- The RCC does not incorporate the recommendation to require that the third party is at least 18 years of age when the complainant is under the age of 16 years because it would be inconsistent with the requirements for liability in the RCC sexual abuse of a minor statute. The RCC sexual abuse of a minor statute does not require that the actor be at least 18 years of age and at least four years older than a complainant under 16 years of age.
 - The RCC partially incorporates the recommendation to include “with or for the arousal or gratification of another person.” The RCC uses the language “with or for” to make clear that masturbation is included in the scope of the offense, consistent with several of the RCC trafficking statutes.
- (2) *The CCRC recommends adding as a discrete basis of liability giving effective consent to a third party to “cause the complainant to engage in or submit to a sexual act or sexual contact with or for a third party.” The previous RCC version of this offense was limited to giving effective consent “for the complainant to engage in or submit to a sexual act or sexual contact.” The revised language is consistent with the other RCC sex offenses that prohibit engaging in conduct with the complainant as well as causing the complainant to engage in or submit to conduct. The commentary to the RCC arranging has been updated to reflect that this revision is a clarificatory change in law.*
- This change improves the clarity, consistency, and proportionality of the revised statute, and removes a possible gap in liability.
- (3) *The CCRC recommends including certain incapacitated complainants in the RCC arranging for sexual conduct offense by codifying what is now subparagraph (a)(2)(C): “The actor is reckless as to: (i) The fact that the complainant is incapable of appraising the nature of the sexual act or sexual contact or of understanding the right to give or withhold consent to the sexual act or sexual contact, either due to a drug, intoxicant, or other substance, or, due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness; or (ii) The fact that the complainant is incapable of communicating willingness or unwillingness to engage in the sexual act or sexual contact.”*

This language is identical to requirements for incapacitated complainants in second degree and fourth degree of the RCC sexual assault statute (RCC § 22E-1301). There is no current D.C. Code offense that specifically prohibits arranging for sexual activity with incapacitated complainants. Without such a provision in the RCC, an actor that is civilly responsible for an incapacitated complainant that “knowingly” gives effective consent to a third party to engage in or cause sexual activity with that incapacitated

complainant would not have liability unless there were a harm or a risk of harm that satisfies the RCC criminal abuse of a minor (RCC § 22E-1501), RCC criminal neglect of a minor (RCC § 22E-1502), RCC criminal abuse of a vulnerable adult or elderly person (RCC § 22E-1503), or RCC criminal neglect of a vulnerable adult or elderly person statute (RCC § 22E-1504). Providing liability in the RCC arranging for sexual conduct statute when there is a lower culpable mental state of “knowingly” is proportionate given that the actor must have a responsibility under civil law for the complainant’s health, welfare, or supervision. An actor that “purposely” engages in this conduct may have liability under an RCC inchoate offense such as solicitation (RCC § 22E-302). The commentary to the RCC arranging has been updated to reflect that this is a change in law.

- This change improves the clarity, consistency, and proportionality of the revised statute, and removes a possible gap in liability.
- (4) *USAO, App. C at 508, repeats its previous objections to the reasonable mistake of age affirmative defense in the RCC sexual abuse of a minor offense (RCC § 22E-1302) and to the “recklessly” culpable mental state for the age of the complainant in the RCC arranging for sexual conduct with a minor statute. However, USAO recommends that, if the RCC retains the affirmative defense, a similar affirmative defense should apply to the age of the complainant in the RCC arranging for sexual conduct with a minor statute, as opposed to requiring recklessness for this element. USAO does not recommend specific language for such an affirmative defense. USAO states that, unlike the reasonable mistake of age affirmative defense, a requirement of recklessness has “no limitations on what that recklessness must be based on, and no minimum age of a complainant to which it would apply.” USAO acknowledges that the RCC sexual abuse of a minor offense is a “more serious offense that carries more serious penalties” than the RCC arranging for sexual conduct with a minor offense, but states that “the same logic should apply to sex offenses involving minors.” USAO states that “[e]ven when less serious conduct is involved, the government has identical concerns about rape shield laws being implicated, and in reality, creating a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws.” USAO states that “[t]his evidence would be argued to be ‘relevant’ in the same way for all of the child sexual abuse provisions, and complainants should be treated the same and have the same protections regardless of the perceived gravity of the offense.”*
- The RCC does not incorporate USAO’s recommendation because the “recklessly” culpable mental state improves the proportionality of the revised statute. The RCC arranging for sexual conduct with a minor offense prohibits giving effect consent for a third party to engage in sexual activity with certain minors or cause minors to do so. A “recklessly” culpable mental state for the age of the complainant, as opposed to a narrow reasonable mistake of age affirmative defense, is proportionate given the inchoate nature of the offense. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally

accepted legal principle,²⁹⁴ but recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.²⁹⁵ The “recklessly” culpable mental state does not “create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,”²⁹⁶ which the RCC does not substantively change in any manner, or “extremely prejudicial, and otherwise inadmissible, evidence not specially covered by the Rape Shield Act.”²⁹⁷ Requiring recklessness as to the age of the secondary education student is not inconsistent with robust rape shield laws as, for example, the current D.C. Code sex trafficking of children statute²⁹⁸ already combines a recklessness requirement for the age of the complainant with a Rape Shield law.²⁹⁹ In addition, the CCRC notes that the American Law Institute’s most recent draft revised sexual abuse of a minor statute requires recklessness as to the age of the complainant, including a complainant under the age of 12 years, and also has a Rape Shield provision.³⁰⁰

²⁹⁴ *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

²⁹⁵ *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) (“There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.

²⁹⁶ USAO lists several examples of “evidence that is known to the defendant” that it states would be admissible under the RCC sexual assault penalty enhancements to prove that the defendant was not reckless as to the age of the complainant, but would not be allowed by the current rape shield statute: “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.” USAO, App. C at 314. However, under the current D.C. Code and RCC rape shield statutes, it appears that this evidence would largely be excluded. To the extent that this evidence is opinion or reputation evidence of the complainant’s “past sexual behavior,” it is excluded under the current and RCC rape shield statutes. *See* D.C. Code § 22-3021(a); RCC § 22E-1311(a). To the extent that this evidence is evidence of the complainant’s “past sexual behavior” and is not reputation or opinion evidence, it is not admissible unless certain procedural requirements are met and it fits it within specific narrow categories. These narrow categories are: 1) evidence that is “constitutionally required to be admitted” (D.C. Code 22-3022(a)(1); RCC § 22E-1311(b)(1)(A)); 2) evidence of past sexual behavior with persons other than the actor, offered by the actor, on the issue of whether or not the actor is the source of semen or bodily injury (D.C. Code § 22-3022(a)(2)(A); RCC § 22E-1311(b)(2)(B)(i)); or 3) evidence of past sexual behavior with the actor where the consent of the complainant is at issue and is offered by the actor on the issue of consent (D.C. Code § 22-3022(a)(3)); RCC § 22E-1311(b)(1)(B)(ii) (requiring the RCC defined term “effective consent.”). Whether the actor was reckless as to the complainant’s age may not categorically fit into these specific categories. The current rape shield statutes and the RCC define “past sexual behavior” as “sexual behavior other than the sexual behavior with respect to which” certain sex offenses is alleged. D.C. Code § 22-3021(b); RCC § 22E-1311.

²⁹⁷ USAO lists several examples of “extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act” that it states would be admissible under the RCC sexual assault penalty enhancements: “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.”

²⁹⁸ D.C. Code § 22-1834.

²⁹⁹ D.C. Code § 22-1839.

³⁰⁰ American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.8; 213.11.

(5) *The CCRC recommends reducing the penalty classification for arranging for sexual conduct with a minor from a Class 8 felony to a Class 9 felony. The current D.C. Code arranging statute has a maximum penalty of five years,³⁰¹ which is lower than the current D.C. Code penalties for sexual abuse of a child³⁰² and sexual abuse of a minor.³⁰³ In the RCC, however, five years is comparable to the maximum penalty for sixth degree sexual abuse of a minor (RCC § 22E-1302(f)). It is disproportionate for an inchoate offense like an arranging for sexual conduct with a minor to have the same penalty as a completed offense. In addition, a higher maximum penalty for arranging for sexual conduct with a minor is unnecessary to proportionately penalize the prohibited conduct. As is discussed elsewhere in this Appendix, the RCC arranging statute requires a “knowingly” culpable mental state. If an actor “purposely” arranges for a sexual act or sexual contact with a minor, the RCC generally has significantly higher penalties than the Class 9 maximum penalty for the RCC arranging offense. Also, while there have been just a handful of convictions (under 20 in total) for this offense 2010-2019, the 97.5% quantile for the sentence imposed was 24 months.³⁰⁴ No enhancements were included as part of the charges for the offense 2010-2019. The revised penalty classification is generally consistent with current sentencing practice for the offense.*

- This change improves the proportionality of the revised statute.

(6) *USAO, App. C at 508-509, reiterates its recommendation that the current sex offense aggravators in D.C. Code § 22-3020³⁰⁵ should apply to all RCC sex offenses. Currently, the RCC sexual assault statute has several penalty enhancements and, based upon a previous USAO recommendation, the RCC sexual abuse of a minor statute shares several of them. USAO states that the complainant’s young age should be an enhancement to other RCC sex offenses because “although [these other sex offenses] may involve less serious sexual acts,” they should still be punished more severely with a younger complainant*

³⁰¹ D.C. Code § 22-3010.02.

³⁰² The current D.C. Code first degree sexual abuse of a child statute has a maximum possible penalty of 30 years unless certain aggravators and conditions are met. D.C. Code § 22-3008. The current D.C. Code second degree sexual abuse of a child statute has a maximum possible penalty of ten years. D.C. Code § 22-3009.

³⁰³ The current D.C. Code first degree sexual abuse of a minor statute has a maximum possible penalty of 15 years. D.C. Code § 22-3009.01. The current D.C. Code second degree sexual abuse of a minor statute has a maximum possible penalty of 7.5 years. D.C. Code § 22-3009.02.

³⁰⁴ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

³⁰⁵ D.C. Code § 22-3020(a) (“Any person who is found guilty of an offense under this subchapter may receive a penalty up to 1 1/2 times the maximum penalty prescribed for the particular offense, and may receive a sentence of more than 30 years up to, and including life imprisonment without possibility of release for first degree sexual abuse or first degree child sexual abuse, if any of the following aggravating circumstances exists: (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.”).

than with an older complainant. USAO gives as an example that “it should be . . . more severely punished to engage in sexually suggestive conduct with a 9-year old child than . . . with a 15 year old child” and states that “[t]his logic applies similarly to other sex offenses that necessarily involve minors,” such as arranging for sexual conduct with a minor. USAO states that “[t]his same logic also applies to an enhancement for the defendant being in a position of trust or authority over the complainant” and that this should be an enhancement for all other RCC sex offenses that could involve minors because “it is more serious and egregious to engage in sexual conduct when this relationship exists.” USAO gives as an example “a defendant who is a child’s biological parent who engages in sexually suggestive conduct . . . should be subject to a higher penalty than a defendant who engages in [this offense] where there is no significant relationship.” USAO states that “if a defendant acts with one or more accomplices for any sex offense, this behavior should be subject to an enhancement” for both minor complainants and adult complainants.

- The RCC does not incorporate this recommendation because it is unnecessary and may authorize disproportionate penalties. The RCC arranging for sexual conduct statute is limited to comparatively less serious sexual conduct of giving effective consent to sexual activity that would violate the RCC sexual abuse of a minor statute (RCC § 22E-1302), without force, threats, or coercion, as required by the RCC sexual assault offense (RCC § 22E-1301). Other RCC Chapter 13 statutes separately address sexual conduct that involves persons in the circumstances described by the D.C. Code § 22-3020 enhancements—e.g., infliction of serious bodily injury, use or threat with a deadly weapon—and those separate statutes provide more severe penalties. The RCC arranging for sexual conduct offense is an inchoate offense that requires a lower culpable mental state of “knowingly” as compared to the “purposely” culpable mental state required by RCC inchoate offenses such as attempt (RCC § 22E-301) and solicitation (RCC § 22E-302), or for accomplice liability (RCC § 22E-210). If an actor “purposely” gives effective consent to a third party for sexual activity that would violate either the RCC sexual abuse of a minor statute or the RCC sexual assault statute, and satisfies the requirements of an RCC inchoate offense such as attempt or solicitation, the penalty is one half the maximum penalty of the underlying offense, which generally results in higher penalties than the RCC arranging for sexual conduct offense and grades the conduct based on circumstances like those addressed in D.C. Code § 22-3020—e.g., the under 12 age of the complainant or whether the actor is in a “position of trust with or authority over” the complainant. If an actor “purposely” gives effective consent and satisfies the requirements for accomplice liability in RCC § 22E-210, the actor receives the same penalty as the underlying offense.
- If the RCC sexual assault penalty enhancements applied to the RCC arranging for sexual conduct statute, similar conduct could receive

significantly different penalties. The RCC also provides a separate, standardized recidivist enhancement (discussed below). The only enhancement under current D.C. Code § 22-3020 that is not reflected in the RCC arranging for sexual conduct offense or another RCC Chapter 13 statute is an enhancement for commission of the offense with an accomplice, and enhancement appears to be unnecessary.

- Notably, CCRC analysis of court data for the current enticing statute shows that while there have been just a handful of convictions (under 20 in total) for this offense 2010-2019, the 97.5% quantile for the sentence imposed was 24 months.³⁰⁶ No enhancements were included as part of the charges for the offense 2010-2019. Additional enhancements here are unnecessary and would be disproportionate.

(7) *USAO, App. C at 509-510, reiterates its recommendation that a sex offense recidivist penalty enhancement should apply to all sex offenses. USAO states that the general repeat offender enhancement in RCC § 22E-606 “only applies to prior convictions, and does not account for multiple victims within the same case (emphasis in original).” In its previous recommendation, USAO recommended a sex offense recidivist penalty enhancement 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 equivalent offense]; 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 equivalent offense], involving 2 or more victims.”*³⁰⁷ *The CCRC previously stated, App. D1 at 170, that this recommendation “significantly expand[s] the scope of the current D.C. Code sexual abuse aggravators, which do not contain an aggravator for only one prior conviction, and require crimes to be committed ‘against’ 2 or more victims.” USAO states that “[i]t is unclear” how its recommendation would expand the current D.C. Code sex offense recidivist enhancement*³⁰⁸:

“For [the current sex offense recidivist penalty] enhancement to apply, the defendant must have been found guilty of committing at least one offense involving at least one victim in the current case; if there is no finding of guilt on the underlying offense, there could be no finding of guilt on the enhancement. At the time of a finding of guilt in the current case, the defendant therefore ‘is’ guilty of committing a sex offense in the current case. If the defendant has one prior conviction for a sex offense, the defendant ‘has been’ found guilty of a sex offense in a prior case. Thus, at the time of a finding of guilt in the current case, the defendant “is or has been” found guilty of committing sex offenses against 2 or more victims. Moreover, if

³⁰⁶ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

³⁰⁷ App. D1 at 170.

³⁰⁸ The current D.C. Code sex offense recidivist enhancement states: “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.” D.C. Code § 22-3020(a)(5).

there are two victims in a single case, then, if the defendant is found guilty of committing offenses against both victims, the defendant ‘is guilty’ of committing sex offenses against 2 or more victims.”

In addition, USAO references the CCRC’s discussion of court data on page 167 of App. D1, where the CCRC noted that based on the limited available statistical evidence, between 2009 and 2015, there were only five instances where an aggravating factor for a sex offense resulted in a sentence higher than the otherwise-authorized statutory maximum, and all of those instances involved an aggravator for a significant relationship, not priors, or multiple victims. USAO states, with additional discussion, that “[j]ust because an aggravator may not raise a sentence above the otherwise-authorized statutory maximum . . . does not mean that it is an irrelevant aggravator.”³⁰⁹

- The RCC does not incorporate this recommendation because it would change current law in a way that leads to inconsistencies with other RCC offenses of similar seriousness and may authorize disproportionate penalties. As the CCRC previously noted in App. D1, 170-171, the plain language of the current recidivist enhancement in D.C. Code § 20-3020(a)(5) is unclear and there is no case law

³⁰⁹ USAO states:

“The CCRC also notes that, based on the limited available statistical evidence, between 2009 and 2015, there were only five instances where an aggravating factor for a sex offense resulted in a sentence higher than the otherwise-authorized statutory maximum, and all of those instances involved an aggravator for a significant relationship, not priors or multiple victims. (App. D1 at 167.) Just because an aggravator may not raise a sentence above the otherwise-authorized statutory maximum, however, does not mean that it is an irrelevant aggravator. First, even if an aggravator results in no change to a sentence, it can help represent more fully the nature of the defendant’s conduct. Second, the CCRC noted that the aggravators did not result in a sentence higher than the otherwise-authorized statutory maximum, but did not note (and, indeed, likely does not have access to information regarding) whether the aggravators resulted in a sentence higher than the top of the otherwise-authorized sentencing guidelines range. An aggravator has the effect of both increasing the statutory maximum, and increasing the top of the sentencing guidelines range. A sentence may, therefore, be increased above the otherwise-applicable top of the sentencing guidelines range, even if is below the otherwise-authorized statutory maximum. Third, even if the aggravator does not result in a sentence that exceeds either the otherwise-authorized statutory maximum or otherwise-authorized top of the sentencing guidelines range, it allows USAO to request a higher sentence, which may ultimately result in the judge imposing a higher sentence than the judge would have imposed otherwise. For example, a judge who may have sentenced the defendant to the mid-range of a sentencing guideline range may, after considering the aggravator, sentence the defendant to the top of the sentencing guideline range. This nuance would be difficult to observe in statistical court data.”

clarifying the issue.³¹⁰ The RCC general recidivist enhancement provides a uniform penalty enhancement for an actor with certain prior convictions. It would be inconsistent with other revised and D.C. Code offenses to provide a recidivist penalty based on the number of victims in an instant case—multiple counts may be brought in such cases, resulting in multiple punishments that can be run consecutively. There is no apparent rationale for singling out sex assaults for this unique kind of enhancement based on prior conduct. Regarding the utility to USAO of an offense-specific recidivist enhancement even when it is not necessary to raise the otherwise applicable statutory minimum, the CCRC notes that the government may present such facts at sentencing where a general recidivist enhancement is charged and even if there is no statutory enhancement

³¹⁰ In its previous recommendation, USAO recommended codifying a sex offense recidivist penalty enhancement when: “(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 equivalent offense].” This recommendation would allow a recidivist enhancement for a single prior conviction, regardless of the identity of the complainant in that case. However, the current D.C. Code sex offense recidivist aggravator applies if the defendant “is or has been found guilty of committing sex offenses *against 2 or more victims*” (D.C. Code § 22-3020(a)(5) (emphasis added)). It does not appear that one prior conviction would be sufficient under this language since it refers to multiple offenses (plural) against two or more victims (plural, indicating different people). Even if D.C. Code § 22-3020(a)(5) were interpreted so that one prior conviction is sufficient, the current aggravator requires that the sex offenses be “against 2 or more victims,” which suggests that a single prior conviction must be against a different complainant than in the instant case or it does not count. The USAO language recommendation, in contrast, appears to expand the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement for a single prior conviction, regardless of the identity of the complainant.

In its previous recommendation, USAO also recommended including a sex offense recidivist penalty enhancement when: “(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 equivalent offense], involving 2 or more victims.” In parsing the current sex offense recidivist aggravator in D.C. Code § 22-3020(a)(5), USAO states that the finding of guilt in the instant case satisfies the “is guilty of” language and that a prior conviction for a sex offense satisfies the “has been found guilty of” language. USAO states that “Thus, at the time of a finding of guilt in the current case, the defendant ‘is or has been’ found guilty of committing sex offenses against 2 or more victims.” However, this analysis risks rendering the “against 2 or more victims” requirement in the current aggravator surplusage. As the CCRC has noted, under the current aggravator it appears that a prior conviction will only be counted if it is against a different complainant than in the instant case. Another interpretation, not precluded by the plain language, is that for a prior to count, it must involve two or more victims—although this interpretation would exclude many prior sex offenses. The USAO recommendation appears to expand the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement regardless of the identity of complainants.

Finally, in parsing the current D.C. Code sex offense recidivist aggravator, USAO states that “if there are two victims in a single case, then, if the defendant is found guilty of committing offenses against both victims, the defendant ‘is guilty’ of committing sex offenses against 2 or more victims.” While the CCRC would agree that a single case involving two or more findings of guilt against each of two or more complainants appears to satisfy the requirement, a single case with two complainants and but lacking multiple findings of guilt against each, may not satisfy this requirement. D.C. Code § 22-3020(a)(5) (emphasis added). Consequently, the USAO recommendation potentially expands the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement based solely on the number of complainants in a single case.

the court may take such facts into account and choose to depart from the voluntary sentencing guidelines or otherwise adjust the penalty.

(8) *The CCRC recommends deleting current D.C. Code § 22-3019: "No actor is immune from prosecution under any section of this subchapter because of marriage, domestic partnership, or cohabitation with the victim; provided, that marriage or the domestic partnership of the parties may be asserted as an affirmative defense in prosecution under this subchapter where it is expressly so provided." The revised arranging for sexual conduct statute and other RCC Chapter 13 statutes account for liability changes based on marriage or domestic partnership in the plain language of the statutes and D.C. Code 22-3019 is deleted as unnecessary.*

- This change improves the clarity of the revised statutes.

RCC § 22E-1307. Nonconsensual Sexual Conduct.

- (1) *OAG, App. C at 471-472 recommends redrafting subsection (c) to incorporate detail that is in the commentary. Subsection (c) currently states that: “An actor does not commit an offense under this section for deception that induces the complainant to consent to the sexual act or sexual contact.” OAG notes that the commentary then states: “The use of deception as to the nature of the sexual act or sexual contact remains a possible basis for liability if the use of deception as to the nature of the sexual act or sexual contact negates the complainant’s effective consent,” with Footnote 6 further stating: “Examples of deception as to the nature of the sexual act or sexual contact include deceptions as to: the object or body part that is used to penetrate the other person; a person’s current use of birth control (e.g., use of a condom or IUD); and a person’s health status (e.g., having a sexually transmitted disease.” OAG states that the commentary can be read as inconsistent with the statutory text and “for clarity and to avoid litigation,” subsection (c) should be redrafted as: “An actor does not commit an offense under this section for deception that induces the complainant to consent to the sexual act or sexual contact, unless the deception is to the nature of the sexual act or sexual contact.”*
 - The RCC incorporates this recommendation by revising subsection (c) to state “An actor does not commit an offense under this section when, in fact, the actor uses deception, unless it is deception as to the nature of the sexual act or sexual contact.”
- (2) *The CCRC recommends adding the defined term "in fact" to the exclusion from liability in subsection (c), to make clear that no awareness or culpable mental state is required.³¹¹*
 - This change clarifies and does not substantively change the revised statute.
- (3) *USAO, App. C at 508-509, reiterates its recommendation that the current sex offense aggravators in D.C. Code § 22-3020³¹² should apply to all RCC sex offenses. Currently, the RCC sexual assault statute has several penalty enhancements and, based upon a previous USAO recommendation, the RCC sexual abuse of a minor statute shares several of them. USAO states that the*

³¹¹ RCC § 22E-207.

³¹² D.C. Code § 22-3020(a) (“Any person who is found guilty of an offense under this subchapter may receive a penalty up to 1 1/2 times the maximum penalty prescribed for the particular offense, and may receive a sentence of more than 30 years up to, and including life imprisonment without possibility of release for first degree sexual abuse or first degree child sexual abuse, if any of the following aggravating circumstances exists: (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.”).

complainant's young age should be an enhancement to other RCC sex offenses because "although [these other sex offenses] may involve less serious sexual acts," they should still be punished more severely with a younger complainant than with an older complainant. USAO gives as an example that "it should be . . . more severely punished to engage in sexually suggestive conduct with a 9-year old child than . . . with a 15 year old child" and states that "[t]his logic applies similarly to other sex offenses . . . that could involve minors," such as nonconsensual sexual conduct. USAO states that "[t]his same logic also applies to an enhancement for the defendant being in a position of trust or authority over the complainant" and that this should be an enhancement for all other RCC sex offenses that could involve minors because "it is more serious and egregious to engage in sexual conduct when this relationship exists." USAO gives as an example "a defendant who is a child's biological parent who engages in sexually suggestive conduct . . . should be subject to a higher penalty than a defendant who engages in [this offense] where there is no significant relationship." USAO states that "if a defendant acts with one or more accomplices for any sex offense, this behavior should be subject to an enhancement" for both minor complainants and adult complainants.

- The RCC does not incorporate this recommendation because it is unnecessary and may authorize disproportionate penalties. The RCC nonconsensual sexual conduct statute is limited to sexual conduct that occurs without force, threats, coercion, or an intoxicated or incapacitated complainant, as required by the RCC sexual assault offense (RCC § 22E-1301). Other RCC Chapter 13 statutes separately address sexual conduct that involves underage persons in the circumstances described by the D.C. Code § 22-3020 enhancements—e.g., infliction of serious bodily injury, use or threat with a deadly weapon—and those separate statutes provide more severe penalties. If the RCC sexual assault penalty enhancements applied to the RCC nonconsensual sexual conduct offense, similar conduct could receive significantly different penalties. For example, if a defendant causes serious bodily injury to the complainant to coerce the complainant to engage in a sexual act, that behavior is more proportionately charged as first degree sexual assault. Also, relevant to the “position of trust” enhancement, if the complainant is under the age of 16 years and the actor is at least four years older, or if the complainant is under the age of 18 years and the actor is at least four years older and in a “position of trust with or authority over there is liability under the RCC sexual abuse of a minor statute, which is a more serious offense than nonconsensual sexual conduct. For example, if a 30-year old defendant engages in non-forceful sexual activity with a 15 year old complainant, the RCC sexual abuse of a minor statute applies and is a more serious offense than nonconsensual sexual conduct. The RCC also provides a separate, standardized recidivist enhancement (discussed below). The only enhancement under current D.C. Code §

22-3020 that is not reflected in the RCC nonconsensual sexual conduct offense or another RCC Chapter 13 statute is an enhancement for commission of the offense with an accomplice, and enhancement appears to be unnecessary.

- Notably, CCRC analysis of court data for the misdemeanor sexual abuse statute shows that in actual practice, for 2010-2019, few convictions for these offenses had any of the enhancements listed in D.C. Code § 22-3020 (<25%) and the penalties were at most about 6 months (not exceeding the regular statutory maximum without any enhancements).³¹³ Additional enhancements here are unnecessary and would be disproportionate.

(4) *USAO, App. C at 509-510, reiterates its recommendation that a sex offense recidivist penalty enhancement should apply to all sex offenses. USAO states that the general repeat offender enhancement in RCC § 22E-606 “only applies to prior convictions, and does not account for multiple victims within the same case (emphasis in original).” In its previous recommendation, USAO recommended a sex offense recidivist penalty enhancement 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 equivalent offense]; 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 equivalent offense], involving 2 or more victims.”*³¹⁴ *The CCRC previously stated, App. D1 at 170, that this recommendation “significantly expand[s] the scope of the current D.C. Code sexual abuse aggravators, which do not contain an aggravator for only one prior conviction, and require crimes to be committed ‘against’ 2 or more victims.” USAO states that “[i]t is unclear”*³¹⁵ *how its recommendation would expand the current D.C. Code sex offense recidivist enhancement*³¹⁵:

“For [the current sex offense recidivist penalty] enhancement to apply, the defendant must have been found guilty of committing at least one offense involving at least one victim in the current case; if there is no finding of guilt on the underlying offense, there could be no finding of guilt on the enhancement. At the time of a finding of guilt in the current case, the defendant therefore ‘is’ guilty of committing a sex offense in the current case. If the defendant has one prior conviction for a sex offense, the defendant ‘has been’ found guilty of a sex offense in a prior case. Thus, at the time of a finding of guilt in the current case, the defendant “is or has been” found guilty of committing sex offenses against 2 or more victims. Moreover, if

³¹³ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

³¹⁴ App. D1 at 170.

³¹⁵ The current D.C. Code sex offense recidivist enhancement states: “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.” D.C. Code § 22-3020(a)(5).

there are two victims in a single case, then, if the defendant is found guilty of committing offenses against both victims, the defendant ‘is guilty’ of committing sex offenses against 2 or more victims.”

In addition, USAO references the CCRC’s discussion of court data on page 167 of App. D1, where the CCRC noted that based on the limited available statistical evidence, between 2009 and 2015, there were only five instances where an aggravating factor for a sex offense resulted in a sentence higher than the otherwise-authorized statutory maximum, and all of those instances involved an aggravator for a significant relationship, not priors, or multiple victims. USAO states, with additional discussion, that “[j]ust because an aggravator may not raise a sentence above the otherwise-authorized statutory maximum . . . does not mean that it is an irrelevant aggravator.”³¹⁶

- The RCC does not incorporate this recommendation because it would change current law in a way that leads to inconsistencies with other RCC offenses of similar seriousness and may authorize disproportionate penalties. As the CCRC previously noted in App. D1, 170-171, the plain language of the current recidivist enhancement in D.C. Code § 20-3020(a)(5) is unclear and there is no case law

³¹⁶ USAO states:

“The CCRC also notes that, based on the limited available statistical evidence, between 2009 and 2015, there were only five instances where an aggravating factor for a sex offense resulted in a sentence higher than the otherwise-authorized statutory maximum, and all of those instances involved an aggravator for a significant relationship, not priors or multiple victims. (App. D1 at 167.) Just because an aggravator may not raise a sentence above the otherwise-authorized statutory maximum, however, does not mean that it is an irrelevant aggravator. First, even if an aggravator results in no change to a sentence, it can help represent more fully the nature of the defendant’s conduct. Second, the CCRC noted that the aggravators did not result in a sentence higher than the otherwise-authorized statutory maximum, but did not note (and, indeed, likely does not have access to information regarding) whether the aggravators resulted in a sentence higher than the top of the otherwise-authorized sentencing guidelines range. An aggravator has the effect of both increasing the statutory maximum, and increasing the top of the sentencing guidelines range. A sentence may, therefore, be increased above the otherwise-applicable top of the sentencing guidelines range, even if is below the otherwise-authorized statutory maximum. Third, even if the aggravator does not result in a sentence that exceeds either the otherwise-authorized statutory maximum or otherwise-authorized top of the sentencing guidelines range, it allows USAO to request a higher sentence, which may ultimately result in the judge imposing a higher sentence than the judge would have imposed otherwise. For example, a judge who may have sentenced the defendant to the mid-range of a sentencing guideline range may, after considering the aggravator, sentence the defendant to the top of the sentencing guideline range. This nuance would be difficult to observe in statistical court data.”

clarifying the issue.³¹⁷ The RCC general recidivist enhancement provides a uniform penalty enhancement for an actor with certain prior convictions. It would be inconsistent with other revised and D.C. Code offenses to provide a recidivist penalty based on the number of victims in an instant case—multiple counts may be brought in such cases, resulting in multiple punishments that can be run consecutively. There is no apparent rationale for singling out sex assaults for this unique kind of enhancement based on prior conduct. Regarding the utility to USAO of an offense-specific recidivist enhancement even when it is not necessary to raise the otherwise applicable statutory minimum, the CCRC notes that the government may present such facts at sentencing where a general recidivist enhancement is charged and even if there is no statutory enhancement

³¹⁷ In its previous recommendation, USAO recommended codifying a sex offense recidivist penalty enhancement when: “(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 equivalent offense].” This recommendation would allow a recidivist enhancement for a single prior conviction, regardless of the identity of the complainant in that case. However, the current D.C. Code sex offense recidivist aggravator applies if the defendant “is or has been found guilty of committing sex offenses *against 2 or more victims*” (D.C. Code § 22-3020(a)(5) (emphasis added)). It does not appear that one prior conviction would be sufficient under this language since it refers to multiple offenses (plural) against two or more victims (plural, indicating different people). Even if D.C. Code § 22-3020(a)(5) were interpreted so that one prior conviction is sufficient, the current aggravator requires that the sex offenses be “against 2 or more victims,” which suggests that a single prior conviction must be against a different complainant than in the instant case or it does not count. The USAO language recommendation, in contrast, appears to expand the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement for a single prior conviction, regardless of the identity of the complainant.

In its previous recommendation, USAO also recommended including a sex offense recidivist penalty enhancement when: “(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 equivalent offense], involving 2 or more victims.” In parsing the current sex offense recidivist aggravator in D.C. Code § 22-3020(a)(5), USAO states that the finding of guilt in the instant case satisfies the “is guilty of” language and that a prior conviction for a sex offense satisfies the “has been found guilty of” language. USAO states that “Thus, at the time of a finding of guilt in the current case, the defendant ‘is or has been’ found guilty of committing sex offenses against 2 or more victims.” However, this analysis risks rendering the “against 2 or more victims” requirement in the current aggravator surplusage. As the CCRC has noted, under the current aggravator it appears that a prior conviction will only be counted if it is against a different complainant than in the instant case. Another interpretation, not precluded by the plain language, is that for a prior to count, it must involve two or more victims—although this interpretation would exclude many prior sex offenses. The USAO recommendation appears to expand the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement regardless of the identity of complainants.

Finally, in parsing the current D.C. Code sex offense recidivist aggravator, USAO states that “if there are two victims in a single case, then, if the defendant is found guilty of committing offenses against both victims, the defendant ‘is guilty’ of committing sex offenses against 2 or more victims.” While the CCRC would agree that a single case involving two or more findings of guilt against each of two or more complainants appears to satisfy the requirement, a single case with two complainants and but lacking multiple findings of guilt against each, may not satisfy this requirement. D.C. Code § 22-3020(a)(5) (emphasis added). Consequently, the USAO recommendation potentially expands the current D.C. Code sex offense recidivist aggravator by allowing a recidivist penalty enhancement based solely on the number of complainants in a single case.

the court may take such facts into account and choose to depart from the voluntary sentencing guidelines or otherwise adjust the penalty.

- (5) *The CCRC recommends deleting current D.C. Code § 22-3019: "No actor is immune from prosecution under any section of this subchapter because of marriage, domestic partnership, or cohabitation with the victim; provided, that marriage or the domestic partnership of the parties may be asserted as an affirmative defense in prosecution under this subchapter where it is expressly so provided." The revised nonconsensual sexual conduct statute and other RCC Chapter 13 statutes account for liability changes based on marriage or domestic partnership in the plain language of the statutes and D.C. Code 22-3019 is deleted as unnecessary.*

- This change improves the clarity of the revised statutes.

RCC§ 22E-1308. Incest.³¹⁸

- (1) *OAG, App. C at 472, recommends revising what was previously subparagraphs (a)(2)(E), (a)(2)(F), and (a)(2)(G) to read “while the marriage or domestic partnership creating the relationship exists.” These subparagraphs were previously limited to “while the marriage creating the relationship exists.” With this revision, the incest statute would prohibit a sexual act with a person who is a step-sibling, a stepchild or step-grandchild, or a stepparent or step-grandparent “while the marriage or domestic partnership creating the relationship exists.” OAG states that, in “the rest of [RCC] Chapter 13 marriages and domestic partnerships are treated the same.” OAG states that: “Given the practical similarities between marriages and domestic partnerships, there is no reason why it should be an offense for step relatives to be guilty of incest while the marriage creating the relationship exists but . . . not be guilty of incest while the domestic partnership creating the relationship exists.” The commentary to this offense has been updated to reflect that this is a change in law*
 - The RCC incorporates this recommendation by codifying new subparagraphs (a)(2)(A) (and (b)(2)(A) and sub-subparagraph (a)(2)(A)(ii) and (b)(2)(A)(ii): “Parent, grandparent, great-grandparent, child, grandchild, great-grandchild, sibling, parent’s sibling, or a sibling’s child, whether related by: Marriage or domestic partnership, either while the marriage or domestic partnership creating the relationship exists, or after such marriage or domestic partnership ends.” This revision includes domestic partnerships, but, as is discussed below, now includes these relationships after the marriage or domestic partnership ends. This change improves the clarity, consistency, and proportionality of the revised statutes.
- (2) *The CCRC recommends including specified relatives by marriage or domestic partnership “either while the marriage or domestic partnership creating the relationship exists, or after such marriage or domestic partnership ends.” The previous version of the incest statute was limited to specified relatives while the marriage or domestic partnership creating the relationship existed. This expanded scope is proportionate given that the revised incest offense requires that the actor obtain the consent of the parent’s sibling by undue influence. The commentary to this offense has been updated to reflect that this is a possible change in law.*
 - This change improves the clarity, consistency, and proportionality of the revised statutes, and removes a gap in liability.
- (3) *The CCRC recommends including a “parent’s sibling” in subparagraphs (a)(2)(A) and (b)(2)(A) of the revised offense. This change expands the offense to include a “parent’s sibling,” whether related by blood, adoption, marriage, or domestic partnership. The previous draft of this offense was limited to a “parent’s sibling” related by blood. This change makes the scope of a “parent’s sibling” in the revised incest offense consistent with the scope of a “parent’s*

³¹⁸ Incest was previously numbered as RCC § 22E-1312.

sibling” in subsection (A) of the RCC definition of “position of trust with or authority over” and in subsection (A) of the current D.C. Code definition of “significant relationship.”³¹⁹ Expanding the scope of a “parent’s sibling” is proportionate given that the revised incest offense now requires that the actor obtain the consent of the parent’s sibling by undue influence. The commentary to this offense has been updated to reflect that this is a change in law.

- This change improves the clarity, consistency, and proportionality of the revised statutes, and removes a gap in liability.
- (4) *The CCRC recommends including a “sibling’s child” in subparagraphs (a)(2)(A) and (b)(2)(A) of the revised offense. This change expands the offense to include a “sibling’s child,” whether related by blood, adoption, marriage, or domestic partnership. The previous draft of this offense was limited to a “sibling’s child” related by blood. This change makes the scope of a “sibling’s child” in the revised incest offense consistent with the scope of a “sibling’s child” in subsection (A) of the RCC definition of “position of trust with or authority over.” Expanding the scope of a “sibling’s child” is proportionate given that the revised incest offense now requires that the actor obtain the consent of the sibling’s child by undue influence. The commentary to this offense has been updated to reflect that this is a change in law.*
- This change improves the clarity, consistency, and proportionality of the revised statutes, and removes a gap in liability.
- (5) *The CCRC recommends including a “child of a parent’s sibling” (first cousins) in subparagraphs (a)(2)(A) and (b)(2)(A) of the revised offense. The previous RCC draft of this offense and the current D.C. Code incest statute³²⁰ do not include first cousins because first cousins are within the fourth degree of consanguinity. However, including cousins, whether by blood, adoption, marriage, or domestic partnership, is consistent with the requirement in the new draft of the incest statute that the consent is obtained by undue influence. The commentary to this offense has been updated to reflect that this is a change in law.*
- This change improves the clarity, consistency, and proportionality of the revised statutes, and removes a gap in liability.
- (6) *The CCRC recommends including a step-great-grandparent and a step-great-grandchild, either while the marriage or domestic partnership creating the relationship exists or after it ends. The previous draft of the RCC incest statute did not include step-great-grandparents and step-great-grandchildren by marriage or domestic partnership, but did include great-grandparents and great-grandchildren related by blood or adoption. Expanding the revised incest offense*

³¹⁹ D.C. Code § 22-3001(10)(A) (“‘Significant relationship’ includes: (A) A parent, sibling, *aunt, uncle, or grandparent*, whether related by blood, marriage, domestic partnership, or adoption.”) (emphasis added).

³²⁰ D.C. Code § 22-1901 (“If any person in the District related to another person within and not including the fourth degree of consanguinity, computed according to the rules of the Roman or civil law, shall marry or cohabit with or have sexual intercourse with such other so-related person, knowing him or her to be within said degree of relationship, the person so offending shall be deemed guilty of incest, and, on conviction thereof, shall be punished by imprisonment for not more than 12 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.”).

to include great-grandparents and step-great-grandchildren by marriage or domestic partnership is proportionate given that the revised incest offense requires that the actor obtain the consent of these individuals by undue influence. The commentary to this offense has been updated to reflect that this is a change in law.

- This change improves the clarity, consistency, and proportionality of the revised offense, and may remove a gap in liability.
- (7) *The CCRC recommends requiring that the actor obtain the consent of the specified relative “by undue influence,” as defined in RCC § 22E-701,³²¹ and applying a “knowingly” culpable mental state to this element. The previous draft of the RCC statute did not have such an element. These requirements, in conjunction with the requirement that the actor in an incest case be at least 16 years old, ensure that the revised incest statute does not criminalize otherwise consensual sexual activity between adults or minors that are close in age. When the defendant in an incest case is at least four years older than a specified relative that is a minor, there will be liability under the RCC sexual abuse of a minor statute, with higher penalties, regardless of whether there was apparent consent.³²² The commentary to this offense has been updated to reflect that this is a change in law.*
- This change improves the clarity, consistency, and proportionality of the revised statutes.
- (8) *The CCRC recommends codifying two degrees of incest. First degree incest requires a “sexual act” and is a Class 9 felony with a maximum term of imprisonment of three years. Second degree incest requires a “sexual contact” and is a Class A misdemeanor with a maximum term of imprisonment of one year. The penalties for first degree incest and second degree incest are the same as first degree and second degree RCC nonconsensual sexual conduct (RCC § 22E-1307), which is also graded based on whether there was a “sexual act” or a “sexual contact.” The commentary to this offense has been updated to reflect that this is a change in law.*
- This change improves the clarity, consistency, and proportionality of the revised statutes.
- (9) *USAO recommends classifying incest as a felony and giving it a penalty “consistent with current law.” Under current law, incest is a felony with a 12*

³²¹ RCC § 22E-701 defines “undue influence” as “mental, emotional, or physical coercion that overcomes the free will or judgment of a person and causes that person to act in a manner that is inconsistent with his or her financial, emotional, mental, or physical well-being.”

³²² If the specified relative is under the age of 16 years, a defendant that is at least 16 years of age and at least four years older will have liability for first degree, second degree, fourth degree, or fifth degree of the RCC sexual abuse of a minor statute (RCC § 22E-1302). If the specified relative is at least 16 years of age, but under 18 years of age, and the defendant is at least 18 years of age and at least 4 years older, there will be liability under third degree or sixth degree of the RCC sexual abuse of a minor statute (RCC § 22E-1302). Third degree and sixth degree of the RCC sexual abuse of a minor statute require that the defendant know that the defendant is in a “position of trust with or authority over” the complainant, and the specified relatives in that definition overlap with the relatives included in the RCC incest statute.

*year maximum penalty.*³²³ *In the previous draft of the RCC incest statute, incest was classified as a Class A misdemeanor with a maximum penalty of one year. USAO states that the RCC’s classification is a “steep drop in liability.” USAO states that incest “takes place in a variety of situations, which can include sexual activity between consenting adults, but can include sexual activity between two relatives where there is a power imbalance, including where one person is a child, or where the abuse began when one person is a child and continued when they became adults.” USAO states that a “higher maximum recognizes the potential severity of this offense.”*

- The RCC partially incorporates this recommendation by codifying two gradations of incest. First degree incest requires a “sexual act” and is a Class 9 felony with a maximum term of imprisonment of three years. Second degree incest requires a “sexual contact” and is a Class A misdemeanor with a maximum term of imprisonment of one year. The revised incest statute requires that consent be obtained by undue influence, which ensures that it does not criminalize sexual activity between consenting individuals. However, even if there is consent, the RCC sexual abuse of a minor statute (RCC § 22E-1302) provides higher penalties if the parties satisfy the various age requirements. Further, as regards absolute penalties available for incest conduct, the CCRC notes that notwithstanding the 12 year statutorily authorized penalty for this offense, actual practice in the District has been sharply different. Court data for 2010-2019 shows that the 97.5% quantile of sentences for all of these offenses, including enhancements, was 36 months (3 years).³²⁴ The CCRC recommendation here is generally consistent with current practice.
- This change improves the clarity, consistency, and proportionality of the revised statutes.

³²³ D.C. Code § 22-1901.

³²⁴ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

[Previous RCC § 22E-1309.] Limitations on Liability for RCC Chapter 13 Offenses.

- (1) *The CCRC recommends deletion of this text as unnecessary and potentially confusing. The text previously provided that “a person under the age of 12 is not subject to liability for offenses in this subchapter other than first degree sexual assault, pursuant to RCC § 22E-1301(a), or third degree sexual assault, pursuant to RCC § 22E-1301(c).” This provision is no longer necessary given the broader developmental incapacity defense in RCC § 22E-505.*
- This change improves the clarity and consistency of the revised statutes.

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

- (1) *OAG, App. C at 471, recommends clarifying in the commentary that the circumstances in D.C. Code § 14-309, pertaining to when specified religious leaders may not be examined in court proceedings, are irrelevant for the purposes of determining which religious leaders are subject to the exclusion to report. OAG recommends part of the commentary be redrafted to state: “regardless of whether the religious leader hears confessions or receives other communications.”*
 - The RCC incorporates this recommendation by revising a sentence in the explanatory note and the discussion of District law to read: “A ‘religious leader described in D.C. Code § 14-309’ is a ‘priest, clergyman, rabbi, or other duly licensed, ordained, or consecrated minister of a religion authorized to perform a marriage ceremony in the District of Columbia or duly accredited practitioner of Christian Science,’ regardless of whether the religious leader hears confessions or receives other communications.” This change improves the clarity of the revised statutes.
- (2) *OAG, App. C at 472, recommends that the RCC codify the offense of failing to report a sex crime (previously RCC § 22E-1309) and the penalty (previously RCC § 22E-1310), in the same statute. OAG states that “[n]otwithstanding that the current Code . . . has the offense and the penalty separated into two Code provisions [D.C. Code §§ 22-3020.52 and 22-3020.54]” the “current structure of the RCC for other offenses has the penalty in the same provision as the offense.”*
 - The RCC incorporates this recommendation by combining what was previously two statutes, 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, into one statute, RCC § 22E-1310, Civil Provisions on the Duty to Report a Sex Crime. This change improves the organization and clarity of the revised statutes.
- (3) *The CCRC recommends, by use of the phrase “in fact” in paragraph (a)(1), specifying that strict liability applies to the requirements of the duty to report a sex crime. With this change, paragraph (a)(1) reads: “A person who is, in fact, at least 18 years of age, and is aware of a substantial risk that a person under 16 years of age is being subjected to, or has been subjected to, a predicate crime, shall immediately report such information or belief in a call to 911, a report to the Child and Family Services Agency, or a report to the Metropolitan Police Department.” The commentary to this statute has been updated to reflect that this is a clarificatory change in law.*
 - This change improves the clarity and consistency of the revised statutes.
- (4) *The CCRC recommends, by use of the phrase “in fact” in paragraph (b)(1), specifying that strict liability applies to the status of the individuals specified in subparagraphs (b)(1)(A), (b)(1)(B), and (b)(1)(C). The commentary to this statute has been updated to reflect that this is a clarificatory change in law.*
 - This change improves the clarity and consistency of the revised statutes.

- (5) *The CCRC recommends codifying as an element of the civil violation that the person “Is, in fact, at least 18 years of age” (paragraph (d)(1)). The previous draft of the civil violation (subsection (a) of former RCC § 22E-1310) did not codify this element. This change improves the consistency of the civil violation with the duty to report in subsection (a) of the revised statute, which only applies if the person is, in fact, at least 18 years of age or older.*
- This change improves the clarity and consistency of the revised statutes.
- (6) *The CCRC recommends requiring “in fact, reasonably believes” for the defense in subsection (e). With this change, the defense reads: “It is a defense to liability under subsection (d) of this section that the person fails to report a predicate crime under subsection (a) of this section because the person, in fact, reasonably believes that they are a survivor of intimate partner violence, as defined in D.C. Code § 16-1001(7), or intrafamily violence, as defined in D.C. Code § 16-1001(9).” The previous version of this defense (subsection (b) of former RCC § 22E-1310) did not have such a requirement and did not specify any culpable mental states as defined in RCC § 22E-205. “In fact, reasonably believes” is consistent with several defenses in the RCC and requires that the person subjectively and reasonably believes that they are a survivor of intimate partner violence or intrafamily violence. The commentary to this statute has been updated to reflect that this is a possible change in law.*
- This change improves the clarity, consistency, and proportionality of the revised statutes.
- (7) *The CCRC recommends codifying an exclusion to the duty to report for sexual assault counselors in subparagraph (b)(1)(D). Section 6 of the Sexual Assault Victims’ Rights Amendment Act of 2019 (the Act) added this exclusion to the current D.C. Code duty to report a sex crime statute³²⁵ since the last RCC draft of this statute. The RCC draft makes several changes to the exclusion. First, the RCC draft requires that the sexual assault counselor “is aware of a substantial risk” that the situations specified in sub-subparagraphs (b)(1)(D)(i), (b)(1)(D)(ii), and (b)(1)(D)(iii) exist, as opposed to having “actual knowledge.”³²⁶ The phrase “is aware of a substantial risk” is consistent with the*

³²⁵ D.C. Code § 22-3020.52(c), (c)(3) ((c) No legally recognized privilege, except for the following, shall apply to this subchapter: (3 “Sexual assault counselors shall be exempt from reporting pursuant to subsection (a) of this section any crime disclosed in a confidential communication unless the sexual assault counselor has actual knowledge that the crime disclosed to the sexual assault counselor involves: (A) A victim under the age of 13; (B) A perpetrator or alleged perpetrator with whom the sexual assault victim has a significant relationship, as that term is defined in § 22-3001(10); or (C) A perpetrator or alleged perpetrator who is more than 4 years older than the sexual assault victim.”).

³²⁶ The exclusion in the current D.C. Code duty to report statute requires that the sexual assault counselor have “actual knowledge” of the specified situations, such as the victim being under the age of 13 years. D.C. Code § 22-3020.52(c), (c)(3). The meaning of “actual knowledge” is unclear and is inconsistent with the “knows, or has reasonable cause to believe” requirement for the duty to report in the current D.C. Code duty to report statute. D.C. Code § 22-3020.52(a) (“Any person who knows, or has reasonable cause to believe, that a child is a victim of sexual abuse shall immediately report such knowledge or belief to the

requirement for the duty to report in subsection (a) of the revised statute. The commentary to the RCC statute states that this is a possible change in law. Second, the RCC draft uses the term “sexual assault victim” as opposed to “victim” (sub-subparagraph (b)(1)(D)(i)) and adopts the definition of that term in D.C. Code § 23-1907(11).³²⁷ The commentary to the RCC statute states that this is a clarificatory change in law. Third, the RCC draft replaces the term “significant relationship” in sub-subparagraph (b)(1)(D)(ii) with the RCC term “position of trust with or authority over,” which may differ in scope. The commentary to the RCC statute states that this is a possible change in law.

- These changes improve the clarity and consistency of the revised statutes.
- (8) *The CCRC recommends replacing the term “infraction” with “civil violation” wherever it appears in the revised statute and codifying in paragraph (f)(2) “A violation of subsection (a) of this section shall not constitute a criminal offense or a delinquent act as defined in D.C. Official Code § 16-2301(7).” This is consistent with the marijuana decriminalization in current D.C. Code § 48-1201, which refers to the prohibited conduct as a “civil violation”³²⁸ and states that a*

police. For the purposes of this subchapter, a call to 911, or a report to the Child and Family Services Agency, shall be deemed a report to the police.”).

³²⁷ The sexual assault counselor exclusion in the current D.C. Code duty to report statute states:

Sexual assault counselors shall be exempt from reporting pursuant to subsection (a) of this section any crime disclosed in a confidential communication unless the sexual assault counselor has actual knowledge that the crime disclosed to the sexual assault counselor involves:

- (A) A *victim* under the age of 13;
- (B) A perpetrator or alleged perpetrator with whom the *sexual assault victim* has a significant relationship, as that term is defined in § 22-3001(10); or
- (C) A perpetrator or alleged perpetrator who is more than 4 years older than *the sexual assault victim*.

D.C. Code § 22-3020.52(c)(3) (emphasis added).

It is unclear why subparagraph (c)(3)(A) uses the term “victim” instead of “sexual assault victim” as in subparagraphs (c)(3)(B) and (c)(3)(C). Section 6 of the Sexual Assault Victims’ Rights Amendment Act of 2019 (the Act) added this exclusion to D.C. Code § 22-3020.52 and does not define the term “victim”. It seems unlikely that the Act intended to adopt the definition of “victim” in D.C. Code § 22-3001 that would otherwise apply (D.C. Code § 22-3001(11) defines “victim” as “a person who is alleged to have been subject to any offense set forth in subchapter II of this chapter.”). Section 5 of the Act added an identical exclusion for sexual assault counselors to D.C. Code § 14-312 for mandatory reporting and also uses the undefined term “victim,” as opposed to “sexual assault victim.”

Although “victim” is undefined in the identical exclusion in D.C. Code § 14-312, that statute defines “sexual assault victim” as “any individual against whom a sexual assault has been committed or is alleged to have been committed, including: (A) Deceased individuals; and (B) Representatives appointed by the court to exercise the rights and receive services on behalf of sexual assault victims who are under 18 years of age, incompetent, incapacitated, or deceased.” D.C. Code § 14-312(a)(6). Sub-subparagraph (b)(1)(D)(i) of the exclusion in the RCC duty to report statute uses the term “sexual assault victim” because this definition is consistent with the use of that term in sub-subparagraphs (b)(1)(D)(i) and (b)(1)(D)(ii).

The definition of “sexual assault victim” in D.C. Code § 14-312(a)(6) is identical to the definition of “sexual assault victim” in D.C. Code § 23-1907(11). The RCC refers to the definition in D.C. Code § 23-1907(11) for consistency with the definition of “sexual assault counselor” in Section 5 of the Act and in the revised duty to report statute (subparagraph (i)(2)(C)).

³²⁸ D.C. Code § 48-1201(a) (“Notwithstanding any other District law, the possession or transfer without remuneration of marijuana weighing one ounce or less shall constitute a civil violation.”).

violation of the prohibited conduct “shall not constitute a criminal offense or a delinquent act as defined in § 16-2301(7).”³²⁹ The commentary to this statute has been updated to reflect that these are clarificatory changes.

- This change improves the clarity and consistency of the revised statute.
- (9) *The CCRC recommends adding Forced Commercial Sex (RCC § 22E-1602) to the predicate offenses in sub-subparagraph (i)(2)(B)(i). This is consistent with the other RCC offenses listed in this sub-subparagraph: Trafficking in Forced Commercial Sex under RCC § 22E-1604; Sex Trafficking of a Minor under RCC § 22E-1605, and Commercial Sex with a Trafficked Person under RCC § 22E-1608. The commentary to the RCC statute has been updated to reflect that this is a change in law.*
- This change improves the clarity and consistency of the revised statute, and removes a possible gap in liability.
- (10) *The CCRC recommends deleting D.C. Code § 22-2704 [Abducting or enticing a child from his or her home for purposes of prostitution; harboring such child] from the predicate offenses under subparagraph (i)(2)(B). To the extent that abducting or enticing a minor for purposes of prostitution satisfies the other offenses listed under subparagraph(i)(2)(B), such as Trafficking in Forced Commercial Sex (RCC § 22E-1602), the RCC duty to report statute still applies. However, for conduct that falls outside these offenses, the RCC duty to report statute does not apply. The commentary to the RCC statute has been updated to reflect that this is a change in law.*
- This change improves the clarity and consistency of the revised statute.
- (11) *The CCRC recommends adding Trafficking in Commercial Sex (RCC § 22E-4403) to the list of predicate offenses under subparagraph (i)(2)(B). This offense broadly prohibits causing an individual to engage in consensual commercial sex acts and should be included in the list of predicate offenses for a duty to report when the complainant is under the age of 16 years. The commentary to the RCC statute has been updated to reflect that this is a change in law.*
- This change improves the clarity and consistency of the revised statute, and removes a possible gap in liability.
- (12) *The CCRC recommends codifying the following definition in subparagraph (i)(2)(A): “‘Confidential communication’ has the meaning specified in D.C. Code § 14-312(a)(1), and is subject to the protections in D.C. Code § 14-312(b)(3).” Section 6 of the Sexual Assault Victims’ Rights Amendment Act of 2019 (the Act) added an exclusion for sexual assault counselors to the current D.C. Code duty to report a sex crime statute,³³⁰ which is codified in*

³²⁹ D.C. Code § 48-1201(b).

³³⁰ D.C. Code § 22-3020.52(c), (c)(3) ((c) No legally recognized privilege, except for the following, shall apply to this subchapter: (3 “Sexual assault counselors shall be exempt from reporting pursuant to subsection (a) of this section any crime disclosed in a confidential communication unless the sexual assault counselor has actual knowledge that the crime disclosed to the sexual assault counselor involves: (A) A victim under the age of 13; (B) A perpetrator or alleged perpetrator with whom the sexual assault victim has a significant relationship, as that term

subparagraph (b)(1)(D) of the revised statute. Section 6 of the Act did not codify a definition for the term “confidential communication.” However, Section 5 of the Act added an identical exclusion to current D.C. Code § 14-312³³¹ for mandatory reporting and codified a definition of “confidential communication”³³² applicable to that exclusion. The revised statute incorporates this definition of “confidential communication,” as well as the protections for a “confidential communication” that Section 5 of the Act added to current D.C. Code § 14-312.³³³ The commentary to the RCC statute has been updated to reflect that this is a clarificatory change in law.

- This change improves the clarity and consistency of the revised statute.
- (13) *The CCRC recommends codifying the following definition in subparagraph (i)(2)(C): “‘Sexual assault counselor’ has the meaning specified in D.C. Code § 23-1907(10).” Section 6 of the Sexual Assault Victims’ Rights Amendment Act of 2019 (the Act) added an exclusion for sexual assault counselors to current D.C. Code § 22-3020.52(c)(3),³³⁴ which is codified in subparagraph (b)(1)(D) of the*

is defined in § 22-3001(10); or (C) A perpetrator or alleged perpetrator who is more than 4 years older than the sexual assault victim.”).

³³¹ Section 5 of the Act added a new paragraph (b)(5) to current D.C. Code § 14-312:

(5) Notwithstanding § 4-1321.02, sexual assault counselors shall be exempt from mandatory reporting of any crime disclosed in a confidential communication unless the sexual assault counselor has actual knowledge that the crime disclosed to the sexual assault counselor involves:

- (A) A victim under the age of 13;
- (B) A perpetrator or alleged perpetrator with whom the sexual assault victim has a significant relationship, as that term is defined in § 22-3001(10); or
- (C) A perpetrator or alleged perpetrator who is more than 4 years older than the sexual assault victim.

D.C. Code § 14-312(b)(5).

³³² D.C. Code § 14-312(a), (a)(1):

(a) For the purposes of this section, the term:

(1) “Confidential communication” means:

- (A) Information exchanged between a sexual assault victim 13 years of age or older and a sexual assault counselor during the course of the sexual assault counselor providing counseling, support, and assistance to the victim; and
- (B) Records kept by a community-based organization in the course of providing victim advocacy services pursuant to § 23-1909 for sexual assault victim 13 years of age or older.

³³³ D.C. Code § 14-312(b)(3):

(3) The confidentiality of a confidential communication shall not be waived by the presence of, or disclosure to a:

- (A) Sign language or foreign language interpreter; provided, that a sign language or foreign language interpreter shall be subject to the limitations and exceptions set forth in paragraph (1) of this subsection and the same privileges set forth in subsection (c) of this section;
- (B) Third party participating in group counseling with the sexual assault victim;
- or
- (C) Third party with the consent of the victim where reasonably necessary to accomplish the purpose for which the sexual assault counselor is consulted.

³³⁴ D.C. Code § 22-3020.52(c), (c)(3) ((c) No legally recognized privilege, except for the following, shall apply to this subchapter: (3) “Sexual assault counselors shall be exempt from reporting pursuant to subsection (a) of this section any crime disclosed in a confidential

revised statute. Section 6 of the Act did not codify a definition for the term “sexual assault counselor.” However, Section 5 of the Act added an identical exclusion to current D.C. Code § 14-312³³⁵ for mandatory reporting and codified a definition of “sexual assault counselor”³³⁶ applicable to that exclusion. The revised statute incorporates this definition of “sexual assault counselor.” The commentary to the RCC statute has been updated to reflect that this is a clarificatory change in law.

- This change improves the clarity and consistency of the revised statute.

communication unless the sexual assault counselor has actual knowledge that the crime disclosed to the sexual assault counselor involves: (A) A victim under the age of 13; (B) A perpetrator or alleged perpetrator with whom the sexual assault victim has a significant relationship, as that term is defined in § 22-3001(10); or (C) A perpetrator or alleged perpetrator who is more than 4 years older than the sexual assault victim.”).

³³⁵ Section 5 of the Act added a new paragraph (b)(5) to current D.C. Code § 14-312:

(5) Notwithstanding § 4-1321.02, sexual assault counselors shall be exempt from mandatory reporting of any crime disclosed in a confidential communication unless the sexual assault counselor has actual knowledge that the crime disclosed to the sexual assault counselor involves:

(A) A victim under the age of 13;

(B) A perpetrator or alleged perpetrator with whom the sexual assault victim has a significant relationship, as that term is defined in § 22-3001(10); or

(C) A perpetrator or alleged perpetrator who is more than 4 years older than the sexual assault victim.

D.C. Code § 14-312(b)(5).

³³⁶ D.C. Code § 14-312(a)(5A): “(a) For the purposes of this section, the term: (5) ‘Sexual assault counselor’ shall have the same meaning as provided in § 23-1907(10).”.

RCC § 22E-1401. Kidnapping.

- (1) *USAO, App. C at 512, recommends that the word “substantially” be deleted from paragraphs (a)(1) and (b)(1) in RCC § 22E-1401.*
 - The RCC does not incorporate this recommendation because it may result in disproportionate penalties. Although most kidnappings will involve substantial confinement or movement, retaining the substantiality element in criminal restraint is necessary to prevent minor or trivial confinements or movements from being criminalized.
- (2) *USAO, App. C at 513, recommends redrafting commentary to add the sentence: “The phrase ‘by displaying or using a dangerous weapon or imitation dangerous weapon’ should be broadly construed to include kidnappings in which the accused only momentarily displays such a weapon, or slightly touches the complainant with such a weapon.”*
 - The RCC incorporates this change, and the commentary to the kidnapping offense will be updated.
- (3) *USAO, App. C at 513-514, recommends changing the requirement from “significant bodily injury” in subparagraphs (a)(3)(F) and (b)(3)(F) to “bodily injury,” so that those provisions refer to “Cause any person to believe that the complainant will not be released without suffering bodily injury, or a sex offense defined in Chapter 13 of this Title”.*
 - The RCC partially incorporates this recommendation. The CCRC recommends dividing kidnapping into two penalty gradations, based on the actor’s intent in confining or moving the complainant. Under this revised kidnapping statute, first degree kidnapping includes causing any person to fear that the complainant will not be released without having suffered a serious bodily injury, and second degree kidnapping includes causing any person to fear that the complainant will not be released without having suffered bodily injury. Under this revision, kidnapping with intent to cause a person to fear the complainant will suffer a bodily injury will qualify as kidnapping but not be subject to the same penalty as kidnapping a person with intent to cause a person to fear the complainant will suffer a serious bodily injury, death, or a sex offense. This change improves the clarity and proportionality of the revised statutes.
- (4) *USAO, App. C at 514, recommends that kidnapping should be revised to include restraining or moving a person for “any other purpose that the actor believes will benefit the actor.”*
 - The RCC does not incorporate this recommendation because the change would result in disproportionate penalties. This element would virtually eliminate the distinction between kidnapping and the lesser criminal restraint offense. The kidnapping offense is intended to cover cases in which confinement or movement is especially dangerous or harrowing for the complainant. Under USAO’s proposal, any case in which the actor had any motive for confining or restraining a person would constitute kidnapping, even if there was still limited harm or risk to the complainant. Regarding the hypothetical case presented by USAO, CCRC believes such

facts would constitute kidnapping. If an actor confines a person for months on end, but without intent to cause injury or commit a sexual offense, the complainant and the complainant's friends and family, would fear that the complainant will not be released at all, or without having suffered significant bodily injury or a sexual offense. In addition, the CCRC recommends adding a new version of kidnapping, discussed below.

(5) *USAO, App. C at 514-15, recommends that kidnapping and criminal restraint retain an elements-based merger analysis instead of a fact-based merger analysis.*

- The RCC does not incorporate this recommendation because the change would result in disproportionate penalties. Several offenses against persons, notably assault, robbery, and sexual assault, *inherently* involve restraining or moving a person, with intent to cause bodily injury or facilitate commission of a felony offense. Under an elements-based analysis, kidnapping does not merge with these offenses. The additional penalties authorized under the kidnapping statute are not warranted when the movement or confinement of the complainant was incidental to the commission of another offense. An elements-based merger analysis does not sufficiently address the significant overlap between kidnapping and other offenses against persons. Retaining a fact-based merger analysis prevents unnecessary overlap and improves the proportionality of the revised statute.

(6) *The CCRC recommends adding a new version of kidnapping in which the actor restrains the complainant for 72 hours or more. The kidnapping offense is intended to cover restraints that are particularly dangerous or harrowing. In the vast majority of cases, if an actor restrains a person for 72 hours or more, that actor also has intent that a person will fear that the complainant will not be released. However, in order to ensure that such cases constitute kidnapping, the statute will be amended to specifically address restraints of this duration.*

- This change improves the clarity and proportionality of the revised statutes.

(7) *The CCRC recommends re-labeling the exclusion to liability under subsection (c) as a defense. This change does not substantively change the revised offense. Under RCC § 22E-201, under both exclusions and defenses, if there is any evidence at trial then the government bears the burden of disproving all elements of the exclusion or defense beyond a reasonable doubt.*

- This change improves the clarity and organization of the revised statutes.

(8) *The CCRC recommends re-organizing the kidnapping offense into two penalty grades, with separate penalty enhancements that are applicable to each grade. First degree kidnapping now requires intent to commit particularly dangerous and harrowing harms on the complainant³³⁷, while second degree kidnapping*

³³⁷ Under the revised statute, first degree kidnapping will require intent to: hold the complainant for ransom or reward; use the complainant as a shield or hostage; facilitate the commission of any felony or flight thereafter; inflict serious bodily injury upon the complainant; commit a sexual offense defined in Chapter 13 of this Title against the complainant; cause any person to believe that the complainant will not be released without suffering serious bodily injury, or a sex offense defined in Chapter 13 of this Title;

requires intent to inflict bodily injury or to cause any person to believe that the complainant will not be released without suffering bodily injury. The previous version of the kidnapping statute treated confinement or movement with intent to inflict mere bodily injury the same as confinement or movement that involve a risk of more serious injury, death, or sexual assaults.

- This change improves the proportionality of the revised statute.

(9) *The CCRC recommends that elements from the prior aggravated kidnapping offense be re-categorized as penalty enhancements, applicable to both grades of the revised kidnapping statute. Under the prior version of the statute, the kidnapping offense was divided into aggravated and non-aggravated forms. Aggravated kidnapping required the same elements as kidnapping, plus at least one additional aggravating factor.³³⁸ These aggravating factors will now be penalty enhancements that can apply to both first and second degree kidnapping under the revised statute. One element from the aggravated kidnapping offense will not be included in the revised statute's penalty enhancements. The revised statute's penalty enhancement does not include committing kidnapping with recklessness that the complainant is under 12 years of age. This element is unnecessary, as the penalty enhancements include committing kidnapping with recklessness as to the fact that the complainant is a "protected person." The term "protected person" includes persons under 18 years of age when the actor is at least 18 years of age and 4 years older than the complainant.*

- This change improves the organization and proportionality of the revised statute.

(10) *The CCRC recommends revising the kidnapping statute to include any movement or confinement of incapacitated persons and children under the age of 16, without the effective consent of a "person with legal authority over the complainant who is acting consistent with that authority," but providing an affirmative defense when the actor reasonably believes a person with legal authority would give consent. Under the prior version of the statute, kidnapping included as an element only moving or confining incapacitated persons or children under the age of 16 if the actor was reckless that "a person with legal authority over the complainant would not give effective consent to the confinement or movement[.]" Under that version, if the actor did not communicate with a person with legal authority, the element required that the actor disregarded a substantial risk that such a person would not have effectively consented. Under the revised statute, however, confining or moving an incapacitated persons and children under the age of 16 without communicating with a person with legal authority of the person satisfies this element of the offense. There is no need to prove that the actor disregarded a substantial risk that a person with legal authority would not have*

permanently deprive a person with legal authority over the complainant of custody of the complainant; or confine or move the complainant for 72 hours or more.

³³⁸ These aggravating factors were: the actor was reckless as to the fact that the complainant was under the age of 12 or a protected person; the actor committed the offense with the purpose of harming the complainant due to the complainant's status as a law enforcement officer, public safety employee, or District official; or the actor committed the offense by using or displaying a dangerous weapon or imitation dangerous weapon.

consented. However, the statute also includes as an affirmative defense that the actor reasonably believed that a person with legal authority would have consented to the movement or confinement. Under this revision, when an actor confines or moves an incapacitated persons and child under the age of 16 without consent of a person with legal authority, the actor bears the burden of proving that the actor reasonably believed a person with legal authority would have consented.

- This change improves the proportionality of the revised statute.

(11) *The CCRC recommends amending the close relatives with intent to assume responsibility for minor defense to require that the complainant is, in fact, under 18 years of age. The prior version of the defense did not specify that the complainant must be under 18 years of age. This change clarifies that the defense only applies for certain kidnappings of minors.*

- This change improves the clarity of the revised criminal statute.

RCC § 22E-1402. Criminal Restraint.

- (1) *USAO, App. C at 512, recommends that the word “substantially” be deleted from paragraphs (a)(1) and (b)(1) in RCC § 22E-1402.*
 - The RCC does not incorporate this recommendation for the reasons set forth in responses to the analogous recommendation to the kidnapping statute. Removing the term “substantially” from the criminal restraint statute would technically criminalize even trivial restrictions on a person’s freedom of movement, such as momentarily confining a person, or causing a person to walk to the opposite side of a sidewalk in order to pass.
- (2) *USAO, App. C at 514-15, recommends that kidnapping and criminal restraint retain an elements-based merger analysis instead of a fact-based merger analysis.*
 - The RCC does not incorporate this recommendation for the reasons set forth in responses to the analogous recommendation to the kidnapping statute.
- (12) *The CCRC recommends re-organizing the criminal restraint statute to include a single grade of the offense, and elements that were specific to the aggravated form of criminal restraint will become penalty enhancements. Under the prior version of the statute, the criminal restraint offense was divided into aggravated and non-aggravated forms. Aggravated criminal restraint required the same elements as criminal restraint, plus at least one additional aggravating factor.³³⁹ These aggravating factors will now be penalty enhancements applicable to the single grade of criminal restraint. One element from the aggravated criminal restraint offense will not be included in the revised statute’s penalty enhancements. The revised statute’s penalty enhancement does not include committing criminal restraint with recklessness that the complainant is under 12 years of age. This element is unnecessary, as the penalty enhancements include committing criminal restraint with recklessness as to the fact that the complainant is a “protected person.” The term “protected person” includes persons under 18 years of age when the actor is at least 18 years of age and 4 years older than the complainant.*
 - This change improves the organization and proportionality of the revised statute.
- (3) *The CCRC recommends revising the criminal restraint statute to include any movement or confinement of incapacitated persons and children under the age of 16, without the effective consent of a “person with legal authority over the complainant who is acting consistent with that authority,” but providing an affirmative defense when the actor reasonably believes a person with legal authority would give consent. Under the prior version of the statute, criminal restraint included as an element only moving or confining incapacitated persons*

³³⁹ These aggravating factors were: the actor was reckless as to the fact that the complainant was under the age of 12 or a protected person; the actor committed the offense with the purpose of harming the complainant due to the complainant’s status as a law enforcement officer, public safety employee, or District official; or the actor committed the offense by using or displaying a dangerous weapon or imitation dangerous weapon.

or children under the age of 16 if the actor was reckless that “a person with legal authority over the complainant would not give effective consent to the confinement or movement[.]” Under that version, if the actor did not communicate with a person with legal authority, the element required that the actor disregarded a substantial risk that such a person would not have effectively consented. Under the revised statute, however, confining or moving an incapacitated persons and children under the age of 16 without communicating with a person with legal authority of the person satisfies this element of the offense. There is no need to prove that the actor disregarded a substantial risk that a person with legal authority would not have consented. However, the statute also includes as an affirmative defense that the actor reasonably believed that a person with legal authority would have consented to the movement or confinement. Under this revision, when an actor confines or moves an incapacitated persons and child under the age of 16 without consent of a person with legal authority, the actor bears the burden of proving that the actor reasonably believed a person with legal authority would have consented.

- This change improves the proportionality of the revised statute.
- (4) *The CCRC recommends re-labeling the exclusions to liability under subsection (c) as defenses. This change does not substantively change the revised offense. Under RCC § 22E-201, under both exclusions and defenses, if there is any evidence at trial then the government bears the burden of disproving all elements of the exclusion or defense beyond a reasonable doubt.*
- This change improves the clarity of the revised criminal statute.
- (5) *The CCRC recommends adding a new defense to prosecution under subparagraph (a)(2)(A) that the actor is either is a transportation worker who moves the complainant in the course of the worker’s official duties; or a person who moves the complainant solely by persuading the complainant to go to a location open to the general public to engage in a commercial or other legal activity. Under the revised statute, moving a child under the age of 16 or incapacitated person without consent of a person with legal authority constitutes criminal restraint. This could include a bus driver transporting a 15 year old child without that child’s guardian’s consent, or a shop owner convincing a 15 year old to come into a store without that child’s guardian’s consent. This defense bars liability in such cases.*
- This change improves the clarity and proportionality of the revised criminal code.
- (6) *The CCRC recommends omitting as a defense to criminal restraint that the actor is a person with legal authority over the complainant. This defense was originally codified to recognize that persons with legal authority over the complainant may legally move or confine the complainant, even without effective consent. The CCRC recommended including this defense before it had drafted RCC § 22E-408, which codifies a general special responsibility for care, discipline, or safety defense, which more broadly governs when persons with legal authority may use force against persons in their care. Instead of including a specific defense for criminal restraint, the general defense under RCC §22E-408 will apply to the criminal restraint statute.*

- This change improves the proportionality and consistency of the revised statute.

RCC § 22E-1403. Blackmail.

- (1) *The CCRC recommends replacing the words “by threatening that any person will” with the words “[b]y communicating that if the person does not commit or refrain from the act, any person will[.]” The word “communicating” replaces the word “threatens” from the prior version of the blackmail statute to maintain consistency with the language of the revised criminal threats statute while avoiding the inference that all the elements of the criminal threats statute must be proven for blackmail. Using the word “communicates” ensures that the criminal threats offense is a lesser included offense of blackmail.*
 - This change improves the clarity and consistency of the revised statutes.
- (2) *The CCRC recommends adding a new effective consent affirmative defense. Under this defense, the defendant bears the burden of proving by a preponderance of the evidence that the defendant reasonably believed that the complainant effectively consented to the conduct constituting the offense. This defense recognizes that in some circumstances, a person may consent to another using various coercive threats to compel the person to engage or refrain from particular conduct.*
 - This change improves the clarity and proportionality of the revised criminal code.

RCC § 22E-1501. Criminal Abuse of a Minor.

- (1) *The CCRC recommends two changes to the list of predicate offenses against persons in paragraph (e)(2): 1) deleting the RCC menacing offense; and 2) replacing the reference to “Sixth Degree Assault” with “Fourth Degree Assault.” The updated RCC no longer has a separate menacing offense and in the new draft of the RCC assault statute, fourth degree assault is the equivalent gradation to what was previously sixth degree assault.*
 - This change improves the clarity of the revised statute.
- (2) *The CCRC recommends moving recklessly causing serious mental injury from second degree of the revised criminal abuse of a minor statute—a Class 8 felony—to third degree—a Class 9 felony. The occurrence of a severe mental injury unaccompanied by physical abuse and with a mental state of only recklessness (as opposed to purposeful infliction, categorized as first degree criminal abuse of a minor) is closer in culpability to the predicate offenses in third degree.*
 - This change improves the proportionality of the revised statutes.
- (3) *The CCRC recommends codifying an exclusion from liability in what is now subsection (d): “An actor does not commit an offense under this section when, in fact, the actor’s conduct is specifically permitted by a District statute or regulation.” This exclusion resolves any apparent conflict within District laws. For example, Title 22, Health, of the current D.C. Municipal Regulations, has regulations that specifically refer to immunity from assault liability that clearly will satisfy this exclusion from liability.³⁴⁰*
 - This change improves the clarity, consistency, and proportionality of the revised statutes.
- (4) *The CCRC recommends codifying an effective consent affirmative defense in subsection (e). In previous compilations of draft statutes for the RCC, RCC § 22E-409³⁴¹ codified a general effective consent defense for several RCC offenses*

³⁴⁰ For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

³⁴¹ In relevant part, the defense in RCC § 22E-409 stated:

- (c) *Defense.* Except as provided in subsection (b) of this section, it is a defense to an offense in Subtitle II of this title that:
 - (1) The complainant or a person with legal authority over the complainant gave effective consent to the actor, or the actor reasonably believed that the complainant or a person with legal authority over the complainant gave effective consent to the actor, for the conduct charged to constitute the offense or for the result thereof; and
 - (2) Either:

against persons, including criminal abuse of a minor. In this update, however, the RCC deletes the general defense in RCC § 22E-409 and instead codifies specific effective consent defenses in the offenses.

Like the previous effective consent defense in RCC § 22E-409, the defense continues to exclude an actor that is a “person with legal authority over the complainant”³⁴² from availing themselves of the defense so that such an actor must use the RCC parent defense or RCC guardian defense in RCC § 22E-408. The exclusion effectively means that the defense applies to individuals that have a duty of care to the minor, but do not rise to the level of a “person with legal authority over the complainant” as that term is defined in the RCC, such as a parent or guardian. The defense eliminates liability where the actor knows that they have no effective consent by the person with legal authority (e.g., they are absent or the contract for the childcare services didn’t foresee the eventuality), and the requirements in the limited duty of care defense (RCC § 22E-408(a)(4)) are too stringent. For example, the defense would cover the babysitter who decides without prior consultation with the parent to let a minor climb the tree that results in a significant bodily injury.

The previous effective consent defense in RCC § 22E-409 applied, in part, if the “conduct charged to constitute the offense did not create a substantial risk of, or cause, death or a protracted loss or impairment of the function of a bodily member or organ.” The new defense continues to recognize these limitations by applying only to subsection (b)—recklessly causing significant bodily injury—and subsection (c)—recklessly causing serious mental injury or, in fact, engaging in a specified RCC predicate offense against persons, such as fourth degree assault or criminal restraint. An actor that commits a predicate offense against persons, but does not have liability for criminal abuse of a minor due to a successful affirmative defense, would still have liability for the predicate offense against persons if the requirements of that offense are met.

- This change improves the clarity, consistency, and proportionality of the revised statutes.

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- (A) The conduct charged to constitute the offense did not create a substantial risk of, or cause, death or a protracted loss or impairment of the function of a bodily member or organ; or
 - (B) The result was a reasonably foreseeable hazard of:
 - (i) The complainant’s occupation;
 - (ii) A medical procedure, otherwise permitted under District and federal civil law, by a licensed health professional or a person acting at the direction of a licensed health professional; or
 - (iii) Participation in a lawful contest or sport.

³⁴² RCC § 22E-701 defines “person with legal authority over the complainant” as:

- (A) When the complainant is under 18 years of age, the parent, or a person acting in the place of a parent per civil law, who is responsible for the health, welfare, and supervision of the complainant, or someone acting with the effective consent of such a parent or such a person; or
- (B) When the complainant is an incapacitated individual, the court-appointed guardian to the complainant, or someone acting with the effective consent of such a guardian.

(5) *USAO, App. C at 542-543, recommends increasing the maximum possible penalty for a Class 6 felony from 12 years³⁴³ to 15 years. Specific to the RCC criminal abuse of a minor statute, USAO states that first degree criminal abuse of a minor is “comparable to” first degree child cruelty under current D.C. Code §§ 22-1101 which has a maximum possible penalty of 15 years. USAO states that it “does not believe that the maximum penalt[y]” for first degree criminal abuse of a minor should be lowered from 15 years’ incarceration to 12 years’ incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;³⁴⁴ 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;³⁴⁵ 5) relative ordering of related RCC offenses;³⁴⁶ and 6) national data on sentencing and time served.³⁴⁷ Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the 15 year statutorily authorized penalty for first degree child cruelty, actual practice in the District has been somewhat different. Court data for 2010-2019 indicates that the 97.5% quantile of sentences for all first degree child cruelty, with or without an aggravator enhancement, appears to be under 120 months (10 years) once an apparent error is accounted for.³⁴⁸ The CCRC recommendation here is generally consistent with current practice.

³⁴³ In its comments, USAO states that an RCC Class 6 felony has a maximum possible penalty of 10 years. However, per First Draft of Report #52, a RCC Class 6 felony has a maximum possible penalty of 12 years.

³⁴⁴ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

³⁴⁵ CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

³⁴⁶ CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.

³⁴⁷ See Danielle Kaoble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

³⁴⁸ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions. Notably, this analysis includes an apparent error based on a single sentence that, while marked as unenhanced in the raw data, had a penalty above 15 years that legally could only be possible with an enhancement. The CCRC hopes that its forthcoming analysis (in the next month or so) which uses data corrected by the court after 72 hours will resolve this discrepancy. Without this one case, however, it appears that the 97.5% would be below 120 months.

RCC § 22E-1502. Criminal Neglect of a Minor.

- (1) *The CCRC recommends codifying as a discrete basis of liability for third degree of the revised criminal neglect of a minor statute that a person with a responsibility under civil law for the health, welfare, or supervision of the minor complainant recklessly “Creates, or fails to mitigate or remedy, a substantial risk that the complainant would experience bodily injury from consumption of alcohol, or consumption or inhalation, without a valid prescription, of a controlled substance or marijuana” (sub-subparagraph (c)(2)(B)(ii)).*

The current D.C. Code contributing to the delinquency of a minor statute prohibits, in relevant part, certain persons over the age of 18 years “permit[ting] . . . or allow[ing]” a minor to “[p]ossess or consume alcohol or, without a valid prescription, a controlled substance as that term is defined in § 48-901.02(4).”³⁴⁹ The current D.C. Code contributing to the delinquency of a minor statute does not require a duty of care between the adult and the minor. As is discussed in the commentary to the RCC contributing to the delinquency of a minor statute, imposing omission liability without a duty of care is generally disfavored. As such, the RCC contributing to the delinquency of a minor statute no longer prohibits “permitting” or “allowing” the complainant to engage in the prohibited conduct because the statute does not require a duty of care.³⁵⁰

With this change, the RCC criminal neglect of a minor statute provides liability for caretakers (persons with a duty of care to the minor complainant) who create or fail to mitigate risks of bodily injury arising from the complainant’s consumption of alcohol, or consumption or inhalation, without a valid prescription, of a controlled substance or marijuana.³⁵¹ Rather than use the undefined terms “permitting” or “allowing” (such as in the current D.C. Code contributing to the delinquency of a minor statute), the RCC criminal neglect of a minor statute requires that the actor recklessly “creates, or fails to mitigate or remedy, a substantial risk” of bodily injury from the complainant’s consumption of alcohol or drugs. Already under the RCC, if the actor recklessly creates such a risk, and causes “bodily injury” to the complainant, there is liability, with a higher penalty, under third degree of the RCC criminal abuse of a minor statute

³⁴⁹ D.C. Code § 22-811(a), (a)(2).

³⁵⁰ As is discussed in the commentary to the offense, the RCC contributing to the delinquency of a minor statute no longer separately prohibits encouraging, causing, or soliciting a minor to possess or consume alcohol or a controlled substance without a valid prescription. Instead, the RCC statute prohibits being an accomplice to an offense under RCC § 23E-210 or soliciting a minor to commit an offense under RCC § 22E-302. An offense includes a violation of the RCC possession of a controlled substance statute (RCC § 48-904.01) and the RCC contributing statute specifically includes a violation of D.C. Code § 25-1002 (underage possession or consumption of alcohol) as an offense.

³⁵¹ Specific reference is made to marijuana to ensure that marijuana is categorically included, regardless of amount. Title 48 of the D.C. Code generally defines a controlled substance to include marijuana as a controlled substance (see D.C. Code § 48-901.02(4)), but also separately modifies that general definition (see D.C. Code § 48-904.01(a)(1A)(A)) to eliminate marijuana under 2 ounces possessed by a person 21 or over. Because marijuana is categorically included, a parent who legally possesses marijuana may, for example, still be liable for blowing smoke from the marijuana upon a small child if it is proven that such conduct creates a substantial risk that the complainant would experience a bodily injury from the smoke.

(RCC § 22E-1501) for committing what is now fourth degree assault. Also, if the actor recklessly creates such a risk of a higher level of “bodily injury,” such as “significant bodily injury,” there already is liability under first degree or second degree of the RCC criminal neglect of a minor statute. This change fills a gap for a caretaker creating or failing to mitigate risks of lower-level harms (bodily injury) without proof of actual injury due to the complainant’s consumption of alcohol or drugs. This revision also addresses a written comment OAG made on an earlier draft of the RCC criminal abuse of a minor and criminal neglect of a minor statutes that “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 injury.”³⁵² The commentary to this offense has been updated to reflect that this is a substantive change in law

- This change improves the clarity, consistency, and proportionality of the revised statute, removing a possible gap in liability.
- (2) *The CCRC recommends codifying an exclusion from liability in what is now paragraph (d)(2): “An actor does not commit an offense under this section when, in fact, the actor’s conduct is specifically permitted by a District statute or regulation.” This exclusion resolves any apparent conflict within District laws. For example, Title 22, Health, of the current D.C. Municipal Regulations, has regulations that specifically refer to immunity from assault liability that clearly will satisfy this exclusion from liability.³⁵³*
- This change improves the clarity, consistency, and proportionality of the revised statutes.
- (3) *The CCRC recommends codifying an effective consent affirmative defense in subsection (e). In previous compilations of draft statutes for the RCC, RCC § 22E-409³⁵⁴ codified a general effective consent defense for several RCC offenses*

³⁵² OAG written comments on First Draft of Report #20, Abuse & Neglect of Children, Elderly, and Vulnerable Adults (May 11, 2018) at 1-2.

³⁵³ For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

³⁵⁴ In relevant part, the defense in RCC § 22E-409 stated:

- (d) *Defense.* Except as provided in subsection (b) of this section, it is a defense to an offense in Subtitle II of this title that:
- (1) The complainant or a person with legal authority over the complainant gave effective consent to the actor, or the actor reasonably believed that the complainant or a person with legal authority over the complainant gave effective consent to the actor, for the conduct charged to constitute the offense or for the result thereof; and
 - (2) Either:

against persons, including criminal neglect of a minor. In this update, however, the RCC deletes the general defense in RCC § 22E-409 and instead codifies specific effective consent defenses in the offenses.

Like the previous effective consent defense in RCC § 22E-409, the defense continues to exclude an actor that is a “person with legal authority over the complainant”³⁵⁵ from availing themselves of the defense so that such an actor must use the RCC parent defense or RCC guardian defense in RCC § 22E-408. The exclusion effectively means that the defense applies to individuals that have a duty of care to the minor, but do not rise to the level of a “person with legal authority over the complainant” as that term is defined in the RCC, such as a parent or guardian. The defense eliminates liability where the actor knows that they have no effective consent by the person with legal authority (e.g., they are absent or the contract for the childcare services didn’t foresee the eventuality), and the requirements in the limited duty of care defense (RCC § 22E-408(a)(4)) are too stringent. For example, the defense would cover the babysitter who decides to let a minor briefly play outside in the snow without gloves if the babysitter can’t find them or there aren’t any available.

The previous effective consent defense in RCC § 22E-409 applied, in part, if the “conduct charged to constitute the offense did not create a substantial risk of, or cause, death or a protracted loss or impairment of the function of a bodily member or organ.” The new defense continues to recognize these limitations by applying only to subsection (b)—recklessly causing, or failing to mitigate, a risk of significant bodily injury or serious mental injury—and subsection (c)—recklessly failing to make a reasonable effort to provide essential items or care or creating, or failing to remedy a risk of bodily injury from drug or alcohol consumption.

- This change improves the clarity, consistency, and proportionality of the revised statutes.

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- (A) The conduct charged to constitute the offense did not create a substantial risk of, or cause, death or a protracted loss or impairment of the function of a bodily member or organ; or
 - (B) The result was a reasonably foreseeable hazard of:
 - (i) The complainant’s occupation;
 - (ii) A medical procedure, otherwise permitted under District and federal civil law, by a licensed health professional or a person acting at the direction of a licensed health professional; or
 - (iii) Participation in a lawful contest or sport.

³⁵⁵ RCC § 22E-701 defines “person with legal authority over the complainant” as:

- (A) When the complainant is under 18 years of age, the parent, or a person acting in the place of a parent per civil law, who is responsible for the health, welfare, and supervision of the complainant, or someone acting with the effective consent of such a parent or such a person; or
- (B) When the complainant is an incapacitated individual, the court-appointed guardian to the complainant, or someone acting with the effective consent of such a guardian.

(4) *The CCRC recommends adding the defined term "in fact" to the exclusion from liability subsection, to make clear that no awareness or culpable mental state is required.*³⁵⁶

- This change clarifies and does not substantively change the revised statute.

³⁵⁶ RCC § 22E-207.

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

- (1) *The CCRC recommends two changes to the list of predicate offenses against persons in paragraph (f)(2): 1) deleting the RCC menacing offense; and 2) replacing the reference to “Sixth Degree Assault” with “Fourth Degree Assault.” The updated RCC no longer has a separate menacing offense and in the new draft of the RCC assault statute, fourth degree assault is the equivalent gradation to what was previously sixth degree assault.*
 - This change improves the clarity of the revised statute.
- (2) *The CCRC recommends moving recklessly causing serious mental injury from second degree of the revised criminal abuse of a vulnerable adult or elderly person statute—a Class 8 felony—to third degree—a Class 9 felony. The occurrence of a severe mental injury unaccompanied by physical abuse and with a mental state of only recklessness (as opposed to purposeful infliction, categorized as first degree criminal abuse of a vulnerable adult or elderly person) is closer in culpability to the predicate offenses in third degree.*
 - This change improves the proportionality of the revised statutes.
- (3) *The CCRC recommends codifying an exclusion from liability in what is now subsection (d): “An actor does not commit an offense under this section when, in fact, the actor’s conduct is specifically permitted by a District statute or regulation.” This exclusion resolves any apparent conflict within District laws. For example, Title 22, Health, of the current D.C. Municipal Regulations, has regulations that specifically refer to immunity from assault liability that clearly will satisfy this exclusion from liability.³⁵⁷*
 - This change improves the clarity, consistency, and proportionality of the revised statutes.
- (4) *The CCRC recommends codifying an effective consent defense in subsection (e) of the revised criminal abuse of a vulnerable adult or elderly person statute. In previous compilations of draft statutes for the RCC, RCC § 22E-409³⁵⁸ codified a*

³⁵⁷ For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

³⁵⁸ In relevant part, the defense in RCC § 22E-409 stated:

- (e) *Defense.* Except as provided in subsection (b) of this section, it is a defense to an offense in Subtitle II of this title that:
 - (1) The complainant or a person with legal authority over the complainant gave effective consent to the actor, or the actor reasonably believed that the complainant or a person with legal authority over the complainant gave effective consent to the actor, for the conduct charged to constitute the offense or for the result thereof; and
 - (2) Either:

general effective consent defense for several RCC offenses against persons, including criminal abuse of a vulnerable adult or elderly person. In this update, however, the RCC deletes the general defense in RCC § 22E-409 and instead codifies specific effective consent defenses in the offenses.

The new defenses in paragraphs (e)(1) and (e)(2) are generally consistent with the previous effective consent defense in RCC § 22E-409 with a few main differences. The defenses continue to exclude an actor that is a “person with legal authority over the complainant” from availing themselves of the defense so that such an actor must use the RCC guardian defense in RCC § 22E-408. The revised defenses still apply if the actor reasonably believes that the actor has the effective consent of the complainant or a “person with legal authority over the complainant,” as that term is defined in RCC § 22E-701.³⁵⁹ However, the defenses no longer apply if the actor “in fact” has the complainant’s effective consent but does not have any subjective awareness of this fact. Attempt liability addresses the rare situation when the actor actually has effective consent, but mistakenly believes that he or she does not.³⁶⁰

The previous effective consent defense in RCC § 22E-409 applied, in part, if the “conduct charged to constitute the offense did not create a substantial risk of, or cause, death or a protracted loss or impairment of the function of a bodily member or organ.” The new defenses continue to recognize these limitations by permitting a defense for subparagraph (a)(2)(B) of first degree—which requires “serious bodily injury,” as that term is defined in RCC § 22E-701³⁶¹—when the injury is “caused by a lawful cosmetic or medical procedure.” The defense to

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- (A) The conduct charged to constitute the offense did not create a substantial risk of, or cause, death or a protracted loss or impairment of the function of a bodily member or organ; or
 - (B) The result was a reasonably foreseeable hazard of:
 - (i) The complainant’s occupation;
 - (ii) A medical procedure, otherwise permitted under District and federal civil law, by a licensed health professional or a person acting at the direction of a licensed health professional; or
 - (iii) Participation in a lawful contest or sport.

³⁵⁹ RCC § 22E-701 defines “person with legal authority over the complainant,” in relevant part, as “. . . (B)When the complainant is an incapacitated individual, the court-appointed guardian to the complainant, or someone acting with the effective consent of such a guardian.” Subsection (A) of the definition applies if the complainant is under the age of 18 years and neither a “vulnerable adult” or an “elderly person,” as those terms are defined in the RCC, can be under the age of 18 years.

³⁶⁰ It is an unusual scenario where an actor actually has effective consent but mistakenly believes he or she does not, and commits a crime. However, in such a situation, there may be attempt liability under the RCC general provision for attempt in RCC § 22E-301, which includes that the actor “would have come dangerously close to completing that offense if the situation was as the [actor] perceived it to be.”

³⁶¹ RCC § 22E-701 defines “serious bodily injury” as “a bodily injury or significant bodily injury that involves: (A) A substantial risk of death; (B) Protracted and obvious disfigurement; (C) Protracted loss or impairment of the function of a bodily member or organ; or (D)Protracted loss of consciousness.”

second degree—causing “significant bodily injury”³⁶²—and the defense to third degree—recklessly causing serious mental injury or, in fact, engaging in a specified RCC predicate offense against persons, such as fourth degree assault or criminal restraint—allows the complainant or a person with legal authority over the complainant to give effective consent to the injury without any such restriction as to the cause. An actor that commits a predicate offense against persons, but does not have liability for criminal abuse of a vulnerable adult or elderly person due to a successful affirmative defense, would still have liability for the predicate offense against persons if the requirements of that offense are met.

For the comparatively low-level harms required in second degree and third degree of the revised criminal abuse of vulnerable adult or elderly person statute, the new defenses continue to provide a defense when the actor inflicts the injury in a lawful sport or occupation when the injury is a “reasonably foreseeable hazard” of those activities. However, the new defenses also apply when the actor inflicts the injury as a “reasonably foreseeable hazard” of “other concerted activity.” This change clarifies that informal activities such as sparring, playing “catch” with a baseball, or helping someone repair their car all are within the scope of the defense when the other defense requirements are satisfied. The “or other concerted activity” tracks the language in the Model Penal Code³⁶³ and several other jurisdictions.³⁶⁴

In contrast to the previous effective consent defense in RCC § 22E-409, the new effective consent defenses in subsection (e) specifically address where the injury may be caused by an “omission” and allow the complainant, or a “person with legal authority over the complainant” to give effective consent to such an omission. This in part replaces the defense in the previous version of the revised statute for the administration of, or allowing the administration of, prayer in lieu of medical treatment,³⁶⁵ which was based off an exception in the current D.C.

³⁶² RCC § 22E-701 defines “bodily injury” as “physical pain, physical injury, illness, or impairment of physical condition.” RCC § 22E-701 defines “significant bodily injury” as “a bodily injury that, to prevent long-term physical damage or to abate severe pain, requires hospitalization or immediate medical treatment beyond what a layperson can personally administer. In addition, 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; a burn of at least second degree severity; a brief loss of consciousness; a traumatic brain injury; and a contusion, petechia, or other bodily injury to the neck or head sustained during strangulation or suffocation.”

³⁶³ See Model Penal Code § 2.11.

³⁶⁴ See, e.g., Del. Code Ann. tit. 11, § 452.

³⁶⁵ Subsection (d) of the revised criminal abuse of a vulnerable adult or elderly person statute was:

Defenses. It is a defense to liability under this section that, in fact:

- (1) The actor has the complainant’s effective consent to the conduct charged to constitute the offense, or the actor reasonably believes that the actor has the complainant’s effective consent to the conduct charged to constitute the offense; and
- (2) The conduct charged to constitute the offense is the administration of, or allowing the administration of, religious prayer alone, in lieu of medical treatment which the actor otherwise has a responsibility, under civil law, to provide or allow.

*Code abuse or neglect of a vulnerable adult or elderly person statutes.*³⁶⁶ *An omission includes the actor administering prayer or allowing prayer to be administered instead of medical treatment, but also accounts for other types of omissions that a vulnerable adult or elderly person should be able to give effective consent to, such as a refusal to eat, drink, or take medication, or refusing an offer from the actor to get up from a fall.*

The commentary to the RCC assault statute discusses the revised defenses in detail.

- This change improves the clarity, consistency, and proportionality of the revised statutes.

RCC § 22E-1504. Criminal Neglect of a Vulnerable Adult or Elderly Person.

- *The CCRC recommends codifying as a discrete basis of liability for third degree of the revised criminal neglect of a vulnerable adult or elderly person statute that a person with a responsibility under civil law for the health, welfare, or supervision of vulnerable adult or elderly person recklessly “Creates, or fails to mitigate or remedy, a substantial risk that the complainant would experience bodily injury from consumption of alcohol, or consumption or inhalation, without a valid prescription, of a controlled substance or marijuana” (subparagraph (c)(2)(B)). This is consistent with a revision to the RCC criminal abuse of a minor statute (RCC § 22E-1501), discussed elsewhere in this Appendix, but also clarifies the scope of the current D.C. Code neglect of a vulnerable adult or elderly person statute as it pertains to the risk of comparatively less serious physical harms.*

The current D.C. Code neglect of a vulnerable adult or elderly person statute prohibits failing to discharge a duty to “provide care and services necessary to maintain the physical and mental health of a vulnerable adult or elderly person.”³⁶⁷ The offense is partially graded on a failure to discharge the required duty.³⁶⁸ The statute appears to provide liability for a failure to discharge the required duty even if the resulting risk to the physical or mental health of the complainant is comparatively trivial. There is no DCCA case law on this issue. Resolving this ambiguity, the revised criminal neglect of a vulnerable adult or elderly person statute limits liability for creating a risk of comparatively low-level physical harm to a risk of “bodily injury” due to the complainant consuming alcohol or consuming or inhaling, without a valid prescription, a controlled

³⁶⁶ Current D.C. Code § 22-935 states:

A person shall not be considered to commit an offense of abuse or neglect under this chapter for the sole reason that he provides or permits to be provided treatment by spiritual means through prayer alone in accordance with a religious method of healing, in lieu of medical treatment, to the vulnerable adult or elderly person to whom he has a duty of care with the express consent or in accordance with the practice of the vulnerable adult or elderly person.

³⁶⁷ D.C. Code § 22-934.

³⁶⁸ D.C. Code §§ 22-934, 22-936(a) (stating that “[a] person who commits the offense of . . . criminal neglect of a vulnerable adult or elderly person shall” receive a maximum term of imprisonment of 180 days.”).

substance or marijuana. With this change, the RCC criminal neglect of a minor statute provides liability for caretakers (persons with a duty of care to the vulnerable adult or elderly person) who create or fail to mitigate risks of bodily injury arising from the complainant’s consumption of alcohol, or consumption or inhalation, without a valid prescription, of a controlled substance or marijuana.³⁶⁹ Already under the RCC, if the actor recklessly creates such a risk, and causes “bodily injury” to the complainant, there is liability, with a higher penalty, under third degree of the RCC criminal abuse of a vulnerable adult or elderly person statute (RCC § 22E-1501) for committing what is now fourth degree assault. Also, if the actor recklessly creates such a risk of a higher level of “bodily injury,” such as “significant bodily injury,” there already is liability under first degree or second degree of the RCC criminal neglect of a vulnerable adult or elderly person statute. This change fills a gap for a caretaker creating or failing to mitigate risks of lower-level harms (bodily injury) without proof of actual injury due to the complainant’s consumption of alcohol or drugs. The commentary to this offense has been updated to reflect that this is a possible change in law.

- This change improves the clarity, consistency, and proportionality of the revised statute, removing a possible gap in liability.
- *The CCRC recommends codifying an exclusion from liability in what is now subsection (d): “An actor does not commit an offense under this section when, in fact, the actor’s conduct is specifically permitted by a District statute or regulation.” This exclusion resolves any apparent conflict within District laws. For example, Title 22, Health, of the current D.C. Municipal Regulations, has regulations that specifically refer to immunity from assault liability that clearly will satisfy this exclusion from liability.³⁷⁰*
 - This change improves the clarity, consistency, and proportionality of the revised statutes.
- *The CCRC recommends codifying an effective consent defense in subsection (e) of the revised criminal neglect of a vulnerable adult or elderly person statute. In previous compilations of draft statutes for the RCC, RCC § 22E-409³⁷¹ codified a*

³⁶⁹ Specific reference is made to marijuana to ensure that marijuana is categorically included, regardless of amount. Title 48 of the D.C. Code generally defines a controlled substance to include marijuana as a controlled substance (see D.C. Code § 48–901.02(4)), but also separately modifies that general definition (see D.C. Code § 48–904.01(a)(1A)(A)) to eliminate marijuana under 2 ounces possessed by a person 21 or over. Because marijuana is categorically included, a caregiver who legally possesses marijuana may, for example, still be liable for blowing smoke from the marijuana upon a vulnerable adult or elderly person if it is proven that such conduct creates a substantial risk that the complainant would experience a bodily injury from the smoke.

³⁷⁰ For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

³⁷¹ In relevant part, the defense in RCC § 22E-409 stated:

general effective consent defense for several RCC offenses against persons, including criminal neglect of a vulnerable adult or elderly person. In this update, however, the RCC deletes the general defense in RCC § 22E-409 and instead codifies specific effective consent defenses in the offenses.

The new defenses in paragraphs (e)(1) and (e)(2) are generally consistent with the previous effective consent defense in RCC § 22E-409 with a few main differences. The defenses continue to exclude an actor that is a “person with legal authority over the complainant” from availing themselves of the defense so that such an actor must use the RCC guardian defense in RCC § 22E-408. The revised defenses still apply if the actor reasonably believes that the actor has the effective consent of the complainant or a “person with legal authority over the complainant,” as that term is defined in RCC § 22E-701.³⁷² However, the defenses no longer apply if the actor “in fact” has the complainant’s effective consent but does not have any subjective awareness of this fact. Attempt liability addresses the rare situation when the actor actually has effective consent, but mistakenly believes that he or she does not.³⁷³

The previous effective consent defense in RCC § 22E-409 applied, in part, if the “conduct charged to constitute the offense did not create a substantial risk of, or cause, death or a protracted loss or impairment of the function of a bodily

(f) *Defense.* Except as provided in subsection (b) of this section, it is a defense to an offense in Subtitle II of this title that:

(1) The complainant or a person with legal authority over the complainant gave effective consent to the actor, or the actor reasonably believed that the complainant or a person with legal authority over the complainant gave effective consent to the actor, for the conduct charged to constitute the offense or for the result thereof; and

(2) Either:

(A) The conduct charged to constitute the offense did not create a substantial risk of, or cause, death or a protracted loss or impairment of the function of a bodily member or organ; or

(B) The result was a reasonably foreseeable hazard of:

(i) The complainant’s occupation;

(ii) A medical procedure, otherwise permitted under District and federal civil law, by a licensed health professional or a person acting at the direction of a licensed health professional; or

(iii) Participation in a lawful contest or sport.

³⁷² RCC § 22E-701 defines “person with legal authority over the complainant,” in relevant part, as “. . . (B)When the complainant is an incapacitated individual, the court-appointed guardian to the complainant, or someone acting with the effective consent of such a guardian.” Subsection (A) of the definition applies if the complainant is under the age of 18 years and neither a “vulnerable adult” or an “elderly person,” as those terms are defined in the RCC, can be under the age of 18 years.

³⁷³ It is an unusual scenario where an actor actually has effective consent but mistakenly believes he or she does not, and commits a crime. However, in such a situation, there may be attempt liability under the RCC general provision for attempt in RCC § 22E-301, which includes that the actor “would have come dangerously close to completing that offense if the situation was as the [actor] perceived it to be.”

member or organ.” The new defenses continue to recognize these limitations by permitting a defense for first degree—which requires a risk of “serious bodily injury,” as that term is defined in RCC § 22E-701,³⁷⁴ or death—when the risk is “caused by a lawful cosmetic or medical procedure.” The defense to second degree—a risk of “significant bodily injury” or a risk of “serious mental injury”—and the defense to third degree—failing to make a reasonable effort to provide essential items or care or creating, or failing to remedy a risk of bodily injury from drug or alcohol consumption—allows the complainant or a person with legal authority over the complainant to give effective consent to the injury without any such restriction as to the cause.

For the comparatively low-level risks required in second degree and third degree of the revised criminal neglect of vulnerable adult or elderly person statute, the new defenses continue to provide a defense when the actor’s creation, or failure to mitigate or remedy, the risk is a “reasonably foreseeable hazard” of a lawful sport or occupation. However, the new defenses also apply when the actor creates, or fails to mitigate or remedy, the risk as a “reasonably foreseeable hazard” of “other concerted activity.” This change clarifies that informal activities such as sparring, playing “catch” with a baseball, or helping someone repair their car all are within the scope of the defense when the other defense requirements are satisfied. The “or other concerted activity” tracks the language in the Model Penal Code³⁷⁵ and several other jurisdictions.³⁷⁶

In contrast to the previous effective consent defense in RCC § 22E-409, the new effective consent defenses in subsection (e) specifically address where the risk, or failure to mitigate or remedy the risk, is caused by an “omission” if the complainant, or a “person with legal authority over the complainant” gives effective consent to the omission. This replaces in relevant part the defense in the previous version of the revised statute for the administration of, or allowing the administration of, prayer in lieu of medical treatment,³⁷⁷ which was based off an exception in the current D.C. Code abuse or neglect of a vulnerable adult or elderly person statutes.³⁷⁸ An omission includes the actor administering prayer or

³⁷⁴ RCC § 22E-701 defines “serious bodily injury” as “a bodily injury or significant bodily injury that involves: (A) A substantial risk of death; (B) Protracted and obvious disfigurement; (C) Protracted loss or impairment of the function of a bodily member or organ; or (D) Protracted loss of consciousness.”

³⁷⁵ See Model Penal Code § 2.11.

³⁷⁶ See, e.g., Del. Code Ann. tit. 11, § 452.

³⁷⁷ The previous subsection (d) of the revised criminal abuse of a vulnerable adult or elderly person statute was:

Defenses. It is a defense to liability under this section that, in fact:

- (1) The actor has the complainant’s effective consent to the conduct charged to constitute the offense, or the actor reasonably believes that the actor has the complainant’s effective consent to the conduct charged to constitute the offense; and
- (2) The conduct charged to constitute the offense is the administration of, or allowing the administration of, religious prayer alone, in lieu of medical treatment which the actor otherwise has a responsibility, under civil law, to provide or allow.

³⁷⁸ Current D.C. Code § 22-935 states:

allowing prayer to be administered instead of medical treatment, but also accounts for other types of omissions that a vulnerable adult or elderly person should be able to give effective consent to, such as a refusal to eat, drink, or take medication, or refusing an offer from the actor to get up from a fall.

The commentary to the RCC assault statute discusses the revised defenses in detail.

- This change improves the clarity, consistency, and proportionality of the revised statutes.

A person shall not be considered to commit an offense of abuse or neglect under this chapter for the sole reason that he provides or permits to be provided treatment by spiritual means through prayer alone in accordance with a religious method of healing, in lieu of medical treatment, to the vulnerable adult or elderly person to whom he has a duty of care with the express consent or in accordance with the practice of the vulnerable adult or elderly person.

RCC § 22E-1601. Forced Labor.

- (1) *The CCRC recommends re-labeling the offense “forced labor” instead of “forced labor and services” and omitting the term “labor” in the revised statute. This change is clarificatory and is not intended to change the scope of the offense. The term “services” as defined in RCC § 22E-701 includes “labor.” This change does not substantively change the scope of the offense and is merely clarificatory.*
- The change improves the clarity of the revised criminal code.

RCC § 22E-1602. Forced Commercial Sex.

- (1) *PDS, App. C at 489, recommends that the phrase “knowingly causes the complainant to engage in a commercial sex act other than with the actor” be re-drafted as “Knowingly causes the complainant to engage in a commercial sex act with or for the gratification or arousal another person[.]”*
- The RCC partially adopts this recommendation by adoption of language similar to that recommended by PDS. In the Second Draft of Report #27, the CCRC recommended that the relevant portion of the forced commercial sex statute be revised to read, “causes the complainant to engage in or submit to a commercial sex act with or for another person[.]” This change improves the clarity of the revised criminal code.

RCC § 22E-1603. Trafficking in Labor.

- (1) *The CCRC recommends re-labeling the offense “trafficking in labor” instead of “trafficking in labor and services” and omitting the term “labor” in the revised statute. This change is clarificatory and is not intended to change the scope of the offense. The term “services” as defined in RCC § 22E-701 includes “labor.” This change does not substantively change the scope of the offense, and is merely clarificatory.*
- The change improves the clarity of the revised criminal code.

RCC § 22E-1605. Sex Trafficking of a Minor or Adult Incapable of Consenting.

- (1) *The CCRC recommends re-drafting subparagraph (a)(1)(C) to require that complainant is incapable of communicating willingness or unwillingness to engage in a commercial sexual act. Re-drafting this subparagraph to include that the complainant is incapable of communicating willingness as well as unwillingness is consistent with the requirements in second degree and fourth degree of the RCC sexual assault statute, as well as a penalty enhancement that has been codified in the RCC trafficking in commercial sex statute (RCC § 22E-4403), discussed later in this appendix. The commentary to the offense has been updated to reflect that this is a substantive change in law.*
- This change improves the clarity and consistency of the revised criminal code.

RCC § 22E-1608. Commercial Sex with a Trafficked Person.

(1) *The CCRC recommends re-drafting sub-subparagraph (b)(2)(B)(iii) to require that complainant is incapable of communicating willingness or unwillingness to engage in a commercial sex act. Re-drafting this sub-subparagraph to include that the complainant is incapable of communicating willingness as well as unwillingness is consistent with the requirements in second degree and fourth degree of the RCC sexual assault statute, as well as a penalty enhancement that has been codified in the RCC trafficking in commercial sex statute (RCC § 22E-4403), discussed later in this appendix. The commentary to the offense has been updated to reflect that this is a substantive change in law.*

- This change improves the clarity and consistency of the revised criminal code.

RCC § 22E-1801. Stalking.

(1) *OAG, App. C at 473, says that the statute’s exception for expressing an opinion on a “political or public matter” neither in the statutory language nor in the commentary defines the phrase “public matter.” OAG provides an example in which one neighbor repeatedly follows another neighbor, yelling at her about failing to clean up after a dog, negligently causing significant emotional distress. [The CCRC infers that OAG requests a clarification of this term, although the comment itself does not recommend or ask for any action.]*

- The RCC does incorporate this recommendation by noting in the commentary explanatory note that “public matter” has the meaning indicated in Supreme Court case law. The Supreme Court has addressed the distinction between matters of public concern (also called “public questions” and “public affairs”) and matters of purely private interest since 1940.³⁷⁹ Public matters have been said to include “all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.”³⁸⁰ It is difficult to analyze whether the OAG’s hypothetical involves protected speech, because the example does not include any specific language. For examples of public matters, see, e.g., *Snyder v. Phelps*, 562 U.S. 443 (2011); *Rankin v. McPherson*, 483 U.S. 378 (1987); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). For examples of private concerns, see, e.g., *City of San Diego, Cal. v. Roe*, 543 U.S. 77 (2004); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

(2) *USAO, App. C at 515 – 516, recommends that the commentary state that any fear or distress taking place in D.C. is sufficient to establish jurisdiction in D.C. USAO raises a question as to whether a person who travels to D.C. within a day or several hours of experiencing emotional distress would be a proper complainant under the revised statute. USAO states that its previous proposal allowing for jurisdiction if the victim suffers any harm in the District stemming from the defendant’s actions is clearer.*

- The RCC does not incorporate this recommendation because it may render the statute unconstitutional. Generally, a state has jurisdiction over crimes if the conduct or the result *happens* within its territorial limits,³⁸¹ not if the result merely *continues* there. The result element of the negligent version of this offense³⁸² is satisfied as soon as the fear or emotional distress occurs and, if the complainant is in the District at that time, there would be jurisdiction. A stalking victim does not create jurisdiction in the District by traveling here while still being under distress that was inflicted in

³⁷⁹ *Thornhill v. State of Alabama*, 310 U.S. 88, 101 (1940).

³⁸⁰ *Id.* at 102.

³⁸¹ See WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 4.4(a) Common law view of territorial jurisdiction, 1 Subst. Crim. L. § 4.4(a) (3d ed.).

³⁸² The intentional version of this offense does not require proof that “the victim suffers any harm.”

another state. (Nor would a theft victim create jurisdiction by traveling here while still being deprived of property stolen in another state.)

- (1) *The CCRC recommends requiring that the actor engage in a course of conduct negligent as to the fact that the course of conduct is without the complainant's effective consent. The RCC has been updated to eliminate the general defense for effective consent under RCC § 22E-409. Addition of this negligence element, however, performs a similar function in eliminating liability for conduct such as physically following, where the actor had a reasonable belief that he or she had the complainant's effective consent. The negligence culpable mental state does not require proof of any subjective awareness by the actor that the conduct was without the complainant's effective consent.*
 - This change improves the logical order and consistency of the revised statutes.
- (3) *The CCRC recommends including in the exclusion from liability provision speech on a matter of public concern directed at a law enforcement officer. Such speech is generally recognized as protected speech under the First Amendment and more narrowly tailoring the statute to exclude such protected speech may improve the constitutionality of the revised statute. CCRC also revises paragraph (b)(2) to improve its grammar.*
 - This change clarifies and improves the proportionality (and perhaps the constitutionality) of the revised statute.
- (4) *The CCRC recommends specifying that a person is not subject to both a penalty enhancement under subparagraph (d)(2)(B) for having a prior conviction and a repeat offender penalty enhancement in RCC § 22E-606 for having a prior conviction.*
 - This change reduces unnecessary overlap and improves the proportionality of the revised statutes.

RCC § 22E-1802. Electronic Stalking.

- (2) *USAO, App. C at 515 – 516, recommends that the commentary state that any fear or distress taking place in D.C. is sufficient to establish jurisdiction in D.C. USAO raises a question as to whether a person who travels to D.C. within a day or several hours of experiencing emotional distress would be a proper complainant under the revised statute. USAO states that its previous proposal allowing for jurisdiction if the victim suffers any harm in the District stemming from the defendant’s actions is clearer.*
- The RCC does not incorporate this recommendation because it may render the statute unconstitutional. Generally, a state has jurisdiction over crimes if the conduct or the result *happens* within its territorial limits,³⁸³ not if the result merely *continues* there. The result element of the negligent version of this offense³⁸⁴ is satisfied as soon as the fear or emotional distress occurs and, if the complainant is in the District at that time, there would be jurisdiction. A stalking victim does not create jurisdiction in the District by traveling here while still being under distress that was inflicted in another state. (Nor would a theft victim create jurisdiction by traveling here while still being deprived of property stolen in another state.)
- (3) *CCRC recommends requiring that the actor engage in a course of conduct negligent as to the fact that the course of conduct is without the complainant’s effective consent. The RCC has been updated to eliminate the general defense for effective consent under RCC § 22E-409. Addition of this negligence element, however, performs a similar function in eliminating liability for conduct such as physically following, where the actor had a reasonable belief that he or she had the complainant’s effective consent. The negligence culpable mental state does not require proof of any subjective awareness by the actor that the conduct was without the complainant’s effective consent.*
- This change improves the logical order and consistency of the revised statutes.
- (4) *CCRC recommends specifying that a person is not subject to both a penalty enhancement under subparagraph (d)(2)(B) for having a prior conviction and a repeat offender penalty enhancement in RCC § 22E-606 for having a prior conviction.*
- This change reduces unnecessary overlap and improves the proportionality of the revised statutes.

³⁸³See WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 4.4(a) Common law view of territorial jurisdiction, 1 Subst. Crim. L. § 4.4(a) (3d ed.).

³⁸⁴The intentional version of this offense does not require proof that “the victim suffers any harm.”

RCC § 22E-1803. Voyeurism.

- (1) *OAG, App. C at 473, recommends that the commentary affirmatively state that a person has committed this offense even when they use items such as binoculars, a telescope, or any nonrecording electronic device to enhance their ability to see the victim.*
 - The RCC incorporates this recommendation by revising the commentary to state, “The word ‘directly’ includes observations made with the aid of a device such as binoculars, a telescope, or any nonrecording electronic device to enhance their ability to see. It does not include viewing an image that another person recorded.” This change clarifies the revised commentary.
- (2) *The CCRC recommends specifying in a footnote to the commentary that the word “breast” excludes the chest of a transmasculine man.*
 - This change clarifies the revised statute.

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

- (1) *USAO, App. C at 515 – 516, recommends that the commentary state that any fear or distress taking place in D.C. is sufficient to establish jurisdiction in D.C. USAO raises a question as to whether a person who travels to D.C. within a day or several hours of experiencing emotional distress would be a proper complainant under the revised statute. USAO states that its previous proposal allowing for jurisdiction if the victim suffers any harm in the District stemming from the defendant’s actions is clearer.*
 - The RCC does not incorporate this recommendation because it may render the statute unconstitutional. Generally, a state has jurisdiction over crimes if the conduct or the result happens within its territorial limits.³⁸⁵ Unlike the negligent versions of stalking and electronic stalking,³⁸⁶ emotional distress is not an element of this offense. The revised statute does not require any proof that “the victim suffers any harm.” The result element of this offense is satisfied as soon as distribution of an image occurs.
- (2) *USAO, App. C at 516, recommends that the commentary clarify that the word “alarm,” has its common meaning, to “disturb,” “excite,” or “strike with fear,” and to provide an example of “revenge porn” that would fall under the statute.*
 - The RCC incorporates this recommendation by revising the commentary to include two additional footnotes. The first states, “Per its ordinary meaning, ‘alarm’ includes efforts to ‘disturb,’ ‘excite,’ or ‘strike with fear.’ Merriam-Webster.com, “alarm”, 2020, available at <https://www.merriam-webster.com/dictionary/alarm>.” The second states, “For example, a person may commit an offense by posting a homemade sex tape out of revenge after a bad breakup, with intent to harass or humiliate their ex-partner. This change clarifies the revised commentary.
- (3) *USAO, App. C at 553, recommends reclassifying this offense as a Class B misdemeanor, to ensure that there is a non-jury demandable, misdemeanor version of this offense.³⁸⁷ USAO states that, at trial, a victim must discuss sexually explicit photos or videos of herself or himself, which is much more difficult to process emotionally in front of a group of 14 jurors than in front of 1 judge. USAO states that these offenses and their respective penalties only recently became law in the Criminalization of Non-Consensual Pornography Act of 2014 (L20-275) (eff. May 7, 2015), which expressly created a non-jury demandable, misdemeanor version of this offense.*
 - The RCC partially incorporates this recommendation by reclassifying this offense as a Class B misdemeanor, however that penalty class is not recommended to be non-jury demandable. The RCC seeks to provide proportionate penalties even if that means an offense will be jury

³⁸⁵ See WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 4.4(a) Common law view of territorial jurisdiction, 1 Subst. Crim. L. § 4.4(a) (3d ed.).

³⁸⁶ RCC §§ 22E-1801 and 22E-1802.

³⁸⁷ USAO recommends that Class B misdemeanors be jury demandable only when they are punishable by more than 180 days’ imprisonment.

demandability. Public opinion surveys by the CCRC have not addressed distribution of an image to only a few people, however the surveys indicate that a low felony statutory maximum is justified for the enhanced version of the offense.³⁸⁸ This change improves the proportionality of the revised statute.

(4) *The CCRC recommends specifying in a footnote to the commentary that the word “breast” excludes the chest of a transmasculine man.*

- This change clarifies the revised statute.

³⁸⁸ See Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses (Response to question #3.28, ranking).

RCC § 22E-1805. Distribution of an Obscene Image.

- (1) *The CCRC recommends revision the exclusions from liability and affirmative defenses to ensure a person is not prosecuted when they reasonably believe they are distributing the image to someone who created the image, appeared in the image, or is responsible for the wellbeing of someone who is. Consider, for example, a parent who discovers an obscene image of their teen engaged in a sexual act with another teen. If the parent sends the image to the other teen and their parents, to ensure the behavior is stopped, that conduct does not amount to an offense under RCC §§ 22E-1805 - 1806.*
 - This change improves the consistency and proportionality of the revised statutes.
- (2) *The CCRC recommends specifying in a footnote to the commentary that the word “breast” excludes the chest of a transmasculine man.*
 - This change clarifies the revised statute.

RCC § 22E-1806. Distribution of an Obscene Image to a Minor.

- (1) *The CCRC recommends revision the exclusions from liability and affirmative defenses to ensure a person is not prosecuted when they reasonably believe they are distributing the image to someone who created the image, appeared in the image, or is responsible for the wellbeing of someone who is. Consider, for example, a parent who discovers an obscene image of their child engaged in a sexual act with another child and promises not to share it. If the parent sends the image to the other child and their parents, to ensure the behavior is stopped, that conduct does not amount to an offense under RCC §§ 22E-1804 - 1806.*
 - This change improves the consistency and proportionality of the revised statutes.
- (2) *The CCRC recommends specifying in a footnote to the commentary that the word “breast” excludes the chest of a transmasculine man.*
 - This change clarifies the revised statute.

RCC § 22E-1807. Creating or Trafficking an Obscene Image of a Minor.

- (1) *The CCRC recommends in paragraph (d)(1), by use of the phrase “in fact,” specifying that strict liability applies to the fact that the image has, or will have, serious literary, artistic, political, or scientific value, when considered as a whole. As is discussed in the commentary to this offense, this affirmative defense is new to District law and is taken from the Miller standard for obscenity, which requires the absence of these characteristics to be proven as an element of an obscenity offense.*³⁸⁹
 - This change improves the clarity and consistency of the revised statute.
- (2) *The CCRC recommends in paragraphs (c)(1) and (c)(2), by use of the phrase “in fact,” specifying that strict liability applies to the fact that the actor is a licensee or interactive computer service. This is consistent with the objective nature of these exclusions from liability.*
 - This change improves the clarity and consistency of the revised statute.
- (3) *The CCRC recommends deleting that the actor “in fact” has the required effective consent from sub-subparagraph (d)(2)(B)(ii) of the effective consent affirmative defense and limiting this sub-subparagraph of the affirmative defense to when the actor “reasonably believes” that the actor has the required effective consent. It is an unusual scenario where an actor has effective consent but mistakenly believes he or she does not, and commits a crime. However, in such a situation, there may be attempt liability under the RCC general provision for attempt in RCC § 22E-301, which includes that the actor “would have come dangerously close to completing that offense if the situation was as the [actor] perceived it to be.”*
 - This change improves the clarity, consistency, and proportionality of the revised statutes.
- (4) *The CCRC recommends deleting that the actor “in fact” has the required effective consent from subparagraph (d)(3)(D) of the marriage, domestic partnership, or romantic relationship affirmative defense and limiting this subparagraph of the affirmative defense to when the actor “reasonably believes” that the actor has the required effective consent. It is an unusual scenario where an actor has effective consent but mistakenly believes he or she does not, and commits a crime. However, in such a situation, there may be attempt liability under the RCC general provision for attempt in RCC § 22E-301, which includes that the actor “would have come dangerously close to completing that offense if the situation was as the [actor] perceived it to be.”*
 - This change improves the clarity, consistency, and proportionality of the revised statutes.
- (5) *The CCRC recommends requiring that the actor “reasonably believes” that the recipient, intended recipient, or user of an electronic platform is the complainant in subparagraph (d)(3)(E) of the marriage, domestic partnership, or relationship affirmative defense. The previous draft of subparagraph (d)(3)(E) required that*

³⁸⁹ *Miller v. California*, 413 U.S. 14, 24 (1973).

“in fact” the recipient, intended recipient, or user of an electronic platform is the complainant. Requiring that the actor “reasonably believes” that the recipient, intended recipient, or user of the electronic platform is the actor or the complainant accounts for the inherently unreliable nature of many forms of distribution, display, and electronic platforms,³⁹⁰ and is consistent with this requirement in RCC § 22E-1809, arranging a live sexual performance of a minor.

- This change improves the clarity, consistency, and proportionality of the revised statutes.
- (6) *The CCRC recommends deleting “in fact” from paragraph (d)(4) of the innocent distribution affirmative defense. This “in fact” was an error and conflicts with the “With intent” requirement in subparagraph (d)(4)(A). “In fact” remains specified in subparagraph (d)(4)(B) of the affirmative defense and, per the rule of construction in RCC § 22E-207, applies to the elements in sub-subparagraphs (d)(4)(B)(i) and (d)(4)(B)(ii).*
- This change improves the clarity of the revised statute.

³⁹⁰ For example, a defendant that satisfies all other requirements of the marriage, domestic partnership, or romantic relationship affirmative defense e-mails the permitted image to his girlfriend and reasonably believes that the girlfriend will be the only person that sees it. However, the girlfriend opens her e-mail with her friend present, and her friend sees the image. The affirmative defense will still apply.

RCC § 22E-1808. Possession of an Obscene Image of a Minor.

- (1) *The CCRC recommends in paragraph (d)(1), by use of the phrase “in fact,” specifying that strict liability applies to the fact that the image has, or will have, serious literary, artistic, political, or scientific value, when considered as a whole. As is discussed in the commentary to this offense, this affirmative defense is new to District law and is taken from the Miller standard for obscenity, which requires the absence of these characteristics to be proven as an element of an obscenity offense.³⁹¹*
 - This change improves the clarity and consistency of the revised statute.
- (2) *The CCRC recommends deleting that the actor “in fact” has the required effective consent from sub-subparagraph (d)(2)(B)(ii) of the effective consent affirmative defense and limiting this sub-subparagraph of the affirmative defense to when the actor “reasonably believes” that the actor has the required effective consent. It is an unusual scenario where an actor has effective consent but mistakenly believes he or she does not, and commits a crime. However, in such a situation, there may be attempt liability under the RCC general provision for attempt in RCC § 22E-301, which includes that the actor “would have come dangerously close to completing that offense if the situation was as the [actor] perceived it to be.”*
 - This change improves the clarity, consistency, and proportionality of the revised statutes.
- (3) *The CCRC recommends deleting that the actor “in fact” has the required effective consent from subparagraph (d)(3)(D) of the marriage, domestic partnership, or romantic relationship affirmative defense and limiting this subparagraph of the affirmative defense to when the actor “reasonably believes” that the actor has the required effective consent. It is an unusual scenario where an actor has effective consent but mistakenly believes he or she does not, and commits a crime. However, in such a situation, there may be attempt liability under the RCC general provision for attempt in RCC § 22E-301, which includes that the actor “would have come dangerously close to completing that offense if the situation was as the [actor] perceived it to be.”*
 - This change improves the clarity, consistency, and proportionality of the revised statutes.
- (4) *The CCRC recommends in paragraph (d)(5), by use of the phrase “in fact,” specifying that strict liability applies to all elements of the affirmative defense in subparagraphs (d)(5)(A), (d)(5)(B), and (d)(5)(C). “In fact” is consistent with this affirmative defense in the creating or trafficking an obscene image of a minor offense (RCC § 22E-1807) and was omitted in error from the previous draft.*
 - This change improves the clarity and consistency of the revised statute.

³⁹¹ *Miller v. California*, 413 U.S. 14, 24 (1973).

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

- (1) *The CCRC recommends in paragraph (c)(1), by use of the phrase “in fact,” specifying that strict liability applies to the fact that the live performance has, or will have, serious literary, artistic, political, or scientific value, when considered as a whole. As is discussed in the commentary to this offense, this affirmative defense is new to District law and is taken from the Miller standard for obscenity, which requires the absence of these characteristics to be proven as an element of an obscenity offense.*³⁹²
 - This change improves the clarity and consistency of the revised statute.
- (2) *The CCRC recommends adding the requirement that the live performance is “considered as a whole” to the affirmative defense for serious literary, artistic, political, or scientific value in paragraph (c)(1). This is consistent with the affirmative defense in the other RCC obscenity offenses, such as creating or trafficking an obscene image of a minor (RCC § 22E-1807), and was omitted in error from the previous draft.*
 - This change improves the clarity and consistency of the revised statute.
- (3) *The CCRC recommends deleting that the actor “in fact” has the required effective consent from sub-subparagraph (c)(2)(B)(ii) of the effective consent affirmative defense and limiting this sub-subparagraph of the affirmative defense to when the actor “reasonably believes” that the actor has the required effective consent. It is an unusual scenario where an actor has effective consent but mistakenly believes he or she does not, and commits a crime. However, in such a situation, there may be attempt liability under the RCC general provision for attempt in RCC § 22E-301, which includes that the actor “would have come dangerously close to completing that offense if the situation was as the [actor] perceived it to be.”*
 - This change improves the clarity, consistency, and proportionality of the revised statutes.
- (4) *The CCRC recommends deleting that the actor “in fact” has the required effective consent from subparagraph (c)(3)(D) of the marriage, domestic partnership, or romantic relationship affirmative defense and limiting this subparagraph of the affirmative defense to when the actor “reasonably believes” that the actor has the required effective consent. It is an unusual scenario where an actor has effective consent but mistakenly believes he or she does not, and commits a crime. However, in such a situation, there may be attempt liability under the RCC general provision for attempt in RCC § 22E-301, which includes that the actor “would have come dangerously close to completing that offense if the situation was as the [actor] perceived it to be.”*
 - This change improves the clarity, consistency, and proportionality of the revised statutes.
- (5) *The CCRC recommends deleting that the actor “in fact” is the only audience for the live performance in subparagraph (c)(3)(E) of the marriage, domestic*

³⁹² *Miller v. California*, 413 U.S. 14, 24 (1973).

partnership, or romantic relationship affirmative defense and limiting this subparagraph of the affirmative defense to when the actor “reasonably believes” that the actor is the only audience for the live performance. It is an unusual scenario where an actor is the only audience but mistakenly believes he or she is not, and commits a crime. However, in such a situation, there may be attempt liability under the RCC general provision for attempt in RCC § 22E-301, which includes that the actor “would have come dangerously close to completing that offense if the situation was as the [actor] perceived it to be.”

- This change improves the clarity, consistency, and proportionality of the revised statutes.
- (6) *USAO, App. C at 541-542, recommends increasing the maximum possible penalty for a Class 7 felony from 8 years to 10 years. Specific to the RCC arranging a live sexual performance of a minor statute, USAO states that first degree arranging a live sexual performance of a minor is “comparable to” the sexual performance using minors offense under current D.C. Code § 22-3101 et seq., which has a maximum possible penalty of 10 years. USAO states that it “does not believe that the maximum penal[t]y” for first degree arranging a live sexual performance of a minor should be lowered from 10 years’ incarceration to 8 years’ incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*
- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;³⁹³ 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;³⁹⁴ 5) relative ordering of related RCC offenses;³⁹⁵ and 6) national data on sentencing and time served.³⁹⁶ Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
 - The CCRC notes that notwithstanding the 10 year statutorily authorized penalty for the sexual performance using minors offense, actual practice in the District has been somewhat different. Court data for 2010-2019 indicates that the 97.5% quantile of sentences for all sexual performance using minors offenses, with or without an enhancement, appears to be

³⁹³ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

³⁹⁴ CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

³⁹⁵ CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.

³⁹⁶ See Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

under 18 months (1.5 years).³⁹⁷ The CCRC recommendation here fully encompasses current practice.

³⁹⁷ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

RCC § 22E-1810. Attending or Viewing a Live Sexual Performance of a Minor.

- (1) *The CCRC recommends in paragraph (c)(1), by use of the phrase “in fact,” specifying that strict liability applies to the fact that the live performance or live broadcast has, or will have, serious literary, artistic, political, or scientific value, when considered as a whole. As is discussed in the commentary to this offense, this affirmative defense is new to District law and is taken from the Miller standard for obscenity, which requires the absence of these characteristics to be proven as an element of an obscenity offense.*³⁹⁸
 - This change improves the clarity and consistency of the revised statute.
- (2) *The CCRC recommends codifying that “The actor is under 18 years of age” as subparagraph (c)(2)(A) of the effective consent affirmative defense. The RCC obscenity offenses codify this element as a separate subparagraph of the effective consent affirmative defense for clarity and it was omitted in error from the previous version.*
 - This change improves the clarity and consistency of the revised statute.
- (3) *The CCRC recommends deleting that the actor “in fact” has the required effective consent from sub-subparagraph (c)(2)(B)(ii) of the effective consent affirmative defense and limiting this sub-subparagraph of the affirmative defense to when the actor “reasonably believes” that the actor has the required effective consent. It is an unusual scenario where an actor has effective consent but mistakenly believes he or she does not, and commits a crime. However, in such a situation, there may be attempt liability under the RCC general provision for attempt in RCC § 22E-301, which includes that the actor “would have come dangerously close to completing that offense if the situation was as the [actor] perceived it to be.”*
 - This change improves the clarity, consistency, and proportionality of the revised statutes.
- (4) *The CCRC recommends deleting that the actor “in fact” has the required effective consent from subparagraph (c)(3)(D) of the marriage, domestic partnership, or romantic relationship affirmative defense and limiting this subparagraph of the affirmative defense to when the actor “reasonably believes” that the actor has the required effective consent. It is an unusual scenario where an actor has effective consent but mistakenly believes he or she does not, and commits a crime. However, in such a situation, there may be attempt liability under the RCC general provision for attempt in RCC § 22E-301, which includes that the actor “would have come dangerously close to completing that offense if the situation was as the [actor] perceived it to be.”*
 - This change improves the clarity, consistency, and proportionality of the revised statutes.
- (5) *The CCRC recommends deleting that the actor “in fact” is the only audience for the live performance in subparagraph (c)(3)(E) of the marriage, domestic partnership, or romantic relationship affirmative defense and limiting this*

³⁹⁸ *Miller v. California*, 413 U.S. 14, 24 (1973).

subparagraph of the affirmative defense to when the actor “reasonably believes” that the actor is the only audience for the live performance. It is an unusual scenario where an actor is the only audience but mistakenly believes he or she is not, and commits a crime. However, in such a situation, there may be attempt liability under the RCC general provision for attempt in RCC § 22E-301, which includes that the actor “would have come dangerously close to completing that offense if the situation was as the [actor] perceived it to be.”

- This change improves the clarity, consistency, and proportionality of the revised statutes.

RCC § 22E-1811. Limitations on Liability for RCC Chapter 18 Offenses.

- (1) *The CCRC recommends deletion of this text as unnecessary and potentially confusing. The text previously provided that “a person under the age of 12 is not subject to prosecution for offenses in this chapter.” This provision is no longer necessary given the broader developmental incapacity defense in RCC § 22E-505.*
- (16) This change improves the clarity and consistency of the revised statutes.

RCC § 22E-2101. Theft.

- (1) *The CCRC recommends adding the defined term "in fact" to the exclusion from liability subsection, to make clear that no awareness or culpable mental state is required.*³⁹⁹
 - This change clarifies and does not substantively change the revised statute.
- (2) *In the theft from a person gradation, the CCRC recommends replacing "(i) Holds or carries the property on his or her person; or (ii) Has the ability and desire to exercise control over the property" with "possesses the property." RCC § 22E-701 defines "possesses" as to "hold or carry one one's person" or to "have the ability and desire to exercise control over" and this change codifies the defined term as opposed to its definition. With this change, the gradation (now subparagraph (d)(4)(B)) will require that the property is taken from a complainant who "possesses the property within the complainant's immediate physical control" as opposed to 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 immediate control." This is consistent with the language in the RCC robbery statute (RCC § 22E-1201).*
 - This change improves the clarity and consistency of the revised statute.
- (3) *The CCRC recommends lowering theft from a person from third degree theft to fourth degree theft. Third degree theft is a Class 9 felony, with a maximum term of imprisonment of three years, which is the same classification and penalty as the lowest grade of robbery (third degree robbery in RCC § 22E-1201). It is disproportionate to penalize a non-violent taking of property from a person in the theft statute the same as a violent taking of property in the robbery statute. With this change, a non-violent taking of property from a person will be fourth degree theft, a Class A misdemeanor with a maximum term of imprisonment of one year. It is penalized the same as theft of property with a value of \$500 or more.*
 - This change improves the clarity, consistency, and proportionality of the revised statute.

³⁹⁹ RCC § 22E-207.

RCC § 22E-2102. Unauthorized Use of Property.

(1) *The CCRC recommends adding the defined term "in fact" to the exclusion from liability subsection, to make clear that no awareness or culpable mental state is required.*⁴⁰⁰

- This change clarifies and does not substantively change the revised statute.

(2) *The CCRC recommends adding a defense in what is now subsection (c) of the revised statute: "It is a defense to liability under this section that, in fact: 1) The actor reasonably believes that the property is lost or was stolen by a third party; and 2) Engages in the conduct constituting the offense with intent to return the property to a lawful owner." Without such a defense, a person that takes, obtains, transfers, or exercises control over the property of another without the owner's effective consent, but with the intent to return the property to its lawful owner, would be guilty of the offense. A substantively identical defense is being recommended for the RCC unauthorized use of a motor vehicle statute (RCC § 22E-2103), discussed later in this Appendix.*

Unauthorized use of property (UUP) and unauthorized use of a motor vehicle (UUV) are the only two RCC property offenses where a defendant would have liability despite a good-faith intent to return the property to a lawful owner. In all other RCC property offenses, such a good-faith intent to return property would preclude liability because it would negate the required intent to deprive an owner or other similar intent. However, as the RCC has drafted the revised UUP statute, a defendant's belief that property is lost or stolen would generally not be a mistake of fact defense if the defendant "knows" that it is "property of another" and that he or she lacks the "effective consent" of the owner. The commentary to this offense has been updated to reflect that this is a possible change in law.

- This change improves the clarity, consistency, and proportionality of the revised statute.

⁴⁰⁰ RCC § 22E-207.

RCC § 22E-2103. Unauthorized Use of a Motor Vehicle.

(1) *The CCRC recommends adding a defense in what is now subsection (b) of the revised statute: “It is a defense to liability under this section that, in fact: 1) The actor reasonably believes that the motor vehicle is lost or was stolen by a third party; and 2) Engages in the conduct constituting the offense with intent to return the motor vehicle to a lawful owner.” Without such a defense, a person that operates a motor vehicle without the owner’s effective consent, but with the intent to return the motor vehicle to its lawful owner, would be guilty of the offense. A substantively identical offense is being recommended for the RCC unauthorized use of a property statute (RCC § 22E-2102), discussed earlier in this Appendix.*

Unauthorized use of a motor vehicle (UUV) and unauthorized use of property (UUP) are the only two RCC property offenses where a defendant would have liability despite a good-faith intent to return the property to a lawful owner. In all other RCC property offenses, such a good-faith intent to return property would preclude liability because it would negate the required intent to deprive an owner or other similar intent. However, as the RCC has drafted the revised UUV statute, a defendant’s belief that property is lost or stolen would generally not be a mistake of fact defense if the defendant “knows” that he or she lacks the “effective consent” of the owner. The commentary to this offense has been updated to reflect that this is a possible change in law.

- This change improves the clarity, consistency, and proportionality of the revised statute.

RCC § 22E-2104. Shoplifting.

(1) *The CCRC recommends adding the defined term "in fact" to the qualified immunity provision in subsection (d), to make clear that no awareness or culpable mental state is required.*⁴⁰¹

- This change clarifies and does not substantively change the revised statute.

⁴⁰¹ RCC § 22E-207.

RCC § 22E-2105. Unlawful Creation or Possession of a Recording.

(1) *The CCRC recommends applying the definition of “live performance” in RCC § 22E-701, “a play, dance, or other visual presentation or exhibition for an audience, including an audience of one person,” to this statute. The definition is consistent with the scope of this offense, which prohibits, in relevant part, making, obtaining, or possessing a sound recording or audiovisual recording of a live performance without the effective consent of an owner and with intent to derive commercial gain or advantage.*

- This change clarifies and does not substantively change the revised statute.

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

- (2) *The CCRC recommends adding the defined term "in fact" to the qualified immunity provision in subsection (c), to make clear that no awareness or culpable mental state is required.*⁴⁰²
- This change clarifies and does not substantively change the revised statute.
- (3) *The CCRC recommends replacing "all sound recordings [and] audiovisual recordings" with "any recording" in the forfeiture provision in subsection (d). The RCC definition of "sound recording" ⁴⁰³ excludes recordings of sounds that accompany motion pictures and would not apply to any recordings made in violation of this offense. Given that the offense prohibits operating a recording device and does not require that a recording be produced, it is clearer to refer to "any recording" that might exist.*
- This change improves the clarity and consistency of the revised statute.

⁴⁰² RCC § 22E-207.

⁴⁰³ RCC § 22E-701 defines "sound recording" as "a material object in which sounds, *other than those accompanying a motion picture* or other audiovisual recording, are fixed by any method now known or later developed, from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device" (emphasis added).

RCC § 22E-2205. Identity Theft

(1) OAG, App. C at 474, recommends that the District should have jurisdiction over identity thefts that occur entirely outside of the District if the complainant is a resident of the District. OAG argues that in these cases, although the offense occurred in another jurisdiction, the resident has suffered harm, and therefore, there was a detrimental effect within the District.

- The RCC does not adopt this recommendation because this extension of jurisdiction may not be legal. Although it is true that in OAG's hypothetical that the District resident's harm has a detrimental effect on the District, this is true almost any time a District resident is the victim of a crime that occurs in another jurisdiction. For example, if a District resident is robbed while visiting another jurisdiction, there is also a detrimental effect to the District. However, it would be inappropriate to extend jurisdiction to such cases. In general, it may not be legal to extend extraterritorial jurisdiction to conduct that occurs entirely outside the District.⁴⁰⁴

⁴⁰⁴ See WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 4.4(a), Common law view of territorial jurisdiction, 1 Subst. Crim. L. § 4.4(a) (3d ed.)

RCC § 22E-2206. Identity Theft Civil Provisions

(1) *OAG, App. C at 474-475, recommends that subsection (a) should be amended in include cases in which pursuant to a competency hearing, a court finds that “There is no substantial probability that [the defendant] will attain competence or make substantial progress toward that goal in the foreseeable future.”*

- The RCC does not incorporate this recommendation because it would make the revised statute less clear. Subsection (a) applies in cases in which there has been a determination by a court or fact finder that a person actually committed identity theft against the complainant.⁴⁰⁵ In these cases, the court may order that records that contain incorrect information due to the identity be corrected. When a person is found incompetent to stand trial, there is not necessarily a finding that the person committed identity theft. In cases in which the actor is found incompetent to stand trial, under subsection (b), the complainant may petition the court for a determination that public records contain false information, and the court may issue orders necessary to correct the public records.

(2) *The CCRC recommends deleting the words “by reason of insanity” and adding the words “under the mental disability affirmative defense in RCC § 22E-504.” The RCC has codified a mental disability affirmative defense, which replaces what was commonly known as the insanity defense. Reference to the mental disability affirmative defense does not change current District law, except to the extent that the codified defense differs from the insanity defense recognized under current law.*

- This change improves the clarity and consistency of the revised criminal code.

⁴⁰⁵ The RCC’s mental disease or defect defense requires a finding that the actor actually committed the offense.

RCC § 22E-2207. Unlawful Labeling of a Recording.

(1) OAG, App. C at 475, recommends redrafting paragraph (c)(2) to read, “Transfers, in his or her own home for his or her own personal use, any sounds or images recorded on a sound recording or audiovisual recording.”

- The RCC adopts this recommendation. This change does not substantively alter the scope of the offense. This change improves the clarity of the revised statute.

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

- (1) *OAG, App. C at 475, recommends redrafting subparagraphs (e)(1)(A) and (e)(1)(C) to refer to “the owner” instead of “an owner.”*
- The RCC does not adopt this recommendation because it would make the revised statute less clear. Subparagraphs (e)(1)(A) and (e)(1)(C) use the term “an owner,” because those elements may be satisfied if *any* owner’s consent is obtained by undue influence, or if the actor had intent to deprive *any* owner of the property. However, subparagraph (e)(1)(B) uses the term “the owner,” to specify that the owner whose consent was obtained by undue influence must be a vulnerable adult or elderly person. For example, if property is jointly owned by two people and the actor uses undue influence to obtain consent to take property from one owner, and the *other* owner is a vulnerable adult or elderly person, the actor would not be guilty of financial exploitation of a vulnerable adult or elderly person.
- (2) *OAG, App. C at 475 recommends adding the term “as to the fact” to subparagraph (1)(C). [The CCRC assumes that OAG meant that the term “as to the fact” should be added to paragraph (e)(2).]*
- The RCC adopts this recommendation. Paragraph (e)(2) will be amended to read in part, “with recklessness as to the fact that the complainant is a vulnerable adult or elderly person.” This change clarifies the revised statutes.
- (3) *OAG, App. C at 476, recommends that paragraph (e)(2) be re-drafted to replace the word “complainant” with the word “owner.”*
- The RCC does not adopt this recommendation because it would make the revised statute less clear. Paragraph (e)(2) specifically refers to commission of various offenses defined elsewhere in the RCC, and it is clearer to refer to the complainant of one of those offenses.
- (4) *The CCRC recommends redefining the term “undue influence” to omit reference to a vulnerable adult or elderly person. However, this change to the definition of “undue influence” does not affect the FEVA offense. The FEVA statute still requires that the actor was reckless as to the complainant being a vulnerable adult or elderly person. Amending the definition allows the term “undue influence” to be used in other offenses that do not require that any person involved in the offense be a vulnerable adult or elderly person.*
- This change improves the consistency and clarity of the revised statutes.
- (5) *The CCRC recommends replacing the words “with recklessness” with “reckless” in paragraph (e)(2). This change clarifies that the complainant must actually be a vulnerable adult or elderly person.*
- This change improves the consistency and proportionality of the revised statute.

**RCC § 22E-2209. Financial Exploitation of a Vulnerable Adult or Elderly Person
Civil Provisions.**

(1) OAG, App. C at 476, recommends deleting paragraph (a)(4). OAG states that paragraph (a)(4) sets forth a restitution priority rule that is separately defined in RCC § 22E-2208 (g).

- The RCC adopts this recommendation. This change improves the clarity of the revised statute.

RCC § 22E-2501. Arson.

(1) *OAG, App. C at 476, recommends revising the affirmative defense in subsection (d) so that “in fact” is repeated. With OAG’s recommendation, the affirmative defense would read, “It is an affirmative defense to liability under subsection (c) of this section that the person, in fact, has a valid blasting permit issued by the District of Columbia Fire and Emergency Medical Services Department, and that the person, in fact, complied with all the rules and regulations governing the use of such a permit.” As drafted currently, the affirmative defense only uses “in fact” once, “It is an affirmative defense to liability under subsection (c) of this section that the person, in fact, has a valid blasting permit issued by the District of Columbia Fire and Emergency Medical Services Department, and complied with all the rules and regulations governing the use of such a permit.” OAG states that as currently drafted, it is unclear whether “in fact” applies to the compliance with the rules and regulations.*

- The RCC does not incorporate this recommendation because it would introduce ambiguity into the revised statutes. RCC § 22E-207 has been revised to specify that the phrase “in fact” applies to any result element or circumstance element that follows unless a culpable mental state is specified. It is no longer necessary to repeat “in fact” for each element to which strict liability applies. However, the explanatory note for the revised arson statute has been revised to state that:

“In fact” is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element. Per RCC § 22E-207, “in fact” applies to any result element or circumstance element that follows the phrase “in fact” unless a culpable mental state is specified. In subsection (d), “in fact” means that there is no culpable mental state requirement as to whether the defendant had a valid blasting permit issued by the District of Columbia Fire and Emergency Medical Services Department, and that he or she complied with all the rules and regulations governing the use of the permit.

(2) *USAO, App. C at 543, recommends increasing the maximum possible penalty for a Class 5 felony from 18 years to 20 years. Specific to the RCC arson statute, USAO states that first degree arson is “comparable to” arson under current D.C. Code § 22-301, which has a maximum possible penalty of 10 years, with the added requirement of causing death or serious bodily injury. USAO states that it “does not believe that the maximum penalt[y]” for first degree arson should be lowered from 20 years’ incarceration to 18 years’ incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*

- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C.

Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;⁴⁰⁶ 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;⁴⁰⁷ 5) relative ordering of related RCC offenses;⁴⁰⁸ and 6) national data on sentencing and time served.⁴⁰⁹ Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.

- The CCRC notes that notwithstanding the 10 year statutorily authorized penalty for arson in the D.C. Code currently, actual practice in the District has been somewhat different. Court data for 2010-2019 shows that the 97.5% quantile of sentences for arson of all types, including those with enhancements, was 68.1 months.⁴¹⁰ The CCRC recommendation here appears to fully encompass current practice regarding arson.
- (4) *USAO, App. C at 541-542, recommends increasing the maximum possible penalty for a Class 7 felony from 8 years to 10 years. Specific to the RCC arson statute, USAO states that second degree arson is “comparable to Arson under D.C. Code § 22-301, which has a maximum of 10 years’ incarceration, where a person is present.” USAO states that it “does not believe that the maximum penalt[y]” for second degree arson should be lowered from 10 years’ incarceration to 8 years’ incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*
- The RCC does not incorporate this recommendation at this time. The CCRC continues to review penalty recommendations for all revised offenses in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;⁴¹¹ 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;⁴¹² 5) relative ordering of related RCC offenses;⁴¹³ and 6) national data on sentencing and time served.⁴¹⁴ Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
 - The CCRC notes that notwithstanding the 10 year statutorily authorized penalty for arson in the D.C. Code currently, actual practice in the District

⁴⁰⁶ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

⁴⁰⁷ CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

⁴⁰⁸ CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.

⁴⁰⁹ See Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

⁴¹⁰ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

⁴¹¹ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

⁴¹² CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

⁴¹³ CCRC Third Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.

⁴¹⁴ See Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

has been somewhat different. Court data for 2010-2019 shows that the 97.5% quantile of sentences for arson of all types, including those with enhancements, was 68.1 months.⁴¹⁵ The CCRC recommendation here appears to fully encompass current practice regarding arson.

RCC § 22E-2503. Criminal Damage to Property.

- (1) *OAG, App. C at 476, recommends revising paragraph (e)(4) to require “The amount of damage is, in fact, any amount.” Paragraph (e)(4) is currently drafted as “In fact, there is damage to the property.” OAG states that this drafting is duplicative to paragraph (e)(1), which requires that the defendant recklessly “damages or destroys property.” OAG notes that the Commentary to the offense states that paragraph (e)(4) “requires that the amount of damage to the property for fifth degree CDP is ‘any amount.’”*
- The RCC incorporates this recommendation by revision paragraph (e)(4) to read “In fact, there is any amount of damage.”

⁴¹⁵ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

RCC § 22E-2601. Trespass.

- (1) *The CCRC recommends revising the commentary to note the DCCA’s recent opinion in Wicks v. United States,⁴¹⁶ which was issued after the most recent draft language was released. The decision does not change the meaning of the revised statute and the reference is only clarificatory.*
 - This change clarifies the revised commentary.
- (2) *The CCRC recommends revising the commentary to note the DCCA’s recent opinion in Broome v. United States,⁴¹⁷ which was issued after the most recent draft language was released. The decision does not change the meaning of the revised statute and the reference is only clarificatory.*
 - This change clarifies the revised commentary.
- (3) *The CCRC recommends adding the defined term “in fact” to the exclusion from liability subsection, to make clear that no awareness or culpable mental state is required.⁴¹⁸*
 - This change clarifies and does not substantively change the revised statute.
- (4) *The CCRC recommends repealing D.C. Code § 22-3301, Forcible Entry and Detainer, which is archaic, unused, and duplicative of conduct in the revised Trespass and Burglary statutes.⁴¹⁹*
 - This change reduces unnecessary overlap between the revised statutes.

⁴¹⁶ 226 A.3d 743 (D.C. 2020).

⁴¹⁷ 240 A.3d 35 (D.C. 2020).

⁴¹⁸ RCC § 22E-207.

⁴¹⁹ RCC §§ 22E-2601 and 22E-2701.

RCC § 22E-2701. Burglary.

- (1) *USAO, App. C at 516, recommends striking the requirement that a person who is not a participant in the burglary directly perceive the actor or enter with the actor. Alternatively, USAO recommends requiring that the defendant be reckless that a person who is not a participant in the burglary “may” directly perceive the actor or enter with the actor.*
- The RCC does not incorporate this recommendation because it would result in disproportionate penalties. By requiring that a complainant perceives the burglar, the revised statute reserves first degree liability for the most frightening invasions of privacy. Without this element, a person who stealthily breaks into the laundry room or mailroom of a residential building and leaves unnoticed⁴²⁰ would face the same maximum punishment as a person who enters someone’s bedroom and awakens someone from their sleep. The revised statute punishes both fact patterns as burglary but grades the latter more severely. The revised statute includes the same differentiation between second and third degree burglary in sub-subparagraph (b)(1)(B)(ii).
 - USAO’s proposed alternative language would make the statute unclear, by raising questions about the degree of probability that a person would be seen and inviting the factfinder to speculate about what would have been possible if events did not transpire as they did. The RCC does not broaden the burglary statute itself to include inchoate or endangerment fact patterns. However, where a person comes dangerously close to being seen in a dwelling, they may commit an attempted first degree burglary under the revised attempt statute, consistent with the standard for other criminal offenses.⁴²¹ Similarly, where a person comes dangerously close to being seen in a building, they may commit an attempted second degree burglary.
- (2) *USAO, App. C at 548, opposes eliminating the statutory minimum for this offense.*
- The RCC does not incorporate this recommendation because it would result in disproportionate penalties. For more information on the subject, see Advisory Group Memorandum #32, Supplemental Materials to the First Draft of Report #52.
- (3) *USAO, App. C at 551, continues to recommend that, at a minimum, 1st Degree Burglary and Enhanced 1st Degree Burglary both be increased in class. USAO states the RCC equivalent of 1st Degree Burglary While Armed is subject only to a maximum of 8 years’ incarceration and unarmed 1st Degree Burglary is subject only to a maximum of 5 years’ incarceration. USAO states that the offense is very serious because a home invasion can shatter a victim’s feeling of safety and security. USAO does not state specifically how much higher the revised penalty should be for this offense.*

⁴²⁰ Consistent with recent District case law, the RCC defines the term “dwelling” to include communal areas secured from the general public. *Ruffin v. United States*, 219 A.3d 997 (D.C. App. 2019).

⁴²¹ See RCC § 22E-301.

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. Critically important for assessing the proportionality of burglary penalties is the fact that the offense overlaps with attempts to commit, or successful completion of, a wide array of RCC crimes. These predicate crimes that a person attempts or commits in the course of a burglary carry their own penalties and must be considered in establishing proportionate penalties. The RCC authorizes proportionate punishment for criminal behavior, including the most serious forms of that behavior, but the totality of punishment is not always reflected in one offense. This change clarifies and improves the proportionality of the revised statute.
- Nationally, for burglary, 78.3% of prisoners served less than 3 years, 91.5% of prisoners served less than 5 years, and 98.1% of prisoners served less than 10 years before release, when the burglary was the most serious crime (so presumably not concurrent to another penalty).⁴²² These statistics appear to include all forms of burglary, including enhanced forms of burglary due to prior convictions or presence of a weapon.
- Polling of District voters also strongly suggests that while the commission of crimes in a dwelling or building merits an increased penalty, this increase is quite modest and is almost entirely washed out by the effect of the predicate offense committed inside for aggravated assault and worse felonies. See the responses to survey questions in Advisory Group Memo #27 (Public Opinion Surveys on Ordinal Ranking of Offenses).⁴²³ Critically, the polling questions asked for an assessment of a hypothetical individual's behavior as a whole, not "burglary" specifically, and there would be additional liability for other crimes under the RCC.

⁴²² U.S. Department of Justice Bureau of Justice Statistics, Time Served in State Prison, 2016, November 2018 at 3.

⁴²³ Question 3.27 provided the scenario: "Entering an occupied home intending to steal property while armed with a gun. When confronted by an occupant, the person displays the gun, then flees without causing an injury or stealing anything." Question 3.27 had a mean response of 6.8, less than one class above the 6.0 milestone corresponding to felony assault, currently a 3 year offense in the D.C. Code. Question 1.07 provided the scenario: "Entering an occupied home intending to steal property, and causing minor injury to the occupant before fleeing. Nothing is stolen." Question 1.07 had a mean response of 6.1, just barely above the 6.0 milestone corresponding to felony assault, currently a 3 year offense in the D.C. Code. Question 1.08 "Entering an occupied home with intent to cause a serious injury to an occupant, and inflicting such an injury." Question 1.08 had a mean response of 8.5, just a half-class above the 8.0 milestone corresponding to aggravated assault (causing a serious injury), currently a 10-year offense in the D.C. Code.

RCC § 22E-3201. Impersonation of an Official.

- (1) *USAO, App. C at 602, recommends renaming the offense to “Impersonation of an Official.” USAO notes that the statute includes various federal officials and limiting the title to “District” may be confusing.*
 - The RCC incorporates this recommendation using the language suggested by OAG. This change clarifies the revised statute.
- (2) *USAO, App. C at 602, recommends redrafting paragraph (a)(1)(B) and paragraph (b)(1)(B). USAO notes that the statute may unnecessarily exclude benefits for others. USAO recommends new language of “Cause a benefit or harm, to any person.”*
 - The RCC incorporates this recommendation using substantially identical language per the similar recommendation by OAG (see immediately below). This change clarifies the revised statute.
- (3) *OAG, App. C at 599, recommends redrafting paragraph (a)(1)(B) to state, “That any person receive a personal benefit of any kind, or to cause harm to another” instead of “[the actor] receive a personal benefit of any kind, or to cause harm to another.” OAG says that the current formulation is too limited as there may be times when the actor is impersonating an official to benefit someone else.*
 - The RCC incorporates this recommendation using the language suggested by OAG, although with a slight change in word order to: “To cause harm to another or that any person receive a personal benefit of any kind”. This change clarifies the revised statute.
- (4) *OAG, App. C at 603-604,⁴²⁴ recommends elimination of paragraph (a)(1)(B) and paragraph (b)(1)(B) as unnecessary. OAG says that the current formulation is so broad as to be satisfied in virtually any case where there is impersonation.*
 - The RCC does not incorporate this recommendation because it may result in disproportionate penalties. While the requirement may be a low burden, it is not met in all cases and, indeed, some cases of impersonation may be so trivial in the benefit (e.g., temporary amusement) that they would subject to a de minimis defense under RCC § 22E-215.

⁴²⁴ The CCRC notes that these comments were submitted on November 9, 2020, after the deadline for written comments on RCC § 22E-3201. However, the comments were also submitted under the memo title of another offense, so the submission may have been in error or supplemental. Regardless, the CCRC addresses the comment.

RCC § 22E-3202. Misrepresentation as a District of Columbia Entity.

(1) *PDS, App. C at 618, proposes rewriting the offense to clarify a requirement of a nexus between the intent to deceive and the lawful authority to represent oneself as a D.C. government entity or representative.*

- The RCC incorporates this recommendation by amending paragraph (a)(2)(A) to read: “Deceive any other person as to the actor’s lawful authority as a District of Columbia entity;”. Other types of misrepresentation to gain a benefit may give rise to a fraud charge under RCC § 22E-2201. This change improves the clarity and proportionality of the revised statute.

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

- (2) *OAG, App. C at 477, recommends redrafting paragraph (b)(2) to state, “Knowingly leaves custody without the effective consent of the law enforcement officer” instead of “Knowingly, without the effective consent of the law enforcement officer, leaves custody.”*
- The RCC does not incorporate this recommendation because it would make the drafting of second degree escape from a correctional facility or officer inconsistent with the other degrees of the offense. Because there are multiple, alternative conduct elements for third degree escape, the circumstance element (“without effective consent”) precedes a list. First and second degree mirror this formulation to avoid questions about whether the similar circumstance elements should be read differently, which they should not.
- (3) *OAG, App. C at 477, recommends redrafting the exclusion from liability to state, “A person does not commit an offense under subsection [(a)] of this section if that person has not left the correctional facility, juvenile detention facility, or halfway house.” OAG states that it believes the drafters meant to cite to subsection (a) instead of subsection (b) and believes the drafters meant to clarify that a person has not committed the offense if they had never left the facility. OAG states that it is concerned that it could be read to apply to someone who left a facility and then came back sometime later.*
- The RCC does not incorporate this recommendation because it would create unnecessary overlap in liability. the intended purpose of this provision is not to clarify that a person does not commit an offense under subsection (a) if they have not left the facility or halfway house. Rather, the purpose is to ensure that the escape from a law enforcement officer provision in subsection (b) applies only to street encounters and not to a person who walks away from a corrections officer inside a facility. As the commentary for this exclusion explains in a footnote, “[A] person who is *confined* within a correctional facility does not commit an escape from the lawful *custody* of a law enforcement officer by wriggling out of an officer’s grasp and returning to their designated cell.”
- (4) *The CCRC recommends eliminating the mandatory consecutive sentencing provision. Consistent with CCRC’s reasoning for eliminating all mandatory minima, “‘Sentencing guidelines, rather than statutory mandates are a more appropriate way to guide judicial decision making.’” Judicial discretion may still be exercised to impose consecutive sentencing.*
- This change improves the consistency and proportionality of the revised statutes.

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

(1) *USAO, App. C at 516 – 517, reiterates its recommendation that this offense cover defendants in non-D.C. criminal cases who are supervised by agencies in D.C. USAO states, “[T]o ensure the safety of other D.C. residents, the District has an interest in these individuals complying with their supervision requirements by not tampering with their detection devices. This interest applies regardless of whether the individual is subject to a requirement in a D.C. or non-D.C. case.” USAO also states that the current statute was recently modified in 2017 and did not include this limitation.*

- The RCC does not incorporate this recommendation because it may result in unnecessary overlap between criminal offenses. USAO is correct in noting that many deterrents short of criminal liability also apply to people who are on release in D.C. cases. Examples include revocation of pretrial release or probation and, where applicable, criminal prosecution for criminal damage to property.⁴²⁵ This significant overlap may provide a reasonable basis for eliminating the offense altogether.⁴²⁶ However, the RCC instead retains and marginally narrows the offense to exclude non-D.C. cases. This narrowing seems most appropriate because the District has no control over the underlying statutes and procedures that allow for the placement of a detection device in a case that originated out of state.
- USAO does not provide evidence or statistics on how use of District resources to prosecute and confine persons wearing a detection device based on another jurisdiction’s orders, but commits no other District crime, would ensure public safety in the District. GPS monitoring is not limited to dangerous or high-risk offenders. It is often used to ensure a person’s return to court in the demanding jurisdiction. Although the District’s pretrial release statute⁴²⁷ requires, in many cases, the least restrictive conditions that will reasonably assure the appearance of the person as required and the safety of any other person and the community, there is no such judicial finding required before GPS monitoring is ordered as a condition of probation or required as a sanction for a technical violation.

(2) *USAO, App. C at 517, recommends clarifying in subparagraph (a)(1)(D) that the offense applies to those incarcerated at or committed to a D.C. Department of Corrections facility.*

⁴²⁵ RCC § 22E-2503. Consider, for example, a person who cuts an ankle bracelet, automatically destroying the tracking mechanism inside the device.

⁴²⁶ Criminal statutes that apply only to people who are already system-involved can perpetuate a cycle of reincarceration and the collateral consequences that stem therefrom, leading to disparate outcomes for segments of the community that are more heavily surveilled, policed, prosecuted, and incarcerated. See Josh Kaplan, *D.C. Defendants Wear Ankle Monitors That Can Record Their Every Word and Motion*, WASHINGTON CITY PAPER (October 8, 2019).

⁴²⁷ D.C. Code § 23-1321(c)(1)(B).

- The RCC does not incorporate this recommendation because the statutory language already includes the proposed language. Subparagraph (a)(1)(D) already says “or incarcerated.”⁴²⁸
- (3) *The CCRC recommends striking the definition of “protection order” as potentially confusing. Where applicable, individual statutes will refer to a temporary protection order under D.C. Code § 16-1004, a final protection order under D.C. Code § 16-1005, or a valid foreign protection order as defined in D.C. Code § 16-1041.*
- This change clarifies, but does not substantively change, the revised code.

⁴²⁸ See also App. D (April 15, 2019) adopting an OAG’s recommendation, App. C at 214, to rephrase “Incarcerated or committed to the Department of Youth Rehabilitation Services” to read “committed to the Department of Youth Rehabilitation Services or incarcerated,” to avoid confusion as to whether a person can be incarcerated to the Department of Youth Rehabilitation Services.

RCC § 22E-3403. Correctional Facility Contraband.

- (1) *OAG, App. C at 477, recommends clarifying in commentary that the word “bringing” includes lobbing an object over a facility wall.*
- The RCC incorporates this recommendation by adding a footnote to the commentary stating, “The word ‘bringing’ has its ordinary meaning, ‘to convey, lead, carry, or cause to come along with one toward the place from which the action is being regarded’ Merriam-Webster.com, ‘bring’, 2020, available at <https://www.merriam-webster.com/dictionary/bring>. For example, where a person lobs a tennis ball filled with contraband over the wall of a facility, the person can be said to have brought the contraband there, without having entered the building.” Moreover, a person who lobs contraband over a wall likely commits an offense (or attempts to commit an offense) under paragraph (a)(2) or (b)(2) as an accomplice under RCC § 22E-210.
- (2) *OAG, App. C at 477 – 478, recommends that subsection (d) be amended to allow the director of New Beginnings to detain a person for up to three hours. OAG states that New Beginnings is located in Laurel, Maryland and the Metropolitan Police Department (“MPD”) must travel along highways that often have bumper-to-bumper traffic. OAG does not provide evidence of any specific incidents arising from the current two-hour detention rule in current law.*
- The RCC does not incorporate this recommendation because it would change current District law in a manner that does not appear necessary. According to General Order 305-01(M)(2) (January 28, 2020), MPD’s 5th District does not respond to New Beginnings for contraband incidents, only for “deaths, criminal assaults requiring medical treatment, and escapes.” Nevertheless, under the revised statute, the director of New Beginnings would two hours to detain a nonresident⁴²⁹ who brings in contraband, which is ample time for MPD to travel from the 5th District⁴³⁰ or for authorities in Maryland to respond. Where authorities do not respond in a timely manner, the director has administrative remedies available, including ejecting or barring the visitor from the premises.

⁴²⁹ The director may detain a resident for the duration of their placement.

⁴³⁰ According to the Office of the District of Columbia Auditor, the 5th District’s average response time to a call for service is under 14 minutes. *See* letter from Kathleen Patterson to D.C. Councilmembers (February 3, 2017) (available at <http://lims.dccouncil.us/Download/37333/AU22-0004-Introduction.pdf>). It is unlikely that traffic would prolong a 20-minute, 18-mile drive by more than an hour and 45 minutes.

RCC § 22E-4103. Possession of a Dangerous Weapon with Intent to Commit Crime.

(1) *PDS, App. C at 489 – 490, objects to the elimination of the provision that excluded liability for an attempt to commit this offense. PDS states, “Allowing attempt liability generally for this offense creates a double inchoate crime...[it] punishes the risk of that harm that is created when the actor possesses a dangerous weapon with the intent to commit a crime against a person. To allow attempt liability would then allow punishment of the risk of the risk of the completed offense.” PDS offers a hypothetical in which a person instructs a friend to meet him at their favorite bar and bring him a pair of brass knuckles because the actor plans to hurt X when X gets back in town next week. PDS objects to imposing liability where the possession and the assault never came to fruition. PDS also recommends rewriting the offense to include as a possible means of committing the crime that the actor possessed an object with the intent (instead of knowledge) that it is a dangerous weapon.⁴³¹*

- The RCC does not incorporate this recommendation because it would create a gap in liability. The CCRC believes PDS’ proposed hypothetical does not amount to an attempted offense because the person did not come dangerously close to possessing (having the ability to exercise control over⁴³²) the brass knuckles. As USAO noted in its prior comment (App. C at 399), attempt liability would apply where the 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.” Consider, for example, a person who buys what they believe to be a bomb,⁴³³ with intent to use that bomb to blow up a building.⁴³⁴ If it turns out that the bomb is actually broken or fake, the person has not committed a completed offense but has committed an attempted offense because they “[w]ould have come dangerously close to completing that offense if the situation was as the person perceived it to be.”⁴³⁵ The CCRC retains attempt liability to cover such situations.
- PDS’s proposed alternative language makes the statute less clear and may authorize disproportionate penalties. RCC § 22E-701 defines “dangerous weapon” to include “Any object, other than a body part or stationary object, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person.” Read literally, the proposed language would impose liability where a person incorrectly – even irrationally – believes that an object can be dangerous.⁴³⁶ The revised offense requires that the object actually be dangerous.

⁴³¹ “(1) Knowingly possesses (A) A dangerous weapon; or (B) An object with intent that the object be a dangerous weapon; (2) With intent to use the dangerous weapon or object to commit a criminal harm.”

⁴³² “Possess” is defined in RCC § 22E-701.

⁴³³ “Restricted explosive” is defined in RCC § 22E-701.

⁴³⁴ See RCC §§ 22E-2501 (Arson); 22E-2503 (Criminal Damage to Property).

⁴³⁵ See RCC § 22E-301(a)(3)(B).

⁴³⁶ Consider, for example, a person who intends to beat someone to death with a very soft foam bat, even though the toy is not at all likely to cause death or serious bodily injury.

(2) *The CCRC recommends amending the phrase “offense against persons under Subtitle II” to state “offense under Subtitle II.” The phrase “against persons” was included in error.*

- This change clarifies and does not substantively change the revised statute.

RCC § 22E-4104. Possession of a Dangerous Weapon During a Crime.

(1) *PDS, App. C at 490 – 491, objects to the elimination of the provision that excluded liability for an attempt to commit this offense. PDS states, “Society has an interest in criminalizing the conduct of possessing a dangerous weapon during a crime because the presence of a weapon may make the crime more likely to succeed and creates a risk that someone will be seriously injured. However, committing a crime not actually possessing a dangerous weapon but only attempting to possess such a weapon does not make the offense more likely to succeed or more dangerous.” PDS offers a hypothetical in which a person is in the middle of a fight and yells to the surrounding crowd, “someone give me a knife!” but never receives one. PDS then recommends rewriting the offense to include as a possible means of committing the crime that the actor possessed an object with the intent (instead of knowledge) that it is a dangerous weapon.⁴³⁷*

- The RCC does not incorporate this recommendation because it would create a gap in liability. The proposed hypothetical does not amount to an attempted offense because the person did not come dangerously close to possessing (having the ability to exercise control over⁴³⁸) the knife. As USAO noted in its prior comment (App. C at 400), attempt liability would apply where the 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.” Consider, for example, a person who detonates what they believe to be a bomb,⁴³⁹ intending to blow up a building.⁴⁴⁰ If it turns out that the bomb is actually broken or fake, the person has not committed a completed offense but has committed an attempted offense because they “[w]ould have come dangerously close to completing that offense if the situation was as the person perceived it to be.”⁴⁴¹
- PDS’s proposed language makes the statute less clear and may authorize disproportionate penalties. RCC § 22E-701 defines “dangerous weapon” to include “Any object, other than a body part or stationary object, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person.” Read literally, the proposed language would impose liability where a person incorrectly – even

⁴³⁷ “(1) Knowingly possesses (A) A dangerous weapon; or (B) An object with intent that the object be a dangerous weapon; (2) With intent to use the dangerous weapon or object to commit a criminal harm.”

⁴³⁸ “Possess” is defined in RCC § 22E-701.

⁴³⁹ “Restricted explosive” is defined in RCC § 22E-701.

⁴⁴⁰ See RCC §§ 22E-2501 (Arson); 22E-2503 (Criminal Damage to Property).

⁴⁴¹ See RCC § 22E-301(a)(3)(B).

irrationally – believes that an object can be dangerous.⁴⁴² The revised offense requires that the object actually be dangerous.

(2) *USAO, App. C at 517, reiterates its recommendation that a firearm and imitation firearm be graded the same. USAO states, “Because the weapon must be used ‘in furtherance’ of the offense, the weapon will surely make an impression on the complainant.” USAO states that it may still be impossible for a victim to tell if a firearm is real or imitation, particularly if the defendant flees.*

- The RCC does not incorporate this recommendation because it would be inconsistent with the general RCC approach to structuring penalties for weapon-related crimes and may authorize disproportionate penalties.
- First, where a dangerous weapon or imitation dangerous weapon is used against or displayed to a person (as in the USAO hypothetical), the RCC provides additional punishment for that conduct in its offenses against persons in Subtitle II, regardless of whether it was a real or imitation weapon. For example, the RCC raises the penalty otherwise applicable to an assault causing significant bodily injury from fourth degree to third degree⁴⁴³ and includes a penalty enhancement for criminal threats with a weapon.⁴⁴⁴ The separate crime of merely possessing—but not using or displaying—a dangerous weapon in RCC § 22E-4104 is thus primarily intended to capture conduct that is unknown and unseen by the complainant but found on the actor at time of arrest or otherwise subsequently linked to the crime. And, it is precisely in those instances where a weapon is apprehended (though never displayed or used in the crime) that the distinction between an imitation and a real dangerous weapon is a fact available to the prosecution.
- Second, where a weapon is possessed but not used or displayed (and so makes no impression on the complainant), the difference in actual dangerousness between a real and fake dangerous weapon should be reflected in the RCC penalty. The presence of an actual firearm creates a danger that someone will be fatally injured, intentionally or inadvertently. Polling of District voters also suggests that carrying a fake, concealed firearm in a public place is substantially lower level conduct as compared to a real firearm.⁴⁴⁵

⁴⁴² Consider, for example, a person who intends to beat someone to death with a very soft foam bat, even though the toy is not at all likely to cause death or serious bodily injury.

⁴⁴³ Such a person could certainly be charged with both committing an assault using a dangerous or imitation dangerous weapon and possessing a dangerous weapon during a crime, but at sentencing a conviction would not be entered for more than 1 of these overlapping offenses per RCC § 22E-4119, Limitation on Convictions for Multiple Related Weapon Offenses.

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RCC § 22E-1204.

⁴⁴⁵ See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses. Compare the following. Question 4.11 provided the scenario: “Carrying a concealed pistol while walking down the street without a license to carry a pistol as required by law. The gun is not involved in any crime.” Question 4.11 had a mean response of 5.6, below the 6.0 milestone corresponding to felony assault, currently a 3-year offense in the D.C. Code. Question 4.15 provided the scenario: “Carrying a concealed, realistic but fake gun while walking down the street. The fake gun is not

- (3) *USAO, App. C at 517, reiterates its recommendation that the requirement that a weapon be used “in furtherance of” an offense be removed. USAO states, given that this offense is targeted at punishing possession of a dangerous weapon during an offense where the complainant is not aware of the dangerous weapon, the “in furtherance” requirement impedes that objective.*
- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. Striking the “in furtherance” requirement appears to include constructive possession of a weapon far away from the offense. For example, a person who commits a simple assault in one part of the city could be convicted of first degree possession of a weapon during a crime by virtue of having a lawfully registered handgun in their home miles away, even if their possession of the handgun has no connection to the crime and poses not additional threat to the complainant. In contrast, RCC § 22E-4104 requires a link between the possession of the weapon and the crime in some manner. Other RCC crimes provide liability for conduct where an actor brings a dangerous weapon to a location where a crime is committed (e.g., RCC § 22E-4102, Carrying a Dangerous Weapon) or displays or uses a dangerous weapon (see RCC offenses against persons under Subtitle II with gradations that authorize higher penalties for use or display of a weapon).
- (4) *USAO, App. C at 517-518, recommends aligning the predicate offenses for first and second degree, so that, at minimum, both degrees include burglary, arson, and reckless burning as predicate offenses. USAO states that “it creates a large gap in liability not to have burglary listed as an underlying offense in first degree.”*
- The RCC partially incorporates this recommendation by eliminating references to arson, reckless burning, and burglary from the offense, such that the predicate offenses in first and second degree align and consist of all Subtitle II Offenses Against Persons. Since burglary was initially drafted in the RCC, the offense has been updated to provide an enhancement when “the actor knowingly holds or carries on the actor’s person a dangerous weapon or imitation firearm while entering or surreptitiously remaining in the location.” See RCC § 22E-2701(d)(4). Also, a review of court statistics shows that from 2009 through 2019, there was not a single arson charge (or conviction) brought with a while-armed enhancement.⁴⁴⁶ Consequently, inclusion of burglary and arson in this statute is unnecessary. This change improves the consistency and proportionality of the revised statutes.
- (5) *USAO, App. C at 548, opposes eliminating the mandatory minimum for this offense. USAO notes an increase in gun violence.⁴⁴⁷ USAO states, “This offense*

involved in any crime.” Question 4.15 had a mean response of 4.0, the same as the 4.0 milestone corresponding to simple assault, currently a 180-day offense in the D.C. Code.

⁴⁴⁶ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

⁴⁴⁷ <https://cdn.americanprogress.org/content/uploads/2019/11/18070707/WashingtonDCGunViolence-Factsheet.pdf>

involves not just possession of firearms, but possession of firearms when the firearms are being used to commit offenses against others.” USAO also states that under federal law, many firearms offenses are subject to a mandatory minimum.⁴⁴⁸

- The RCC does not incorporate this recommendation because it would result in disproportionate penalties. For more information on the subject, see Advisory Group Memorandum #32, Supplemental Materials to the First Draft of Report #52.
- The CCRC also notes that USAO does not assert that the current mandatory minimum and statutory maximum penalty in the D.C. Code adequately deter either the possession of firearms or the use of firearms during the commission of offenses against others.⁴⁴⁹
- The RCC’s penalty recommendations for RCC § 22E-4104 reflect a sharp decrease from the current D.C. Code § 22-4504(b) statutory penalties and related federal statutes cited by USAO, however those offenses are limited to possessing a firearm during a crime of violence. In contrast, RCC § 22E-4104 applies much more broadly and includes minor assaults and other offenses against persons.
- The RCC recognizes that the degree of additional punishment due to the mere possession of a dangerous weapon during a crime should be less than the display or use of the weapon during the crime.⁴⁵⁰ (Indeed, to the extent that penalty differences are a factor in deterring commission of criminal acts, there is a strong social interest in incentivizing those committing crimes to not pull out a gun or knife.) The mere possession crime in RCC § 22E-4104 (and its penalty classification) is not intended to account for the actual use or brandishing of a dangerous weapon, let alone to account for the whole harm done during the crime. At least in the case of serious felonies, the physical injury or sexual intrusion experienced by the complainant almost always far outweighs the means (a dangerous weapon) by which the crime was committed.

⁴⁴⁸ See, e.g., 18 U.S.C. § 924(c)(1)(A)(i) (5- year minimum for using or carrying a firearm during a crime of violence); 18 U.S.C. § 924(c)(1)(A)(ii) (7-year minimum for brandishing a firearm during a crime of violence); 18 U.S.C. § 924(e) (15-year minimum for possessing a firearm after 3 convictions for violent felonies or drug offenses).

⁴⁴⁹ See U.S. Department of Justice, National Institute of Justice, *Five Things About Deterrence*, NCJ 247350 (May 2016) at 1 (“1. The *certainty* of being caught is a vastly more powerful deterrent than the punishment... 2. Sending an individual convicted of a crime to prison isn’t a very effective way to deter crime... 3. Police deter crime by increasing the perception that criminals will be caught and punished... 4. Increasing the severity of punishment does little to deter crime... 5. There is no proof that the death penalty deters criminals.”).

⁴⁵⁰ Display or use of a weapon during a crime is punished inside the offense definitions themselves. See, e.g., RCC §§ 22E-1201, 22E-1203, 22E-2701.

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

- (2) *USAO, App. C at 518, recommends that sub-subparagraph (b)(2)(C)(ii) be modified to include a stay away/no contact order. USAO states both D.C. Code § 22-4503(a)(5)(B) and the revised statute contain a gap in liability by failing to include a stay away/no contact order, which is stricter order than a “no HATS”⁴⁵¹ order.*
- The RCC partially incorporates this recommendation by amending subparagraph (b)(2)(C) to include any final civil protection order issued under D.C. Code § 16-1005, whether the order includes a stay away/no contact provision, a “no HATS” provision, or not.⁴⁵² This change eliminates a gap in liability.
- (3) *USAO, App. C at 548, opposes eliminating the mandatory minimum for this offense. USAO notes an increase in gun violence.⁴⁵³*
- The RCC does not incorporate this recommendation because it would result in disproportionate penalties. For more information on the subject, see Advisory Group Memorandum #32, Supplemental Materials to the First Draft of Report #52.
 - The CCRC also notes that USAO does not assert that the current mandatory minimum and statutory maximum penalty in the D.C. Code adequately deter the possession of firearms.⁴⁵⁴
- (2) *The CCRC recommends clarifying that the term “prior conviction” (now defined in RCC § 22E-701) includes a conviction that is pending appeal but does not include a conviction that has been vacated or reversed. The DCCA’s recent opinion in Blocker v. United States,⁴⁵⁵ which was issued after the most recent draft language was released, noted an ambiguity here but did not resolve it.*
- This change clarifies the revised commentary.
- (4) *The CCRC recommends allowing a 24-hour grace period.⁴⁵⁶ This ensures that a lawful gun owner does not automatically commit an offense the moment a new conviction is entered. It also provides a short period of time for a person to safely relinquish their firearms after being convicted or served with a protective order.*
- This change improves the proportionality of the revised statute.

⁴⁵¹ “No Harassing, Assaulting, Threatening, or Stalking.”

⁴⁵² Current D.C. Code § 22-4503(a)(5) appears to apply to civil protection orders only. A stay away/no contact order or “no HATS” order issued as a condition of release under D.C. Code § 23-1321, does not require the actor “relinquish possession of any firearms.”

⁴⁵³ <https://cdn.americanprogress.org/content/uploads/2019/11/18070707/WashingtonDCGunViolence-Factsheet.pdf>

⁴⁵⁴ See U.S. Department of Justice, National Institute of Justice, *Five Things About Deterrence*, NCJ 247350 (May 2016) at 1 (“1. The *certainty* of being caught is a vastly more powerful deterrent than the punishment... 2. Sending an individual convicted of a crime to prison isn’t a very effective way to deter crime... 3. Police deter crime by increasing the perception that criminals will be caught and punished... 4. Increasing the severity of punishment does little to deter crime... 5. There is no proof that the death penalty deters criminals.”).

⁴⁵⁵ 240 A.3d 35 (D.C. 2020).

⁴⁵⁶ See, e.g., Va. Code Ann. § 18.2-308.1:4.

RCC § 22E-4106. Negligent Discharge of Firearm.

- (1) *The CCRC recommends amending the phrase “discharges a firearm” to state “discharges a projectile from a firearm,” consistent with the revised endangerment with a firearm statute in RCC § 22E-4120.*
 - This change clarifies and does not substantively change the revised statute.

RCC § 22E-4114. Civil Provisions for Licenses of Firearms Dealers.

- (1) *OAG, App. C at 478, recommends that paragraph (b)(5) be redrafted to strike the reference to “a book.” OAG states, in an electronic age, the use of the term “book” in this statement may be viewed as prohibiting the Mayor from requiring that the information be kept in electronic form.*
 - The RCC incorporates this recommendation by adopting OAG’s proposed language in paragraph (b)(5) and in paragraph (b)(6). This change clarifies the revised statute.

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

- (1) *OAG, App. C at 478, recommends that paragraph (c)(5) be redrafted to say, “The Property Clerk shall make no disposition of a dangerous article under this section, whether in accordance with their own decision or in accordance with the judgment of the court, until the United States Attorney for the District of Columbia and the Office of the Attorney General for the District of Columbia certifies to the Property Clerk that the dangerous article will not be needed as evidence.” (Emphasis added.) OAG states that, because its Juvenile Section has jurisdiction to prosecute youth for all offenses for which USAO prosecutes adults and its Criminal Section prosecutes unregistered firearm, no potential evidence should be destroyed unless OAG is also consulted.*
 - The RCC partially incorporates this recommendation by requiring that either USAO or OAG certify that the article is not needed as evidence. Consistent with current District practice,⁴⁵⁷ the authorization of the office in charge of the prosecution will be required before seized property is destroyed. This change eliminates a gap in the revised statute.
- (2) *OAG, App. C at 478 – 479, recommends restructuring subsection (d) so that each subparagraph flows naturally from the lead in language.*
 - The RCC incorporates this recommendation by adopting OAG’s proposed language. This change clarifies the revised statute.
- (3) *OAG, App. C at 479, recommends redrafting the last sentence in subsection (e) to state, “A District government agency receiving a dangerous article under this section shall establish property responsibility and records.” OAG states, the Council lacks authority to regulate federal agencies.*
 - The RCC incorporates this recommendation by adopting OAG’s proposed language. This change clarifies the revised statute.
- (4) *OAG, App. C at 479, n. 16, recommends replacing the phrase “law-enforcing agency” with “law enforcement agency.”*
 - The RCC incorporates this recommendation by adopting OAG’s proposed language. This change improves the consistency of the revised statutes.

⁴⁵⁷ For example, currently, when a case is referred to USAO for papering, the Metropolitan Police Department requires only an AUSA signature on the Property Record form (PD-81(c)) before evidence is forfeited or returned to its owner.

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

- (1) *PDS, App. C at 491, recommends that the commentary clarify that the limitation applies to convictions for the enumerated offenses without regard to the theory of liability under which the conviction was obtained, such as an attempt theory.*
 - The RCC incorporates this recommendation by amending the commentary to include the proposed example in a footnote stating, “The limitation applies to convictions for the enumerated offenses without regard to the theory of liability under which the conviction was obtained. For example, the limitation prevents the court from entering judgments of conviction for possession of a dangerous weapon during a crime and for attempted first degree robbery.” This change clarifies the revised commentary.
- (2) *The CCRC recommends revising a footnote in the revised commentary to correctly cite controlling District case law on the unit of prosecution for firearm offenses.*
 - This change clarifies the revised commentary.

RCC § 22E-4120. Endangerment with a Firearm.

- (1) *USAO, App. C at 592, recommends increasing the maximum authorized penalty for this offense. USAO states that the conduct is serious. USAO does not specify a penalty recommendation.*
- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. For example, increasing the penalty class for this offense by one class would punish endangering a person with a firearm (which does not require inflicting any fear or injury) more severely than using a firearm to cause a significant bodily injury.⁴⁵⁸
- (2) *PDS, App. C at 588, recommends that the statute and commentary make clear that this offense merges with any completed offense or inchoate offense, such as attempt, where part of the government’s proof is evidence of the discharge of a firearm. PDS states, “Failing to address explicitly the overlap/merger issues created by this new offense would threaten to undo much, if not most, of the work the CCRC has done to reduce overlap amongst and between weapons offenses and offenses against persons.”*
- The RCC incorporates this recommendation by adding to the revised statute a new subsection (c) that states: “*Multiple convictions for related offenses.* A conviction for an offense under this section and a conviction for another offense that has as an objective element in the offense definition or applicable penalty enhancement the use or display, or attempted use or display, of a firearm, imitation firearm, or dangerous weapon shall merge, under RCC § 22E-214, when both convictions arise from the same course of conduct and the same complainant.”
 - The updated subsection (c) merges a conviction for endangerment with a firearm with a conviction for a crime that already accounts the use or display of a firearm in the offense definition or penalty enhancement. The updated subsection (c) does not apply, however, to crimes involving only the possession or attempted possession of a firearm, imitation firearm, or dangerous weapon. The fact that subsection (c) requires merger in specified circumstances is not intended to preclude the court from merging endangerment with a firearm with another conviction in other circumstances under RCC § 22E-214. This change improves the clarity and proportionality of the revised statutes.

⁴⁵⁸ RCC § 22E-1202.

RCC § 22E-4201. Disorderly Conduct.

- (1) *The CCRC recommends striking the word “involving,” to make clear that a categorical approach is intended.*⁴⁵⁹
 - This change clarifies and improves the consistency of the revised statutes.
- (2) *The CCRC recommends repealing D.C. Code § 22-1809, which provides that a person who fails to pay a fine for a disorderly conduct offense shall be committed to a workhouse for up to six months.*
 - This change improves the consistency and proportionality of the revised statutes and eliminates an archaic provision in the D.C. Code.

⁴⁵⁹ In *Taylor v. United States*, a case involving a prior-conviction statutory provision, the Court pointed to the *absence* of the word “involved” in adopting a categorical approach. 495 U.S. at 600, 110 S.Ct. 2143. And in *Nijhawan v. Holder*, another case involving a prior-conviction statutory provision, the Court explained that the word “involves” did not support a categorical approach. 557 U.S. at 36, 129 S.Ct. 2294. Here, unlike in *Taylor*, the statute does use the word “involves.” Under *Taylor*'s reasoning, the inclusion of the word “involves” in § 924(c)(3)(B) supports the conclusion that § 924(c)(3)(B) employs a conduct-specific approach rather than a categorical approach.

United States v. Davis, 139 S. Ct. 2319, 2348 (2019).

RCC § 22E-4202. Public Nuisance.

(1) *OAG, App. C at 479 – 480, recommends that the commentary make clear that the notice to stop may be given by any person and give the following example: “At 1:00 in the morning a person plays the drums in his or her house. The noise wakes the neighbors and their children. The neighbor calls the person and tells them that the drumming is too loud and then asks them to stop playing. If the person continues to play the drums, the person has resumed the conduct after receiving oral notice to stop and has committed a public nuisance.”*

- The RCC incorporates this recommendation by amending the commentary to include a similar statement and example. It states, “The notice to stop may be given by any person and is not limited to notice from a law enforcement officer.” An accompanying footnote states, “For example, a private citizen may give notice by calling a noisy neighbor and asking them to, ‘Keep it down.’” This change clarifies the revised commentary.

RCC § 22E-4205. Breach of Home Privacy.

(1) *OAG, App. C at 480, recommends adding a new subsection (b) stating, “It is not necessary that the dwelling be occupied at the time the person makes the observation.” OAG states that this proposed change would make the provision understandable to a lay person.*

- The RCC does not incorporate this recommendation because it would be inconsistent with the RCC’s approach to drafting and might, thereby, make the statute confusing. The RCC does not specify in statutory language elements that *may or may not* exist, although such a style was used in the original 1901 D.C. Code in some offenses. For example, unlike current D.C. Code § 22-801, RCC § 22E-2701 does not state that a person commits burglary “in the nighttime or in the daytime” or if they “break and enter, or enter without breaking.” Similarly, the revised breach of home privacy does not specify that the dwelling may be “occupied or unoccupied.” Doing so may raise questions as to whether elements should be inferred in other statutes that do not explicitly state that the element does not exist.

RCC § 22E-4206. Indecent Exposure.

- (1) *OAG, App. C at 480, recommends striking the language in the prosecutorial subsection that states, “except as otherwise provided in D.C. Code § 23-101.”*
 - The RCC incorporates this recommendation by striking the language as proposed. This clause was included in error.
- (2) *The CCRC recommends specifying that OAG will prosecute second degree indecent exposure, leaving first degree to USAO. D.C. Code § 23-101(b), which states in relevant part: “Prosecutions for violations of section 6 of the Act of July 29, 1892 (D.C. Official Code, sec. 22-1307), relating to disorderly conduct, and for violations of section 9 of that Act (D.C. Official Code, sec. 22-1312), relating to lewd, indecent, or obscene acts, shall be conducted in the name of the District of Columbia by the Corporation Counsel [Attorney General for the District of Columbia] or his assistants.” (Emphasis added.) However, section 9 of the Act of July 29, 1892 does not include conduct by a person in a private location to a person who is in a private location.⁴⁶⁰*
 - This change improves the clarity and consistency of the revised statutes.
- (3) *The CCRC recommends adding the defined term “in fact” to the exclusions from liability, to make clear that no awareness or culpable mental state is required.⁴⁶¹*
 - This change clarifies and does not substantively change the revised statute.

⁴⁶⁰ See *United States v. Strothers*, 228 F.2d 34, 35 (D.C. Cir. 1955) (“On July 29, 1892, Congress passed ‘An act for the preservation of the public peace and the protection of property within the District of Columbia’, 27 Stat. 322. The first seventeen sections of this Act enumerated and made unlawful a number of certain actions, mostly minor in nature, some more serious, each section containing a separate provision for a penalty ranging from a maximum fine of five dollars in some instances to a maximum fine of two hundred and fifty dollars in some others. Section 18 of this Act provided that all prosecutions for the offenses were to be conducted in the name of and for the benefit of the District of Columbia. From the date of the passage of this Act until August 15, 1935, the Corporation Counsel for the District of Columbia, and his predecessors, prosecuted cases arising thereunder...”).

⁴⁶¹ RCC § 22E-207.

RCC § 22E-4301. Rioting.

- (3) *The CCRC recommends striking the word “involving,” to make clear that a categorical approach is intended.*⁴⁶²
- This change clarifies and improves the consistency of the revised statutes.
- (4) *The CCRC recommends specifying in statutory text that the other people engaged in riotous conduct must be in the area reasonably perceptible to the actor.*
- This change clarifies the revised statute and does not change its meaning.

⁴⁶² In *Taylor v. United States*, a case involving a prior-conviction statutory provision, the Court pointed to the *absence* of the word “involved” in adopting a categorical approach. 495 U.S. at 600, 110 S.Ct. 2143. And in *Nijhawan v. Holder*, another case involving a prior-conviction statutory provision, the Court explained that the word “involves” did not support a categorical approach. 557 U.S. at 36, 129 S.Ct. 2294. Here, unlike in *Taylor*, the statute does use the word “involves.” Under *Taylor*'s reasoning, the inclusion of the word “involves” in § 924(c)(3)(B) supports the conclusion that § 924(c)(3)(B) employs a conduct-specific approach rather than a categorical approach.

United States v. Davis, 139 S. Ct. 2319, 2348 (2019).

RCC § 22E-4302. Failure to Disperse.

- (1) *The CCRC recommends striking the word “involving,” to make clear that a categorical approach is intended.*⁴⁶³
 - This change clarifies and improves the consistency of the revised statutes.
- (2) *The CCRC recommends specifying in statutory text that the other people engaged in riotous conduct must be in the area reasonably perceptible to the actor.*
 - This change clarifies the revised statute and does not change its meaning.

⁴⁶³ In *Taylor v. United States*, a case involving a prior-conviction statutory provision, the Court pointed to the *absence* of the word “involved” in adopting a categorical approach. 495 U.S. at 600, 110 S.Ct. 2143. And in *Nijhawan v. Holder*, another case involving a prior-conviction statutory provision, the Court explained that the word “involves” did not support a categorical approach. 557 U.S. at 36, 129 S.Ct. 2294. Here, unlike in *Taylor*, the statute does use the word “involves.” Under *Taylor*'s reasoning, the inclusion of the word “involves” in § 924(c)(3)(B) supports the conclusion that § 924(c)(3)(B) employs a conduct-specific approach rather than a categorical approach.

United States v. Davis, 139 S. Ct. 2319, 2348 (2019).

RCC § 22E-4401. Prostitution.

(1) *OAG, App. C at 561, recommends adding “and” after paragraph (a)(3) and adding a new paragraph (a)(4) “Provided the sexual act or sexual conduct that was performed in exchange for any person receiving anything of value.” With this revision, the RCC offense would read:*

(a) Offense. An actor commits prostitution when that actor knowingly:

- (1) Pursuant to a prior agreement, express or implicit, engages in or submits to a sexual act or sexual contact in exchange for any person receiving anything of value;*
- (2) Agrees, expressly or implicitly, to engage in or submit to a sexual act or sexual contact in exchange for any person receiving anything of value; or*
- (3) Commands, requests, or tries to persuade any person to engage in or submit to a sexual act or sexual contact in exchange for any person receiving anything of value; and*
- (4) Provided the sexual act or sexual conduct that was performed in exchange for any person receiving anything of value.*

OAG states that “because ‘any person receiving’ [in the RCC prostitution statute] implies that someone gave, and ‘for giving’ to any person [in the RCC patronizing statute] implies that someone received” the RCC prostitution and RCC patronizing prostitution statutes “are essentially the same.”

- The RCC partially incorporates this recommendation by replacing “in exchange for any person receiving anything of value” in paragraphs (a)(1), (a)(2), and (a)(3) with “in exchange for the actor or a third party receiving anything of value.” When the actor engages in, agrees to, or solicits for sexual activity in exchange for the actor receiving anything of value, this revision excludes the patron.⁴⁶⁴ It is not possible to as clearly distinguish between the prostitute and the patron when the recipient or promised recipient of anything of value is a “third party,”⁴⁶⁵ but the commentary to

⁴⁶⁴ The plain language reading of paragraph (a)(1) with the new language, in relevant part, is the actor, pursuant to a prior agreement, engages in or submits to sexual activity “in exchange for the actor receiving anything of value.” A patron does not engage in or submit to sexual activity in exchange for the patron receiving anything of value.

The plain language reading of paragraph (a)(2) with the new language, in relevant part, is the actor agrees to engage in or submit to sexual activity “in exchange for the actor receiving anything of value.” A patron does not agree to engage in or submit to sexual activity in exchange for the patron receiving anything of value.

The plain language reading of paragraph (a)(3) with the new language, in relevant part, is the actor solicits any person to engage in or submit to sexual activity “in exchange for the actor receiving anything of value.” A patron does not solicit sexual activity in exchange for the patron receiving anything of value.

⁴⁶⁵ The resulting plain language readings are arguably susceptible to OAG’s interpretation that “receiving anything of value” implies “giving anything of value” and would thus apply to a patron, as well as a prostitute.

The plain language reading of paragraph (a)(1) with the new language, in relevant part, is the actor, pursuant to a prior agreement, engages in or submits to sexual activity “in exchange for a third party

the offense states that the phrase “in exchange for” is intended to exclude a patron from the RCC prostitution offense and that the RCC patronizing prostitution offense (RCC § 22E-4402) criminalizes patronizing prostitution. In addition, based on an OAG comment discussed below, the RCC prostitution and RCC patronizing offenses now have the same penalty (excluding enhanced patronizing prostitution), which eliminates incentives for charging one offense over the other. The RCC did not incorporate OAG’s specific recommended language because it did not address the agreement (paragraph (a)(2)) and solicitation (paragraph (a)(3)) prongs of the offense.

- (2) *The CCRC recommends two changes to the deferred disposition provision in subsection (c) of the revised statute: 1) deleting from a sentence in paragraph (c)(1) the language “a nonpublic record thereof shall be retained solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, such person qualifies under this subsection”; and 2) deleting what was previously paragraph (c)(3), which provided for expungement of the nonpublic record created in paragraph (c)(1). With this revision, the sentence in paragraph (c)(1) reads “Discharge and dismissal under this subsection shall be without court adjudication of guilt” and a judge may defer and dismiss proceedings for a prostitution case, even if the defendant has previously had a case dismissed. There is no longer a provision for expungement of the nonpublic record in the revised prostitution statute because paragraph (c)(1) no longer creates such a record.*

The current D.C. Code deferred disposition provision for prostitution does not have a limit on the number of times the provision can be applied.⁴⁶⁶ The

receiving anything of value.” Under OAG’s interpretation, a patron could engage in or submit to sexual activity in exchange for a third party receiving anything of value because the patron will give it.

The plain language reading of paragraph (a)(2) with the new language, in relevant part, is the actor agrees to engage in or submit to sexual activity “in exchange for the a third party receiving anything of value.” Under OAG’s interpretation, a patron could agree to engage in or submit to sexual activity in exchange for a third party receiving anything of value because the patron will give it.

The plain language reading of paragraph (a)(3) with the new language, in relevant part, is the actor solicits any person to engage in or submit to sexual activity “in exchange for a third party receiving anything of value.” Under OAG’s interpretation, a patron could solicit for sexual activity in exchange for a third party receiving anything of value because the patron will give it.

⁴⁶⁶ D.C. Code § 22-2703 (“The court may impose conditions upon any person found guilty under § 22-2701, and so long as such person shall comply therewith to the satisfaction of the court the imposition or execution of sentence may be suspended for such period as the court may direct; and the court may at or before the expiration of such period remand such sentence or cause it to be executed. Conditions thus imposed by the court may include an order to stay away from the area within which the offense or offenses occurred, submission to medical and mental examination, diagnosis and treatment by proper public health and welfare authorities, and such other terms and conditions as the court may deem best for the protection of the community and the punishment, control, and rehabilitation of the defendant. The Department of Human Services of the District of Columbia, the Women's Bureau of the Police Department, and the probation officers of the court are authorized and directed to perform such duties as may be directed by the court in effectuating compliance with the conditions so imposed upon any defendant.”).

previous draft of the RCC prostitution statute imposed such a limit by largely adopting the deferred disposition provision in the RCC possession of a controlled substance statute (RCC § 48-904.01a). However, the RCC possession of a controlled substance statute has since deleted the language pertaining to a nonpublic record retained by the courts, and a judge can defer and dismiss proceedings, even if the defendant has previously had a case dismissed. This change makes the RCC prostitution deferred disposition provision consistent with the deferred disposition in the RCC possession of a controlled substance statute and provides trial judges with broader discretion to dismiss proceedings when appropriate. The commentary to the revised prostitution statute states that a judge may defer and dismiss proceedings for a prostitution case, even if the defendant has previously had a case dismissed.

- This change improves the proportionality of the revised statutes.
- (3) *OAG, App. C at 558-560, recommends revising a sentence in paragraph (c)(1) to read “Discharge and dismissal under this subsection shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained. The sealing of the nonpublic record shall be in accordance to, and subject to the limitations of D.C. Code § 16-803(1).” The current sentence in paragraph (c)(1) reads, “Discharge and dismissal under this subsection shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, such person qualifies under this subsection.” OAG states that the current sentence “does not, on its face, permit a prosecutor from retaining a copy of the records as a check on the court.” OAG states that, “[i]n contrast, D.C. Code § 16-803, the District’s sealing statute, addresses practical issues concerning the sealing of records and recognizes that law enforcement and prosecutors also need to retain and view nonpublic sealed records.” In addition, because paragraphs (c)(1) and (c)(2) “use the term ‘probation’ to describe a defendant’s supervision preadjudication,” OAG recommends that “the Commentary make clear that the court’s authority to expunge records pursuant to RCC § 22E-4401 is limited to situations where the person was not sentenced and that a person who was sentenced would have to avail themselves of the sealing provisions found in D.C. Code § 16-803.”*
- The RCC does not adopt this recommendation at this time. The D.C. Council is currently considering new legislation that would potentially include broader changes to record sealing laws in the District. The CCRC may re-visit this issue to determine if further changes are warranted in light of changes to District law governing record sealing. In addition, as is discussed above in the first entry, the RCC prostitution statute deletes the provision for the courts retaining a nonpublic record solely for use in determining whether or not, in subsequent proceedings, a defendant qualifies for the deferred disposition provision.
- (4) *USAO, App. C at 589-590 states that it “agrees with OAG’s comments [App. C, 558-561] that prosecutors and law enforcement need to have access to” the nonpublic records referred to in subsection (c). However, “in lieu of expungement” (previously provided for in paragraph (c)(3) of the RCC*

prostitution statute), USAO recommends that the “CCRC create a sealing provision” because sealing “would accomplish many of the goals of this provision, including lack of public access to these records.” USAO states that “[e]xpungement would have adverse impacts that are not immediately apparent,” including “an impact on USAO’s ability to locate and disclose relevant Brady material.” USAO states that “[c]losed files, including those that do not result in a conviction, sometimes contain Brady information, and USAO obtains that information from closed files” and “[i]f those files were expunged, the government would not be able to access that material either for its own investigatory purposes or to disclose to defense.” USAO gives as examples a case that “was originally investigated as a felony offense” and a witness testified in the grand jury and committed perjury, a case that went to trial as a misdemeanor and a witness committed perjury at trial, and, regardless of whether a misdemeanor case went to trial, a witness made inconsistent statements to police or prosecutors. USAO also states that “a requirement that USAO or federal law enforcement agencies expunge records may violate the Home Rule Act, as the DC Council cannot alter the authority or duties of a federal agency.”

- The RCC does not incorporate this change for the reasons discussed above in response to an identical recommendation from OAG. With respect to the Home Rule Act, there is no D.C. Court of Appeals case law as to whether mandating USAO expungement of records violates the Home Rule Act. D.C. Code § 16-803 specifically authorizes “the prosecutor’s office” to retain any and all records relating to the . . . arrest and conviction in a nonpublic file[.]” The previous expungement provision in the RCC prostitution statute was modeled off the deferred disposition provision in current D.C. Code § 48-904.01, which contains an identical provision for expungement of a nonpublic record. If omitting reference to D.C. Code § 16-803 violates the Home Rule Act, then current D.C. Code § 48-904.01 already appears to violate the Home Rule Act. The current D.C. Code possession of a controlled substance statute does not reference D.C. Code § 16-803, or otherwise specifically authorize USAO to maintain non-public records.⁴⁶⁷ The CCRC is not aware of any litigation about a Home Rule Act issue with this provision, but welcomes Advisory Group updates about any such litigation.

- (5) *PDS, App. D at 583-584, recommends replacing “Metropolitan Police Department” with “the District” in subparagraph (b)(2) so that it reads, in relevant part, “The District shall refer any person under 18 years of age that is suspected of violating subsection (a) of this section to an organization that provides treatment, housing, or services appropriate for victims of” sex trafficking of a minor under RCC § 22E-1605. PDS states that it “hopes that the Council for the District of Columbia and the Mayor answer the call to narrow the*

⁴⁶⁷ Current D. C. Code § 48-904.01 states that “a nonpublic record thereof shall be retained solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, such person qualifies under this subsection[.]” D.C. Code § 48-904.01(e)(1) (emphasis added). This subsection does not specifically authorize the USAO to retain a non-public record.

duties of MPD and to assign the work of delivering health and human services to District agencies that are better suited to delivering those services.” PDS states that “[r]equiring that the District make the referral allows the District to assign the work to a current social services agency, a new agency not currently in existence, or if it deems it appropriate, even to MPD (emphasis in original).”

- The RCC partially incorporates this recommendation by adding to the subparagraph (b)(2) duty to make a referral “and any other District agency designated by the Mayor” after the current reference to “Metropolitan Police Department.” The updated language reads, in relevant part, “The Metropolitan Police Department and any other District agency designated by the Mayor shall refer any person under 18 years of age that is suspected of violating subsection (a) of this section to an organization that provides treatment, housing, or services appropriate for victims of” sex trafficking of a minor under RCC § 22E-1605. The updated language will ensure the referral provision remains relevant and applicable should there be future changes in service delivery while (unlike the PDS proposed language) ensuring that MPD remains bound to provide referrals. This change improves the clarity of the revised statutes. The commentary to the revised prostitution offense has been updated to reflect that this is a clarificatory change in law.
- (6) *PDS, App. C at 584, states that it supports the provision in subsection (c) that allows for the dismissal of proceedings and reiterates its previous recommendation, App. C at 491 that the CCRC create a general provision that allows for the judicial dismissal of proceedings for all offenses up to a certain class.*
- The RCC does not incorporate in the general provisions at this time an expanded deferred disposition provision that applies to whole classes of RCC offenses. The CCRC will revisit such a possibility as penalty recommendations for misdemeanor classes are reviewed again.
- (7) *The CCRC recommends adding the defined term "in fact" to the immunity provision in paragraph (b)(1) to make clear that no awareness or culpable mental state is required.*⁴⁶⁸
- This change clarifies and does not substantively change the revised statute.

⁴⁶⁸ RCC § 22E-207.

RCC § 22E-4402. Patronizing prostitution.

(1) *OAG, App. C at 561-562, recommends adding “and” after subparagraph (a)(3) and adding a new subparagraph (a)(4) “Was provided the sexual act or sexual conduct that was performed by another person who committed the offense of prostitution in RCC § 22E-4401.” With this revision, the RCC offense would read:*

(a) Offense. An actor commits patronizing prostitution when that actor knowingly:

- (1) Pursuant to a prior agreement, express or implicit, engages in or submits to a sexual act or sexual contact in exchange for giving any person anything of value;*
- (2) Agrees, expressly or implicitly, to give anything of value to any person in exchange for any person engaging in or submitting to a sexual act or sexual contact;*
- (3) Commands, requests, or tries to persuade any person to engage in or submit to a sexual act or sexual contact in exchange for giving any person anything of value; and*
- (4) Was provided the sexual act or sexual conduct that was performed by another person who committed the offense of prostitution pursuant to RCC § 22E-4401.*

OAG states that “because ‘any person receiving’ [in the RCC prostitution statute] implies that someone gave, and ‘for giving’ to any person [in the RCC patronizing statute] implies that someone received” the RCC prostitution and RCC patronizing prostitution statutes “are essentially the same.” OAG further recommends that “the Commentary for Patronizing Prostitution should state that to be convicted of that offense it is not necessary that a person be arrested or convicted for the offense of Prostitution.”

- The RCC partially incorporates this recommendation by replacing “in exchange for giving any person anything of value” with “in exchange for the actor giving another person anything of value” in paragraphs (a)(1) and (a)(3) of the RCC patronizing offense. This revision further clarifies that the actor must engage in or solicit for sexual activity, as well as give or promise to give anything of value to another person, which excludes a prostitute from the scope of the offense.
- The RCC replaces “to give anything of value to any person” in paragraph (a)(2) with “to give anything of value to another person” to maintain consistency with the wording in paragraphs (a)(1) and (a)(3). No further revision is necessary to paragraph (a)(2) because, read in conjunction with subsection (a), it prohibits the actor from agreeing to give anything of value in exchange for sexual activity and cannot apply to a prostitute.
- The RCC does not incorporate OAG’s specific recommended language because it did not address the agreement (paragraph (a)(2)) and solicitation (paragraph (a)(3)) prongs of the offense.
- The commentary to the RCC Patronizing Prostitution has been revised to state that the offense does not require that a person be arrested or

convicted for the RCC prostitution offense. These changes clarify the revised statutes.

- (2) *The CCRC recommends two changes to the deferred disposition provision in subsection (b) of the revised statute: 1) deleting from a sentence in paragraph (b)(1) the language “a nonpublic record thereof shall be retained solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, such person qualifies under this subsection”; and 2) deleting what was previously paragraph (b)(3), which provided for expungement of the nonpublic record created in paragraph (b)(1). With this revision, the sentence in paragraph (b)(1) reads “Discharge and dismissal under this subsection shall be without court adjudication of guilt” and a judge may defer and dismiss proceedings for a patronizing prostitution case, even if the defendant has previously had a case dismissed. There is no longer a provision for expungement of the nonpublic record in the revised patronizing prostitution statute because paragraph (b)(1) no longer creates such a record.*

The current D.C. Code deferred disposition provision for prostitution does not have a limit on the number of times the provision can be applied.⁴⁶⁹ The previous draft of the RCC patronizing prostitution statute imposed such a limit by largely adopting the deferred disposition provision in the RCC possession of a controlled substance statute (RCC § 48-904.01a). However, the RCC possession of a controlled substance statute has since deleted the language pertaining to a nonpublic record retained by the courts, and a judge can defer and dismiss proceedings, even if the defendant has previously had a case dismissed. This change makes the RCC patronizing prostitution deferred disposition provision consistent with the deferred disposition in the RCC possession of a controlled substance statute and provides trial judges with broader discretion to dismiss proceedings when appropriate. The commentary to the revised prostitution statute states that a judge may defer and dismiss proceedings for a patronizing prostitution case, even if the defendant has previously had a case dismissed.

- This change improves the proportionality of the revised statutes.

- (3) *OAG, App. C at 558-560, recommends revising a sentence in paragraph (b)(1) to read “Discharge and dismissal under this subsection shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained. The*

⁴⁶⁹ D.C. Code § 22-2703 (“The court may impose conditions upon any person found guilty under § 22-2701, and so long as such person shall comply therewith to the satisfaction of the court the imposition or execution of sentence may be suspended for such period as the court may direct; and the court may at or before the expiration of such period remand such sentence or cause it to be executed. Conditions thus imposed by the court may include an order to stay away from the area within which the offense or offenses occurred, submission to medical and mental examination, diagnosis and treatment by proper public health and welfare authorities, and such other terms and conditions as the court may deem best for the protection of the community and the punishment, control, and rehabilitation of the defendant. The Department of Human Services of the District of Columbia, the Women's Bureau of the Police Department, and the probation officers of the court are authorized and directed to perform such duties as may be directed by the court in effectuating compliance with the conditions so imposed upon any defendant.”).

sealing of the nonpublic record shall be in accordance to, and subject to the limitations of D.C. Code § 16-803(1).” The current sentence in paragraph (b)(1) reads, “Discharge and dismissal under this subsection shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, such person qualifies under this subsection.” OAG states that the current sentence “does not, on its face, permit a prosecutor from retaining a copy of the records as a check on the court.” OAG states that, “[i]n contrast, D.C. Code § 16-803, the District’s sealing statute, addresses practical issues concerning the sealing of records and recognizes that law enforcement and prosecutors also need to retain and view nonpublic sealed records.” In addition, because paragraphs (b)(1) and (b)(2) “use the term ‘probation’ to describe a defendant’s supervision preadjudication,” OAG recommends that “the Commentary make clear that the court’s authority to expunge records pursuant to RCC § 22E-4401 is limited to situations where the person was not sentenced and that a person who was sentenced would have to avail themselves of the sealing provisions found in D.C. Code § 16-803.”

- The RCC does not adopt this recommendation at this time. The D.C. Council is currently considering new legislation that would potentially include broader changes to record sealing laws in the District. The CCRC may re-visit this issue to determine if further changes are warranted in light of changes to District law governing record sealing. In addition, as is discussed above in the first entry, the RCC prostitution statute deletes the provision for the courts retaining a nonpublic record solely for use in determining whether or not, in subsequent proceedings, a defendant qualifies for the deferred disposition provision.
- (4) *USAO, App. C at 589-590 states that it “agrees with OAG’s comments [App. C, 558-561] that prosecutors and law enforcement need to have access to” the nonpublic records referred to in subsection (b). However, “in lieu of expungement” (previously provided for in paragraph (b)(3) of the RCC patronizing prostitution statute), USAO recommends that the “CCRC create a sealing provision” because sealing “would accomplish many of the goals of this provision, including lack of public access to these records.” USAO states that “[e]xpungement would have adverse impacts that are not immediately apparent,” including “an impact on USAO’s ability to locate and disclose relevant Brady material.” USAO states that “[c]losed files, including those that do not result in a conviction, sometimes contain Brady information, and USAO obtains that information from closed files” and “[i]f those files were expunged, the government would not be able to access that material either for its own investigatory purposes or to disclose to defense.” USAO gives as examples a case that “was originally investigated as a felony offense” and a witness testified in the grand jury and committed perjury, a case that went to trial as a misdemeanor and a witness committed perjury at trial, and, regardless of whether a misdemeanor case went to trial, a witness made inconsistent statements to police or prosecutors. USAO also states that “a requirement that USAO or*

federal law enforcement agencies expunge records may violate the Home Rule Act, as the DC Council cannot alter the authority or duties of a federal agency.”

- The RCC does not incorporate this change for the reasons discussed above in response to an identical recommendation from OAG. With respect to the Home Rule Act, there is no D.C. Court of Appeals case law as to whether mandating USAO expungement of records violates the Home Rule Act. D.C. Code § 16-803 specifically authorizes “the prosecutor’s office” to retain any and all records relating to the . . . arrest and conviction in a nonpublic file[.]” The previous expungement provision in the RCC patronizing prostitution statute was modeled off the deferred disposition provision in current D.C. Code § 48-904.01, which contains an identical provision for expungement of a nonpublic record. If omitting reference to D.C. Code § 16-803 violates the Home Rule Act, then current D.C. Code § 48-904.01 already appears to violate the Home Rule Act. The current D.C. Code possession of a controlled substance statute does not reference D.C. Code § 16-803, or otherwise specifically authorize USAO to maintain non-public records.⁴⁷⁰ The CCRC is not aware of any litigation about a Home Rule Act issue with this provision, but welcomes Advisory Group updates about any such litigation.
- (5) *OAG, App. C at 562-563, recommends changing the penalty classification for this offense to a Class D misdemeanor, which is the same penalty classification as the RCC prostitution offense (RCC § 22E-4401) with a maximum possible penalty of 30 days. The RCC patronizing prostitution offense previously was a Class C misdemeanor, with a maximum possible penalty of 90 days. OAG states that in the current D.C. Code prostitution statute,⁴⁷¹ prostitution and patronizing prostitution have the same penalty—a maximum possible penalty of 90 days for a first offense, a maximum possible penalty of 180 days for a second offense, and a maximum possible penalty of 2 years for a third or subsequent offense. OAG says it “agrees with the CCRC proposal to decrease the penalty for both of these offenses and to do away with the enhancement for second and subsequent offenses.” However, OAG recommends that, as under current law, the offenses have the same penalty.*
- The RCC incorporates this recommendation by decreasing the penalty classification for the RCC patronizing offense to a Class D misdemeanor. The penalty classification for the RCC enhanced patronizing offense remains a Class A misdemeanor.
- (6) *The CCRC recommends codifying a penalty enhancement in subparagraph (c)(2)(A) that, in fact, the person patronized is under 12 years of age. With this revision, subparagraph (c)(2)(A) provides a penalty enhancement when the actor “Is reckless as to the fact that the person patronized is under 18 years of age, or,*

⁴⁷⁰ Current D. C. Code § 48-904.01 states that “a nonpublic record thereof shall be retained solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, such person qualifies under this subsection[.]” D.C. Code § 48-904.01(e)(1) (emphasis added). This subsection does not specifically authorize the USAO to retain a non-public record.

⁴⁷¹ D.C. Code § 22-2701

in fact, the person patronized is under 12 years of age.” Applying strict liability for a person under the age of 12 is consistent with the RCC sex offenses. The penalty enhancement also is consistent with a penalty enhancement in the RCC trafficking in forced commercial sex statute (RCC § 22E-1604), as well as a penalty enhancement that has been codified in the RCC trafficking in commercial sex statute (RCC § 22E-4403), discussed later in this appendix. However, the commentary to the RCC patronizing prostitution statute emphasizes that this penalty enhancement is intended to be used in the rare instance when a more serious RCC sex offense, such as sexual abuse of a minor (RCC § 22E-1302), or RCC Chapter 16 human trafficking offense does not apply.⁴⁷² The commentary to the offense has been updated to reflect that this is a substantive change in law.

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(7) *The CCRC recommends codifying a penalty enhancement in subparagraph (c)(2)(B) and sub-subparagraphs (c)(2)(B)(i) and (c)(2)(B)(ii) that the actor is reckless as to the fact that the person patronized is incapacitated, impaired, or incapable of communicating willingness or unwillingness to engage in a sexual act or sexual contact. These requirements are consistent with the requirements in second degree and fourth degree of the RCC sexual assault statute, as well as a penalty enhancement that has been codified in the RCC trafficking in commercial sex statute (RCC § 22E-4403), discussed later in this appendix. However, the commentary to the RCC patronizing prostitution statute states that this penalty enhancement is generally intended to be used when a more serious RCC sex offense, such as sexual assault (RCC § 22E-1301), or RCC Chapter 16 human trafficking offense does not apply. The commentary to the offense has been updated to reflect that this is a substantive change in law.*

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(8) *PDS, App. C at 584, states that it supports the provision in subsection (b) that allows for the dismissal of proceedings and reiterates its previous recommendation, App. C at 491 that the CCRC create a general provision that allows for the judicial dismissal of proceedings for all offenses up to a certain class.*

- The RCC does not incorporate in the general provisions at this time an expanded deferred disposition provision that applies to whole classes of RCC offenses. The CCRC will revisit such a possibility as penalty recommendations for misdemeanor classes are reviewed again.

⁴⁷² Because the patronizing prostitution statute includes more inchoate conduct (e.g., efforts to persuade) with a “knowingly” culpable mental state, there may be rare instances where patronizing prostitution is chargeable but attempted sexual abuse of a minor or human trafficking offenses are not chargeable due to the heightened mental state requirements for attempt liability.

RCC § 22E-4403. Trafficking in Commercial Sex.

(1) *OAG, App. C at 562, recommends revising subparagraph (a)(3) so that it reads, in relevant part, “Obtains anything of value from the proceeds or earnings from a commercial sex act that a person has engaged in or submitted to.” The language in subparagraph (a)(3) currently reads “Obtains anything of value from the proceeds or earnings of a person who has engaged in or submitted to a commercial sex act.” OAG states that, as currently drafted, “it would technically reach the proceeds derived from a person who has engaged in a commercial sex act even though those proceeds” were earned “at a part time job that was unrelated to prostitution.”*

- The RCC incorporates this recommendation by revising the relevant language in subparagraph (a)(3) to read “Obtains anything of value from the proceeds or earnings of a commercial sex act that a person has engaged in or submitted to.” The commentary to this offense has been updated to reflect that this is a clarificatory change in law. This change improves the clarity of the revised statutes.

(2) *OAG, App. C at 562, recommends creating two penalty enhancements for trafficked persons under the age of 18 years. As currently drafted, subparagraph (b)(2) has a single penalty enhancement with an increase of one penalty class if the actor is reckless as to the fact that the person trafficked is under 18 years of age. Specifically, OAG recommends:*

“(2) Enhanced penalties. In addition to the general penalty enhancements under this title, the penalty classification for this offense is increased by:

- (i) one class when the actor is reckless as to the fact that the person trafficked is under 18 years of age but older than 13 years of age; or*
- (ii) two classes when the actor is either reckless as to the fact that the trafficked person is under 14 years of age or when the actor knowingly traffics a person who is under 18 years of age.”*

OAG “agrees that there should be an enhancement for recklessly trafficking persons who are under the age of 18, [but] we do not believe that the enhancement goes far enough.” OAG states that, as currently drafted, “a person who was reckless to the fact that they were trafficking a 17 year old girl would be subject to the same penalty as someone who intentionally trafficked an 11 year old girl.”

- The RCC partially incorporates this recommendation by revising subparagraph (c)(2)(A) to include “or, in fact, the person trafficked is under 12 years of age.” With this change, subparagraph (c)(2)(A) provides an enhanced penalty if “The actor is reckless as to the fact that the person trafficked is under 18 years of age, or in fact, the person trafficked is under 12 years of age.” Applying strict liability for a person under the age of 12 is consistent with the RCC sex offenses. The penalty enhancement also is consistent with a penalty enhancement in the RCC trafficking in forced commercial sex statute (RCC § 22E-4403). However, the commentary to the RCC trafficking in commercial sex statute emphasizes that this penalty enhancement is intended to be used in the rare

instance when a more serious RCC sex offense, such as sexual abuse of a minor (RCC § 22E-1302), or RCC Chapter 16 human trafficking offense does not apply.⁴⁷³

- The RCC does not incorporate OAG’s proposed language because this statute is limited to consensual commercial sex acts. If a commercial sex act is not consensual, or if the person trafficked is under the age of 18 years, there is more proportionate liability under the RCC sex offenses in Chapter 13 or the RCC human trafficking statutes, which account for the nonconsensual nature of the conduct or the young age of the complainant. However, should RCC § 22E-4403, trafficking in commercial sex, be applied, it is consistent and proportionate to have a penalty enhancement for when, in fact, the complainant is under 12 years of age. The commentary to the RCC Trafficking in Commercial Sex statute has been updated to reflect this discussion and that this revision is a change in law. This change improves the consistency and proportionality of the revised statutes.

(3) *The CCRC recommends adding a penalty enhancement if the actor is reckless as to the fact that the trafficked person is incapacitated, impaired, or incapable of communicating willingness or unwillingness to engage in a commercial sex act. The revised language is:*

“The actor is reckless as to the fact that the person trafficked is:

- (i) Incapable of appraising the nature of the commercial sex act or of understanding the right to give or withhold consent to the commercial sex act, either due to a drug, intoxicant, or other substance, or, due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness; or*
- (ii) Incapable of communicating willingness or unwillingness to engage in the commercial sex act.*

These requirements are consistent with the requirements in second degree and fourth degree of the RCC sexual assault statute, as well as the requirements for an incapacitated complainant in the RCC sex trafficking of a minor or adult incapable of consenting statute (RCC § 22E-1605). The commentary to the statute states that this penalty enhancement is generally intended to be used when a more serious RCC sex offense, such as sexual assault (RCC § 22E-1301), or RCC Chapter 16 human trafficking offense does not apply. The commentary to the RCC Trafficking in Commercial Sex statute has been updated to reflect this discussion and that this revision is a change in law.

- This change improves the clarity, consistency, and proportionality of the revised statutes.

⁴⁷³ Because the trafficking in commercial sex statute includes conduct with a “knowingly” culpable mental state, there may be rare instances where the commercial sex statute is chargeable but accomplice liability for sexual abuse of a minor or human trafficking offenses are not chargeable due to the heightened mental state requirements for accomplice liability.

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

- (1) *The CCRC recommends a single penalty gradation for the revised contributing to the delinquency of a minor (CDM) statute and classifying it as a Class B crime, with a maximum term of imprisonment of 180 days. The previous draft of the revised CDM statute had two degrees and three penalty gradations based, in part, on whether the underlying offense was a felony or a misdemeanor. The single flat penalty for all offenses in the revised statute effectively raises the penalty for what would otherwise be chargeable as lesser misdemeanors (Classes C-E) to a Class B offense when an actor who is an adult is an accomplice to or solicits a minor in an offense. However, where a person is an accomplice to or solicits a serious felony the actor should be charged with and subject to correspondingly higher penalties as provided under RCC § 22E-210 and RCC § 22E-302. The commentary to the revised CDM statute reflects that this is a change in law.*
 - This change improves the proportionality of the revised statute.
- (2) *OAG, App. C at 606-607, recommends revising what was previously subparagraph (a)(3)(B) to read “Knowingly encourages the complainant to engage in specific conduct that, in fact, constitutes a District offense, including a violation of D.C. Code § 25-1002, or a comparable offense in another jurisdiction.” This subparagraph was previously limited to encouraging the commission of a “District offense or a comparable offense in another jurisdiction,” with only a footnote in the RCC commentary explaining that D.C. Code § 25-1002, prohibiting the purchase, possession, of consumption of alcohol by persons under 21 years of age, was an “offense” for the purposes of the revised CDM statute despite the civil penalties for a person under the age of 21 years. OAG states that it could be “argued that the language in D.C. Code § 25-1002(a) that provides for civil penalties means that it is no longer an ‘offense’ for a person under the age of 21 to possess or drink alcohol.”*
 - The RCC incorporates this recommendation by codifying “for a District offense, including a violation of D.C. Code § 25-1002, or a comparable offense in another jurisdiction” in subparagraphs (a)(3)(A) and (a)(3)(B), pertaining to both accomplice liability and solicitation liability. This change improves the clarity of the revised statutes.
- (3) *OAG, App. C at 608, recommends expanding the explanation in the RCC commentary concerning OAG’s lack of prosecutorial authority in the revised CDM statute. OAG states that it “does not disagree with the proposal, [but] given the evolving nature of the analysis concerning the distribution of prosecutorial authority in the District, [OAG] believes that a fuller explanation is warranted.”*
 - The RCC generally incorporates the recommended language into the commentary in the eighth point regarding prosecutorial authority. The added historical detail does not change the analysis that OAG appears to lack prosecutorial authority over the contributing to the delinquency of a minor statute. This change improves the clarity of the commentary.
- (4) *PDS, App. C at 619-621, recommends deleting second degree of the revised CDM statute. PDS states that it agrees with Professor Butler’s comments at the*

October 7, 2020 Advisory Group meeting that “this conduct is better addressed outside of the criminal legal system.” PDS states that “[w]hile the offense does not appear to be directed at parents or at mothers specifically, PDS believes that this who prosecutors will target.” PDS discusses research and statistics and states that second degree of the revised CDM statute will “perpetuate the racism and classism of the District’s criminal legal system.” In addition, PDS states that second degree of the revised CDM statute is “not a necessary tool for holding parents accountable” given several juvenile court provisions in Title 16 of the current D.C. Code.

- The RCC incorporates this recommendation by deleting second degree CDM. The commentary to the revised CDM statute reflects that this is a change in law. Notably, other statutes not addressed in the RCC may still criminalize facilitating truancy (see D.C. Code § 38-203(d)) and facilitating contempt by aiding violation of a court order (see D.C. Code §§ 11-944; § 22-1805). This change reduces unnecessary overlap and improves the proportionality of the revised statutes.
- (5) *PDS, App. C at 621-622, recommends replacing “knowingly” with “purposely” in what is now paragraph (a)(3) and adding an element requiring that the minor had to engage in the conduct or attempt to do so. PDS states that if, as the commentary notes, the revised CDM statute largely tracks the RCC accomplice and RCC solicitation provisions “it is largely duplicative and has no place in a reform code written with a mandate to reduce overlap as a primary goal.” PDS states that “[i]f there is a place for such an offense in the RCC . . . it should be written so that it does not punish a person for speaking to a minor, even if that speech is to suggest that the minor engage in criminal behavior” and that the offense should not allow “liability for speech knowingly made but without any intent for the speech to have an effect.”*

PDS states that it is not clear what it means to “knowingly command” in former subparagraphs (a)(3)(C) and (b)(3)(C). PDS notes that the commentary to the offense stated “it means that the actor must be “practically certain that he or she commands ... the [minor] to engage in or aid the planning or commission of specific conduct which, if carried out, will constitute specific conduct.” PDS states that the “specific conduct” must be a District offense or an offense comparable to a District offense, but there is no mental state required for this circumstance: “In other words, the government need only prove that the specific conduct, as a matter of law, is a District offense or a comparable one. So then is it the case that to violate the offense all the actor must know is that his speech is an instruction to do particular conduct? Does there have to be a chance that the minor will engage in that conduct and does the actor have to have some mental state with respect to that chance?”⁴⁷⁴ PDS states that “[i]f knowingly means

⁴⁷⁴ PDS gives as a hypothetical:

Imagine a 20-year-old young man sees a 15-year-old girl walking down the street wearing a karate uniform with a black belt. He says: “Hey cool! A girl who can fight. That guy over there just bumped into me. Would you go give him a karate chop?” The chances are incredibly low that the teenager is going to assault a man at the request of a

more in this context, the commentary must say so.”

- The RCC partially incorporates this recommendation by requiring that the actor is either an accomplice to the complainant under the RCC general provision for accomplice liability (RCC § 22E-210) or commits criminal solicitation of the complainant under the RCC general solicitation provision (RCC § 22E-302). This effectively changes the required culpable mental state for assisting, encouraging, or soliciting the complainant from “knowingly” to “purposely.” The commentary to the revised CDM statute reflects that this is a possible change in law. This change improves the clarity, consistency, and proportionality of the revised statutes.
 - The RCC does not incorporate the recommendation to add an element that requires that the minor had to engage in the conduct or attempt to do so. The revised CDM statute specifically incorporates the RCC general provisions for accomplice liability and solicitation. The requirements of the general accomplice liability statute (RCC § 22E-210) ensure that the revised CDM statute does not criminalize merely suggesting specific conduct, which, if carried out, would constitute a crime.⁴⁷⁵ The RCC solicitation provision, however, does not require actual assistance, although it does require that the actor solicit “the planning or commission of specific conduct, which, if carried out, will constitute that offense or an attempt to commit” the underlying offense. The RCC solicitation statute does criminalize suggestions of conduct, but the actor must have the purpose of bringing about conduct planned to culminate in an offense.
- (6) *PDS, App. C at 622, recommends revising the definition of “chronic truancy” and the commentary to “explain more clearly that chronic truancy is being absent from school without a legitimate excuse after having already been absent from school without an excuse for at least 10 days.”*
- The RCC does not incorporate this recommendation because, as is discussed above, the updated CDM statute no longer has a second degree and does not cover chronic truancy.
- (6) *PDS, App. C at 622, recommends narrowing the merger restriction in what was previously subsection (f) (“A conviction for contributing to the delinquency of a*

stranger, yet technically, the 20-year-old is “practically certain” that he has requested specific conduct.

⁴⁷⁵ The accomplice liability provision (RCC § 22E-210) requires that the accomplice actually assist the minor in a non-trivial way. As the commentary to RCC § 22E-210 states (footnotes omitted):

To satisfy the conduct requirement of accomplice liability under paragraphs (a)(1) and (a)(2), it is not necessary that the principal actor have been subjectively aware of the effect of the accomplice’s assistance or encouragement. However, the accomplice’s conduct must have actually assisted or encouraged the principal in some non-trivial way. This means that an unsuccessful accomplice—i.e. one who attempts to aid or encourage the principal but fails to promote or facilitate the target offense in any way—is not subject to liability under §22E-210.

minor does not merge with any other offense arising from the same course of conduct.”) PDS states that “[p]rohibiting merger with any offense that arises from the same course of conduct is too broad.” PDS states that as previously drafted, the merger provision “would disallow merger of [the revised CDM statute] with the almost identical offense of solicitation [or] with a conviction for criminal abuse of a minor or criminal neglect of a minor or any other offense where liability rests on the actor being responsible for the health, welfare, or supervision of the minor.” PDS states “[t]hat is not to say that [the RCC merger provision] should necessarily require the merger of either degree of contributing to the delinquency of a minor with the examples provided; it is simply to say that there is no good policy reason to preclude the possibility of such merger.” PDS does not recommend specific language.

- The RCC partially incorporates this recommendation by deleting all limitations on merger. The commentary to the revised CDM statute reflects that this is a possible change in law, given that the scope of the revised offense now is such that it will merge with other convictions for accomplice or solicitation liability based on the same conduct. Specifically, the commentary notes that the RCC accomplice and RCC solicitation offenses are lesser included offenses of the revised contributing to the delinquency of a minor statute, and those offenses would merge into the contributing to the delinquency of a minor conviction under the RCC general merger provision (RCC § 22E-214). This change improves the clarity, consistency, and proportionality of the revised statutes.

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

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

(8) *USAO, App. C at 632-633, recommends clarifying that the revised CDM statute applies to an adult that provides alcohol to a minor in violation of D.C. Code § 25-1002. USAO states that D.C. Code § 25-1002 “makes it only a civil offense” for a minor to possess alcohol and “under the plain language of the RCC statute, it is arguable whether this would constitute a “District offense.” USAO states that it is also unclear whether D.C. Code § 25-1002 would constitute a “misdemeanor offense” for the purposes of the revised CDM penalty gradations.*

USAO states that, at the October 7, 2020 Advisory Group meeting, the CCRC stated the revised CDM statute would apply to D.C. Code § 25-1002. USAO does not recommend specific language.

- The RCC incorporates this recommendation by codifying “for a District offense, including a violation of D.C. Code § 25-1002, or a comparable offense in another jurisdiction” in subparagraphs (a)(3)(A) and (a)(3)(B), pertaining to both accomplice liability and solicitation liability. This change improves the clarity of the revised statutes.
- (9) *USAO, App. C at 633, recommends removing what was previously subsection (c): “An actor does not commit an offense under this section when, in fact, the conduct constituting a District offense or a comparable offense in another jurisdiction, constitutes an act of civil disobedience.” USAO states that “[a]lthough [this provision] tracks current law . . . it is unclear what would constitute ‘civil disobedience.’” USAO states it “is not aware of any legislative history or case law that would elucidate the definition of ‘civil disobedience’ in” the current D.C. Code contributing to the delinquency of a minor statute.*
- The RCC partially incorporates this recommendation by narrowing the exclusion to liability for civil disobedience to conduct that, in fact, constitutes a trespass under RCC § 22E-2601, a public nuisance under RCC § 22E-4202, blocking a public way under RCC § 22E-4203, an unlawful demonstration under RCC § 22E-4204, or a comparable offense in another jurisdiction, by the complainant during a demonstration. The provision makes explicit that a parent or other person cannot be held liable for encouraging such activities protected by the First Amendment. The commentary to the revised CDM statute reflects that this is a possible change in law. This change improves the clarity of the revised statutes.
- (10) *USAO, App. C at 633, recommends adding “or, if carried, out would constitute” in the penalty gradation that was previously in paragraph (f)(1). With this change, the penalty gradation would read “First degree contributing to the delinquency of a minor is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both, when the complainant’s conduct, in fact, constitutes or, if carried out, would constitute a District offense that is a felony, or a comparable offense in another jurisdiction.” USAO states that this language “tracks the language in [former subparagraph] (a)(3)(C).” USAO states that “[b]ecause liability [for first degree of the revised CDM statute] is based primarily on the defendant’s actions in commanding the complainant to engage in certain conduct—not the complainant’s actions—felony liability should attach where the defendant is trying to command the complainant to engage in felony-level conduct, regardless of whether the complainant, in fact, engages in such conduct.”*
- The RCC does not incorporate this recommendation because, as discussed above, the revised CDM statute directly incorporates the RCC general provisions for accomplice liability (RCC § 22E-210) and criminal solicitation (RCC § 22E-302), which address whether and to what extent the complainant must engage in conduct.

- (11) *The CCRC recommends revising subsection (C) of the statute to read: “An actor may be convicted of an offense under this section even though the complainant has not been arrested, prosecuted, convicted, or adjudicated delinquent for an offense.” This language encompasses what was previously specified in paragraph (c)(1) (“Has not been prosecuted, subject to delinquency proceedings, convicted, adjudicated delinquent or found in contempt of court.”) and paragraph (c)(3) (“Has been acquitted, found to be not delinquent, or found to not be in contempt of court.”). What was previously paragraph (c)(2) (“Has been convicted or found delinquent of a different offense or degree of an offense”) has been deleted as surplusage. The revised language is consistent with an identical provision in the RCC accomplice liability statute (RCC § 22E-210).*
- This change improves the clarity and the consistency of the revised statutes.

RCC § 7-2502.01A. Possession of an Unregistered Firearm, Destructive Device, or Ammunition.

- (1) *The CCRC recommends renumbering the revised offense § 7-2502.01A, to clarify that the exclusions, defense, penalties, and definitions do not apply to remaining provisions in D.C. Code § 7-2502.01 that are not being revised at this time.*
- This change clarifies and does not substantively change the revised statute.

RCC § 7-2502.15. Possession of a Stun Gun.

(1) *OAG, App. C at 480 – 481, recommends that the penalty clause state, “The penalty for violation of this offense is governed by D.C. Official Code § 16-2320.” OAG states, “[A] person who is under 18 and commits this offense must be prosecuted as a child in the juvenile justice system for that delinquent act.”*

- The RCC does not incorporate this recommendation because it would reduce the clarity and consistency of the revised statutes. In some instances, a person under 18 years old may be charged and prosecuted under this section as an adult. For example, under D.C. Code § 16-2307(e-2)(2), a charge under this section may be joined with a more serious charge that is transferred to adult court. Further, under D.C. Code § 16-2307(h), a child who has previously been convicted as an adult, must be charged as an adult in any subsequent proceeding. Consistent with most District criminal statutes, the RCC does not specify that children must be treated as children, because Title 16 already specifies when that is and is not the case.

RCC § 7-2507.02A. Unlawful Storage of a Firearm.

- (1) *The CCRC recommends renumbering the revised offense § 7-2507.02A, to clarify that the penalties and definitions do not apply to subsection (a) of D.C. Code § 7-2507.02, which is not being revised at this time.*
 - This change clarifies and does not substantively change the revised statute.
- (2) *The CCRC recommends specifying in the statutory language that the minor or unauthorized person must be a person other than the actor.*
 - This change clarifies and does not substantively change the revised statute.
- (3) *The CCRC recommends striking the word “involving” from the penalty enhancement, to make clear that a categorical approach is intended.*⁴⁷⁶
 - This change clarifies and improves the consistency of the revised statutes.

⁴⁷⁶ In *Taylor v. United States*, a case involving a prior-conviction statutory provision, the Court pointed to the *absence* of the word “involved” in adopting a categorical approach. 495 U.S. at 600, 110 S.Ct. 2143. And in *Nijhawan v. Holder*, another case involving a prior-conviction statutory provision, the Court explained that the word “involves” did not support a categorical approach. 557 U.S. at 36, 129 S.Ct. 2294. Here, unlike in *Taylor*, the statute does use the word “involves.” Under *Taylor*'s reasoning, the inclusion of the word “involves” in § 924(c)(3)(B) supports the conclusion that § 924(c)(3)(B) employs a conduct-specific approach rather than a categorical approach.

United States v. Davis, 139 S. Ct. 2319, 2348 (2019).

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

- (1) *The CCRC recommends renumbering the revised offense § 7-2509.06A, to clarify that it does not replace D.C. Code § 7-2509.06, which is not being revised at this time.*
 - This change clarifies and does not substantively change the revised statute.

RCC § 16-705(b). Jury trial; trial by court.

- (1) *OAG, App. C at 521-522, recommends a different format for the revised statute that uses separate subparagraphs and departs from current D.C. Code § 16-705(b). OAG says that a revised organization would be more intuitive and understandable to a lay person and practitioners.*
 - The RCC partially incorporates this recommendation by restructuring the revised statute, including redrafting current subsection D.C. Code § 16-705(a) and renumbering current subsection D.C. Code § 16-705(c). The updated statute departs from the suggested OAG drafting by no longer maintaining as the primary basis for dividing subsections (a) and (b) whether an offense is jury demandable under the Constitution. Under the revised statute, jury rights extend beyond the constitutional minimum in many respects and constitutional requirements are just one of several considerations. This change improves the clarity and organization of the revised commentary.
- (2) *OAG, App. C at 522, recommends that instead of setting the minimum penalty to qualify for a jury trial in terms of a specific maximum imprisonment of maximum fine, the statute refer to RCC penalty classes that are jury demandable. OAG says that this change would avoid giving organizational defendants—who are subject to higher penalties under the RCC—greater access to jury trials.*
 - The RCC does not incorporate OAG’s recommended language because it would render the statute inapplicable to any unrevised statutes or future statutes that do not follow the RCC penalty classifications. As D.C. Code § 16-705 applies to all criminal statutes in the D.C. Code, currently and as recommended by the CCRC, its operation with respect to all statutes must be clear. The RCC includes revisions to hundreds of charges, but there remain hundreds of additional provisions throughout the D.C. Code that carry imprisonment penalties of variable numbers that are not assigned to a penalty class. However, as noted in a provision described further below, the CCRC recommends that three years after enactment of the Revised Criminal Code all crimes carrying an imprisonment penalty be jury demandable. This would remove almost all remaining differences between the jury rights of an organizational defendant and others.
- (3) *OAG, App. C at 523, says in reference to the provision regarding a right to a jury trial when the person subjected to the criminal offense is a law enforcement officer that where there is a question as to the status of the complainant as a law enforcement officer is in question the revised provision “should clearly state how that determination should be made. OAG said that it believed other Advisory Group members should weigh in and that OAG was not making a recommendation at that time. This item was raised an Advisory Group meeting subsequently, with no clear resolution. OAG has not updated its response in the intervening months.*
 - The RCC does not incorporate a change based on this comment because it appears unnecessary. This issue already may arise in cases where a

factual question exists as to whether the court has jurisdiction or under the District's unlawful entry⁴⁷⁷ statute which provides a right to a jury if the location entered is a public building but does not provide such a right if the location is a private building. The court may hold a pretrial hearing and rule on the matter.

- (4) *OAG, App. C at 524 says that it “do[es] not support the Report’s recommendation that specified completed and inchoate offenses that carry incarceration exposure of 90 days or less be made jury demandable.” OAG notes that because attempt penalties in the RCC are half the maximum penalty, a person who is subject to only a 90 day penalty for attempting a 180 day offense would get a jury trial but another person committing another offense with imprisonment of 90 days would not get a jury trial. OAG says that “defendants who are facing the same amount of time incarcerated should have the same rights to a jury trial.”*
- The RCC partially incorporates this recommendation by recommending, in a provision described further below, that three years after enactment of the Revised Criminal Code all crimes carrying an imprisonment penalty be jury demandable. This change would bring the District in line with the majority of the country and satisfy the principle articulated by OAG that “defendants who are facing the same amount of time incarcerated should have the same rights to a jury trial.” In the interim, however, for the reasons stated in the commentary the RCC retains a greater expansion of jury rights for offenses classified below a Class B offense in a variety of circumstances, including for attempts of Class B offenses. This change improves the proportionality and consistency of the revised statutes.
- (5) *OAG, App. C at 524 recommends that, if retained in the RCC, the subparagraph referring to law enforcement officers refer to an officer, as defined, “who is either working a tour of duty or in uniform.” OAG says that the current “provision does not distinguish between when an officer is on duty or off duty or whether the officer is in uniform or not.”*
- The RCC partially incorporates this recommendation by referring in the statute to the updated definition of a “law enforcement officer” that more clearly states covered individuals and when they are within the definition. Under the updated definition, an MPD officer is a “law enforcement officer” all the time, whether on or off-duty, consistent with MPD policy and other law. However, special police officers and campus police are only “law enforcement officers” while on duty. As previously stated in the commentary regarding jury demandability, there are distinct reasons why a person should have a right to a jury of peers when the complaining witness is a law enforcement officer. Also, as noted in a provision described further below, the CCRC recommends that three years after enactment of the Revised Criminal Code all crimes carrying an imprisonment penalty be jury demandable. This change clarifies the revised statutes.

⁴⁷⁷ D.C. Code § 22–3302.

- (6) *OAG, App. C at 524-525 recommends changing the threshold for jury demandability when there are multiple charges to a cumulative term of imprisonment of more than 90 days. OAG says that, “To a defendant who is sentenced to more than 90 days, it does not matter if that sentence was imposed because they were convicted of a single count or of multiple counts and, therefore, their desire for a jury trial would be as great for the later as for the former.”*
- The RCC partially incorporates this recommendation by adjusting the length of cumulative imprisonment to be “more than \$1,000 or a cumulative term of imprisonment of more than 90 days.” However, as noted in a provision described further below, the CCRC recommends that three years after enactment of the Revised Criminal Code all crimes carrying an imprisonment penalty be jury demandable. This change improves the proportionality of the revised statutes.
- (7) *PDS, App. C at 529 recommends that “all offenses that permit a punishment that includes incarceration should be jury demandable.” PDS cites the reasoning of Chief Judge Washington in the case of Bado v. United States, 186 A.3d 1243 (D.C. 2018).*
- The RCC partially incorporates this recommendation by recommending that three years after enactment of the Revised Criminal Code all crimes carrying an imprisonment penalty be jury demandable. This change would bring the District in line with the majority of the country and satisfy the principle articulated by OAG that “defendants who are facing the same amount of time incarcerated should have the same rights to a jury trial.” However, the delay in implementation would provide government institutions and private practitioners to prepare for possible changes in charging and trial caseload. This change improves the clarity, consistency, and proportionality of the revised statutes.
- (8) *PDS, App. C at 529 recommends expanding the RCC jury trial right regarding sex offender registration “to any charge that would subject the defendant to a registration requirement pursuant to either the laws of the District of Columbia or the United States.” PDS says that, “[c]urrently, this would expand this provision to include gun offenses that require a convicted defendant to register as a gun offender.”⁴⁷⁸*
- The RCC partially incorporates this recommendation by recommending, in a provision described above, that three years after enactment of the Revised Criminal Code all crimes carrying an imprisonment penalty be jury demandable. In the interim, however, the CCRC declines to extend jury demandability to all crimes that may subject a person to a registration requirement. As described in the commentary, ex offender registration is a uniquely stigmatizing form of registration that distinguishes this crime from others. This change improves the proportionality of the revised statutes.

⁴⁷⁸ D.C. Code § 7–2508.02.

- (9) *PDS, App. C at 530-531 recommends expanding the RCC jury trial right for persons who (if they were a non-citizen) would be subject to deportation to include charges that could result in denial of naturalization under federal immigration law. PDS says that the consequences of denial of naturalization are “devastating.” PDS proposes specifically adding the phrase “or denial of naturalization under federal immigration law” to the end of the current RCC provision related to deportation.*
- The RCC incorporates the language recommended by PDS. Denial of naturalization is a collateral consequence that, while civil in nature, holds life-altering consequences for the accused and their family. This change improves the proportionality of the revised statutes.
- (10) *PDS, App. C at 531 recommends (similar to an OAG comment) changing the threshold for jury demandability when there are multiple charges to a cumulative term of imprisonment of more than 90 days or more than \$1,000.*
- The RCC incorporates this recommendation by adjusting the length of cumulative imprisonment to be “more than \$1,000 or a cumulative term of imprisonment of more than 90 days” offense, changing both the amount of imprisonment and fine thresholds. This change improves the proportionality of the revised statutes.
- (11) *USAO, App. C at 536 recommends that, with respect to prior subsections (b)(1)(A), (b)(1)(B), and (b)(1)(F), consistent with current District law, offenses be jury demandable only when they are punishable by more than 180 days’ imprisonment, or when a defendant is charged with 2 or more offenses that are punishable by a cumulative term of more than 2 years’ imprisonment. USAO says that while the RCC commentary notes the historical context for earlier decisions about limiting jury rights, “[m]any concerns that relate to judicial efficiency, however, remain in place.”*
- The RCC does not incorporate this recommendation because it would decrease the proportionality of the revised statutes. USAO concerns about additional costs assume that prosecutors will not adjust to the expansion of jury demandability by bringing different (or fewer) charges for the Classes B-E misdemeanors that would be jury demandable under the RCC recommendation, or that court processing abilities are fixed and static. As noted in the commentary, District misdemeanor bench trial rates have remained low, averaging 5% of all misdemeanor dispositions, and there is no reason to think that an expansion of the misdemeanor jury trial right would create a significant shift in these numbers beyond converting some of these bench trials to jury trials. It is unclear what additional administrative costs will arise under the expanded jury rights of the RCC, but these appear to be outweighed by the benefits to the administration of justice in the District by expansion of community voices in juries.
- (12) *USAO App. C at 538 recommends that prior subsection (b)(1)(E) be more limited to align with what it describes as the D.C. Court of Appeals’ majority holding in Bado v. United States, 186 A.3d 1243 (D.C. 2018). USAO says that the court ruling “focused on the harms incurred by someone who is actually facing the possibility of deportation or is deported” and the holding and rationale*

“would only apply to those actually facing the possibility of deportation—not to all defendants, regardless of their citizenship status.” USAO also says that, “Due to the noted complex nature of federal immigration law, however, the question of whether an offense is jury demandable will be the subject of extensive litigation in misdemeanor cases.”

- The RCC does not incorporate this recommendation because it may result in disproportionate penalties. The USAO recommendation does not address the fundamental problem that, per its recommended language, non-citizens would be in the position of having to reveal their immigration status in open court in order to claim a constitutional right, potentially triggering investigation and the very consequences that the *Bado* opinion recognizes as serious enough under a constitutional standard to warrant jury rights. As a sub-constitutional matter, to avoid placing persons who may be subject to deportation proceedings in such a position, the CCRC recommends a more expansive access to a jury trial as the majority of other states provide. The courts are often called upon to construe federal immigration law and application of the RCC standard is within the court’s abilities notwithstanding potential complexities.

(13) *USAO, App. C at 540-541, recommends removal of prior subsection (b)(1)(D), regarding jury demandability for crimes requiring sex offender registration. USAO cites case law stating that sex offender registration is “an administrative requirement and not penal in nature” such that the constitution does not require a jury trial where the maximum penalty exceeds 180 days. USAO also cites its testimony in 2005 to the D.C. Council for the points that the office sometimes “charges a misdemeanor even though the conduct would support a felony charge because we believe that a particular child victim would be unduly traumatized by testifying in front of a jury” and that jury trials take longer and may delay resolution of a sex offense case such that, if children or minors are involved, their ability to testify may be impaired.*

- The RCC does not incorporate this recommendation because it may result in disproportionate penalties. The CCRC recognizes that testifying before a jury may be more difficult for some witnesses than testifying before a judge, and that resolution may take longer should a jury trial occur. However, given the low 5% misdemeanor bench trial rates and the fact that a strong majority of states provide jury trials in all cases involving any amount of imprisonment, the RCC approach would be well within accepted norms. Sex offense cases may, in fact, raise credibility questions and questions about community norms that make having a diverse jury weighing the evidence particularly valuable to a just resolution.

(14) *The CCRC recommends deletion of current D.C. Code language requiring judicial and prosecutorial consent either to a defendant’s waiver of a jury trial, (except that, if the waiver occurs within 10 days of a scheduled trial the court must consent to a waiver of a jury trial), or to invoke a right to a jury trial that is not required by the Constitution. Under current D.C. Code § 16-705(a), the plain language of the statute requires that a jury trial be held for offenses to which a defendant has a right to a jury under the Constitution, unless the*

*defendant requests trial by the court “and the court and the prosecuting officer consent thereto.”*⁴⁷⁹ *This language appears to allow the court or a prosecutor, by withholding their consent to a defendant’s request for a trial by court, to require a defendant to have a jury trial where the Constitution provides a jury trial right. Also, under current D.C. Code § 16-705(b)(2), the plain language of the statute requires that a trial by the court be held for offenses to which a defendant does not have a right to a jury under the Constitution, unless the defendant requests trial by jury “and the court and the prosecuting officer consent thereto.”*⁴⁸⁰ *This language appears to allow the court or a prosecutor, by withholding their consent to a defendant’s request for a jury trial, to require a defendant to have a trial by the court trial where the Constitution does not provide a jury trial right. It is unclear how requiring prosecutorial and court consent to demand a jury under D.C. Code § 16-705(b)(2) may limit jury demandability for offenses in the D.C. Code with a penalty of 6 months which are presumptively “petty,” non-jury demandable offenses under the Constitution.*⁴⁸¹ *There is confusion in at some legislative history as to the Council’s intent in categorizing some offenses as 180 day versus 6 month offenses to demarcate jury-demandability,*⁴⁸² *and there no case law on point.*

⁴⁷⁹ D.C. Code § 16-705(a) (“In a criminal case tried in the Superior Court in which, according to the Constitution of the United States, the defendant is entitled to a jury trial, the trial shall be by jury, unless the defendant in open court expressly waives trial by jury and requests trial by the court, and the court and the prosecuting officer consent thereto. In the case of a trial without a jury, the trial shall be by a single judge, whose verdict shall have the same force and effect as that of a jury.”).

⁴⁸⁰ D.C. Code § 16-705 (“(b) In any case where the defendant is not under the Constitution of the United States entitled to a trial by jury, the trial shall be by a single judge without a jury, except that if –(1)(A) The defendant is charged with an offense which is punishable by a fine or penalty of more than \$1,000 or by imprisonment for more than 180 days (or for more than six months in the case of the offense of contempt of court); or (B) The defendant is charged with 2 or more offenses which are punishable by a cumulative fine or penalty of more than \$4,000 or a cumulative term of imprisonment of more than 2 years; and (2) The defendant demands a trial by jury, the trial shall be by jury, unless the defendant in open court expressly waives trial by jury and requests trial by the court, and the court and the prosecuting officer consent thereto. In the case of a trial by the court, the judge’s verdict shall have the same force and effect as that of a jury.”).

⁴⁸¹ According to the United States Supreme Court, a criminal defendant is entitled to a jury trial under the United States Constitution when charged with a “serious” offense, but not when charged with a “petty” offense. *Duncan v. Louisiana*, 391 U.S. 145, 157-62 (1968). The Supreme Court has identified the maximum authorized penalty as the most relevant objective criteria by which to judge an offense’s severity and has held then no offense may be deemed “petty” if it is punishable by more than six months imprisonment. *Baldwin v. New York*, 399 U.S. 66, 68-69 (1970). Offenses punishable by six months imprisonment or less are presumptively “petty,” but that presumption may be overcome if a defendant shows that additional statutory penalties, viewed in conjunction with the maximum period of incarceration, are so severe that they clearly reflect a legislative determination that the offense is “serious.” *Blanton v. City of North Las Vegas*, 489 U.S. 538, 543 (1989).

As a District offense with a 6 month penalty is presumptively a “petty” offense under *Blanton*, such an offense would appear to fall under D.C. Code § 16-705(b) and by default be subject to a trial by the court unless the defendant requests a trial by jury and the prosecutor consents. It is unclear if more recent legislative decisions setting a 6 month penalty for certain offenses were made with knowledge that prosecutorial discretion could still be exercised to deny jury demands for offenses with a 6 month penalty.

⁴⁸² The Council’s earliest post-*Blanton* legislation changing dozens of penalties to 180 day maximum imprisonment misstated the *Blanton* holding, with the apparent assumption that a 6 month penalty would be

In contrast, the RCC codifies a right to a jury as a personal right and does not allow a court or prosecutor either to require a jury trial when the defendant timely wishes to waive their right to a jury trial, or to require a trial by court when the defendant wishes to exercise their right to a jury trial for an offense that is not required to be jury demandable under the Constitution. Jurisdictions have taken a range of views on this matter, some treating a defendant's waiver of a jury as a personal right as in the RCC, some treating a defendant's waiver of a jury as subject only to court consent, and others treating a defendant's waiver of a jury as subject to both court and prosecutorial consent.⁴⁸³ The revised statute resolves significant ambiguity under the current D.C. Code as to the status of offenses subject to a 6 month penalty by clarifying that all offenses specifically described in the revised statute are jury demandable and shall be by jury unless the defendant waives the right. The revised statute also addresses possible administrative concerns by requiring court consent to waiver of a jury trial within 10 days of a scheduled trial.

- These changes improve the clarity and proportionality of the revised statutes.

(15) *The CCRC recommends reorganizing and revising current D.C. Code § 16-705(a) and § 16-705(b-1) to provide a clearer and more consistent articulation of jury demandability, and renumbering current D.C. Code § 16-705(c). The CCRC takes no position at this time on the substance of current D.C. Code § 16-705(c) but notes that some jurisdictions have smaller juries for minor misdemeanor cases.*

- This change improves the organization and clarity of the revised statutes.

jury demandable under *Blanton* even though the Court holding was that offenses 6 months or less were presumptively petty. See Committee on the Judiciary, *Report on Bill 10-98, the "Omnibus Criminal Justice Reform Amendment Act of 1994,"* (Jan. 26, 1994) at 3 ("Under *Blanton v. City of Las Vegas*, the Supreme Court indicated that it would presume that offenses punishable by less than 6 months imprisonment are "petty offenses" and not subject to 6th amendment guarantees for trial by Jury.").

⁴⁸³ See *Waiver of Jury Trials*, 0030 SURVEYS 24 (Westlaw); *People v. Dist. Court of Colorado's Seventeenth Judicial Dist.*, 843 P.2d 6, 11 (Colo. 1992) (*en banc*). Notably, Maryland specifically provides that, "The State does not have the right to elect a trial by jury." Md. Rule 4-246.

RCC § 16-1005A. Criminal Contempt for Violation of a Civil Protection Order.

- (16) *OAG, App. C at 565, recommends specifying in commentary that, “The reference to temporary civil protection orders includes both orders issued outside of court business hours (termed emergency temporary protection orders) and those issued during regular business hours.”*
- The RCC incorporates this recommendation by adding OAG’s proposed language to the commentary. This change clarifies the revised commentary.
- (17) *OAG, App. C at 565 – 566, recommends striking the phrase “extension of the protection order” in subparagraph (a)(1)(C). OAG explains that a protection order cannot be extended without notice to the respondent and the issuance of a new, appealable order.*
- The RCC incorporates this recommendation by striking the language as proposed by OAG. This change may reduce a gap in liability.
- (18) *OAG, App. C at 566, recommends revising the commentary concerning D.C. Code § 16-1005(g-1) (regarding violations of protection orders by children) to state, “This change clarifies the revised statutes and does not change District law.” (Emphasis added.)*
- The RCC incorporates this recommendation by adding OAG’s proposed language to the commentary. This change clarifies the revised commentary.
- (19) *OAG, App. C at 566 – 567, recommends specifying in the statutory text that civil protection orders include consent orders, as noted in footnote 2 in the commentary. Alternatively, if this recommendation is not incorporated, OAG recommends that the commentary specifically address this issue and affirmatively state that no change in District law is intended.*
- The RCC partially incorporates this recommendation by amending the commentary to address this issue and affirmatively state that no change in District law is intended. This change clarifies the revised statute.

RCC § 23-586. Failure to Appear after Release on Citation or Bench Warrant Bond.

- (1) *OAG, App. C at 564 – 565, recommends specifying that the defense for persons excused from appearing by a prosecutor be limited in several ways. OAG says, “paragraph (c) be redrafted so that the defense would apply, as to a prosecutor, only when the prosecutor confers with defense counsel (or defendant if he or she is not represented by counsel) before the hearing date and notifies defense counsel (or defendant) that no charges will be filed (i.e. the case will be “no papered”) and excuses the defendant from appearing in court. Similarly, OAG recommends that the defense should be limited, as to a releasing official, to the situation noted in footnote 10. [Footnote 10 states, “Consider, for example, an officer who issues a citation and decides to withdraw it (e.g., to correct an erroneous date or to dismiss the accusation based on newly discovered evidence). The officer retrieves the citation from the accused and tells her that she is excused from appearing on the date specified.”]. In other situations, a releasing official, like a prosecutor, should not be able to excuse a defendant from attending a status, trial, sentencing, or other hearing.” OAG does not provide draft language for these changes.*
- The RCC does not incorporate this recommendation because it is unnecessary and may reduce the clarity of the revised statute. The revised statute applies only to failure to appear at a first court appearance. Status hearings, trials, and sentencings are addressed in RCC § 22E-1327, Failure to Appear in Violation of a Court Order. That statute does not include a defense for persons excused by a prosecutor or releasing official.
- (2) *USAO, App. C at 592 – 593, recommends increasing the maximum authorized penalty for this offense. USAO states, “Under current law, the corollary to 1st degree is a felony punishable by a maximum of 5 years’ incarceration, and the corollary to 2nd degree is a misdemeanor punishable by not more than the maximum provided for the offense for which such citation was issued.” USAO states, “[T]he maximum penalty needs to be sufficiently high to incentivize the defendant’s appearance.” USAO states, “[I]t becomes more difficult for the government to proceed after a defendant has failed to appear. This is particularly true when the defendant has failed to appear for a lengthy time, which may impede the government’s ability to locate essential witnesses, and may lead to witnesses’ memories fading.” USAO does not specify a penalty recommendation.*
- The RCC does not incorporate this recommendation because it may authorize penalties that are disproportionate. For example, USAO’s proposal would punish failing to appear in court after being released by a law enforcement officer as severely or more severely than escaping from a law enforcement officer.⁴⁸⁴ An escape warrants a higher punishment because it may create a physical danger when an officer gives chase.

⁴⁸⁴ Second degree escape from an institution or officer under RCC § 22E-3401 is a Class A misdemeanor.

- The CCRC notes that notwithstanding the 5-year statutorily authorized penalty for failure to appear, actual practice in the District has been somewhat different. Court data for 2010-2019 shows that the 97.5% quantile of sentences for all charges under D.C. Code § 23–585 was 6 months.⁴⁸⁵ The CCRC recommendation here is generally consistent with current practice.
 - The CCRC also notes that USAO does not assert that the current penalty in the D.C. Code adequately deter failing to appear.⁴⁸⁶
- (3) *PDS, App. C at 586, recommends revising the second element of the offense to require the person “(2) Knowingly failed to make reasonable efforts to appear or remain for the hearing; and (3) In fact, the person did not appear or remain for the hearing.” PDS explains that, based on current District case law,⁴⁸⁷ where a defendant desires but fails to appear, the question for the factfinder should not be whether the failure was voluntary (as defined in RCC § 22E-203) but whether the person’s efforts to appear were reasonable.*
- The RCC partially incorporates this recommendation by adopting language similar to PDS’ proposed language. The second and third elements of the offense state, “(2) Knowingly fails to make reasonable efforts to appear or remain for the hearing; and (3) In fact, fails to appear or remain for the hearing.” This change clarifies the revised statute.

⁴⁸⁵ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

⁴⁸⁶ See U.S. Department of Justice, National Institute of Justice, *Five Things About Deterrence*, NCJ 247350 (May 2016) at 1 (“1. The *certainty* of being caught is a vastly more powerful deterrent than the punishment... 2. Sending an individual convicted of a crime to prison isn’t a very effective way to deter crime... 3. Police deter crime by increasing the perception that criminals will be caught and punished... 4. Increasing the severity of punishment does little to deter crime... 5. There is no proof that the death penalty deters criminals.”).

⁴⁸⁷ *Foster v. United States*, 699 A.2d 1113 (D.C. 1997).

RCC § 23-1327. Failure to Appear in Violation of a Court Order.

- (1) *USAO, App. C at 548, opposes eliminating the statutory minimum for this offense.*
- The RCC does not incorporate this recommendation because it may result in disproportionate penalties. For more information on the subject, see Advisory Group Memorandum #32, Supplemental Materials to the First Draft of Report #52.
- (2) *USAO, App. C at 592 – 593, recommends increasing the maximum authorized penalty for this offense. USAO states, “Under current law, the corollary to 1st degree is a felony punishable by a maximum of 5 years’ incarceration, and the corollary to 2nd degree is a misdemeanor punishable by a maximum of 180 days’ incarceration.” USAO states, “[T]he maximum penalty needs to be sufficiently high to incentivize the defendant’s appearance.” USAO states, “[I]t becomes more difficult for the government to proceed after a defendant has failed to appear. This is particularly true when the defendant has failed to appear for a lengthy time, which may impede the government’s ability to locate essential witnesses, and may lead to witnesses’ memories fading.” USAO does not specify a penalty recommendation.*
- The RCC does not incorporate this recommendation because it may authorize penalties that are disproportionate. Specifically, USAO’s proposal would punish failing to appear in court more severely than escaping from a law enforcement officer.⁴⁸⁸ An escape warrants an equal or higher punishment because it may create a physical danger when an officer gives chase.
 - The CCRC notes that notwithstanding the 5-year statutorily authorized penalty for failure to appear under D.C. Code § 23–1327, actual practice in the District has been somewhat different. Court data for 2010-2019 shows that the 97.5% quantile of sentences for all charges under D.C. Code § 23–1327(a)(1) felony charges was 20 months, and the 75% quantile was 12 months.⁴⁸⁹ The CCRC recommendation here is generally consistent with most convictions in current practice.
 - The CCRC also notes that USAO does not assert that the current penalty in the D.C. Code adequately deter failing to appear.⁴⁹⁰
- (3) *PDS, App. C at 584 – 586, recommends revising the second element of the offense to require the person “(2) Knowingly failed to make reasonable efforts to appear or remain for the hearing; and (3) In fact, the person did not appear or remain for the hearing.” PDS explains that, based on current District case law,⁴⁹¹ where*

⁴⁸⁸ Second degree escape from an institution or officer under RCC § 22E-3401 is a Class A misdemeanor.

⁴⁸⁹ CCRC Advisory Group Memo #38 - Statistics on District Adult Criminal Charges and Convictions.

⁴⁹⁰ See U.S. Department of Justice, National Institute of Justice, *Five Things About Deterrence*, NCJ 247350 (May 2016) at 1 (“1. The *certainty* of being caught is a vastly more powerful deterrent than the punishment... 2. Sending an individual convicted of a crime to prison isn’t a very effective way to deter crime... 3. Police deter crime by increasing the perception that criminals will be caught and punished... 4. Increasing the severity of punishment does little to deter crime... 5. There is no proof that the death penalty deters criminals.”).

⁴⁹¹ *Foster v. United States*, 699 A.2d 1113 (D.C. 1997).

- a defendant desires but fails to appear, the question for the factfinder should not be whether the failure was voluntary (as defined in RCC § 22E-203) but whether the person's efforts to appear were reasonable.*
- The RCC partially incorporates this recommendation by adopting language similar to PDS' proposed language. The second and third elements of the offense state, "(2) Knowingly fails to make reasonable efforts to appear or remain for the hearing; and (3) In fact, fails to appear or remain for the hearing." This change clarifies the revised statute.
- (4) *PDS, App. C at 586, recommends eliminating the mandatory consecutive sentencing provision. PDS states, consistent with CCRC's reasoning for eliminating all mandatory minima, "Sentencing guidelines, rather than statutory mandates are a more appropriate way to guide judicial decision making."*
- The RCC incorporates this recommendation by striking the mandatory consecutive sentencing provision. Judicial discretion may still be exercised to impose consecutive sentencing. This change improves the consistency and proportionality of the revised statutes.
- (5) *CCRC recommends revising the commentary to note the DCCA's recent opinion in Laniyan v. United States,⁴⁹² which was issued shortly before the first draft of this section issued. The decision does not change the meaning of the revised statute and the reference is only clarificatory.*
- This change clarifies the revised commentary.

⁴⁹² *Laniyan v. United States*, 226 A.3d 1146 (D.C. 2020).

RCC § 23-1329A. Criminal Contempt for Violation of a Release Condition.

- (1) *USAO, App. C at 590, recommends revising a footnote in the commentary that says, “no statutory or other authority exists under District law for a judicial officer to order a defendant held at D.C. Jail and order that the defendant have no contact with a witness [in the same case].” USAO says this statement inaccurate and that “[a] judge may issue an order other than one listed in D.C. Code § 23-1321.” USAO cites no authority for this assertion.*
- The RCC does not incorporate this recommendation at this time because the CCRC is not aware of any authority under current District law for the government to request or a criminal court to order conditions for a person who is not released. There is statutory authority to preventatively detain a person⁴⁹³ and there is statutory authority to release a person on conditions,⁴⁹⁴ however, there is no statutory authority to do both. Although it may occur routinely in practice, imposition of such an order appears to be illegal.⁴⁹⁵
- (2) *PDS, App. C at 586 – 587, recommends striking the requirement that contempt proceedings be “expedited.” PDS states, “[T]his offense is not inherently more urgent than any other criminal offense and should not dictate how judicial resources are expended.”*
- The RCC incorporates this recommendation by striking the requirement that a contempt proceeding be expedited. This change clarifies the revised statute.
- (3) *PDS, App. C at 587, recommends redrafting the hearing provision to state, “A proceeding determining a violation of this section shall be heard by the court without a jury.” PDS states that a bench trial has the same effect but is not the same as a jury trial.*
- The RCC does not incorporate this recommendation because it would be inconsistent with language in D.C. Code § 16-705(a), which is not being revised at this time, and RCC § 16-705(b). The RCC tracks this language to avoid confusion about the consistency between these provisions.

⁴⁹³ See, e.g., D.C. Code §§ 23-1322(a); 23-1325(a).

⁴⁹⁴ D.C. Code § 23-1321(c)(1).

⁴⁹⁵ The power that judges in the Superior Court of the District of Columbia have to issue orders derives from statutes that were passed by the D.C. Council and later became law. See *In re T.K.*, 708 A.2d 1012 (D.C. 1998); see also *Salvattera v. Ramirez*, 105 A.3d 1003 (D.C. 2014).

RCC § 24-241.05A. Violation of Work Release.

(1) *PDS, App. C at 586, recommends eliminating the mandatory consecutive sentencing provision. PDS states, consistent with CCRC's reasoning for eliminating all mandatory minima, "Sentencing guidelines, rather than statutory mandates are a more appropriate way to guide judicial decision making."*

- The RCC incorporates this recommendation by striking the mandatory consecutive sentencing provision. Judicial discretion may still be exercised to impose consecutive sentencing. This change improves the consistency and proportionality of the revised statutes.

D.C. Code § 24-403.03. Modification of an imposed term of imprisonment.

- (1) *OAG, App. C at 568, states: “While OAG is favorably inclined to extending eligibility for second look procedures to older defendants or eliminating the age requirement altogether in D.C. Code § 24-403.03, we are still researching the status of second look legislation around the country, including the qualifying age of the defendant at the time of the offense, the criteria for judicial review, and the resentencing options available to the judge. OAG will communicate our position as soon as this research is completed.” OAG has not provided an update on this since submitting its comment on June 19, 2020.*
- (2) *PDS, App. C at 587-588, recommends changing the revised statute’s provision regarding teleconferencing. PDS says that some BOP facilities do not have the capacity for video conferencing or may raise objections to video conferencing because it may occur on non-secure lines. PDS says: “Remote participation should include participation by phone” and “non-physical appearance should only occur with the defendant’s consent.” PDS provides specific language recommendations*
 - The RCC does not incorporate the PDS recommendation at this time pending further investigation whether the Omnibus Public Safety and Justice Amendment Act of 2020 (Bill 23-0127) under Council review considered this recommendation. The CCRC welcomes further information from Advisory Group members as to this matter.
- (3) *PDS, App. C at 588, says that: “With respect to modifications to D.C. Code § 24-403.03, PDS also recommends modifying the requirement at (b)(3)(B) that a ‘defendant brought back to the District for any hearing conducted under this section shall be held in the Correctional Treatment Facility’” Rather than mandating detention and a particular placement, PDS recommends the following language: ‘A defendant brought back to the District under this section, if detained, shall be placed in a manner that maximizes programming and educational supports.’”*
 - The RCC does not incorporate the PDS recommendation because the cited language appears to be part of the original committee bill, B23-0127, introduced as the Second Look Amendment Act of 2019 on February 6, 2019. However, as of writing, neither current D.C. Code § 24-403.03 nor the pending Omnibus Public Safety and Justice Amendment Act of 2020 (Bill 23-0127) contain the described language regarding CTF.
- (4) *USAO, App. C at 590-591, recommends against the RCC provision, stating: “Victims are not a monolith voice, and may have vastly differing views on what they want to see happen in a case in which they or a family member were victimized. Many victims, however, are opposed to a defendant’s early release, or may require support services beyond those currently available that would enable them to navigate this second look process and/or a defendant’s early release.” USAO also says it is “concerned about whether USAO and Superior Court will have sufficient resources available to thoroughly address and litigate these important motions” and is “concerned about limited support systems available to defendants who are released early and who transition back to the community following release that would enable them to succeed.” Finally, USAO also says it*

“has concerns regarding the statutory factors that a court must consider, including the fact that the “nature of the offense” is not an expressly enumerated factor for a court to consider.” USAO also said that, “Given that the CCRC, however, notes that its recommendation is based on current law (Commentary at 2 n.1), USAO will address these factors more fully at the appropriate time.” USAO has not provided an update on this since submitting its comment on June 19, 2020.

- The RCC does not incorporate this recommendation because it may result in disproportionate penalties. As described in the RCC commentary, the District is an outlier in not having parole eligibility and requiring at least 85% of a sentence be served (under BOP policy). This sentencing policy bars review whether an offender’s success in rehabilitation or other changed circumstances merits a reduction in sentence. The RCC recommendation to expand second look procedures would provide a mechanism for such review after a minimum of 15 years incarceration. The resource concerns of USAO are significant but must be balanced against the resource costs of lengthy incarceration terms and the more weighty justice concerns at stake in the proposal.
- (5) *The CCRC sole recommendation remains that the age restriction in D.C. Code § 24-403.03 as to time of the offense be removed. While legislation changing the age at the time of the offense to before the 25th birthday and otherwise changing the drafting of the statute is pending, the CCRC makes no change to the language in the draft RCC statutory text or commentary pending finalization of that legislation, the Omnibus Public Safety and Justice Amendment Act of 2020 (Bill 23-0127).*

RCC § 48-904.01a. Possession of a Controlled Substance.

- (1) *OAG, App. C at 481, states that subsection (g) does not “permit a prosecutor from retaining a copy of the record as a check on the court.” OAG recommends that subsection (g) be redrafted to include the words “Discharge and dismissal under this subsection shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained. The sealing of the nonpublic record shall be in accordance to, and subject to the limitations, of D.C. Code § 16-803 (l).”*
- The RCC does not adopt this recommendation at this time. The D.C. Council is currently considering new legislation that would potentially include broader changes to record sealing laws in the District. The CCRC may re-visit this issue to determine if further changes are warranted in light of changes to District law governing record sealing.
 - However, the RCC will delete omit the words “but a nonpublic record thereof shall be retained solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, such person qualifies under this subsection.” These words are unnecessary, as subsection (g) has been amended to allow for dismissals regardless of whether a person has previously had a possession of a controlled substance case dismissed. This change clarifies the revised statutes.
- (2) *USAO, App. C at 589-590, states that it agrees with OAG’s recommendation that USAO should be authorized to retain a non-public record of cases dismissed under section (g) of RCC § 48-904.01a. USAO notes that requiring USAO to expunge records may violate the Home Rule Act.*
- The RCC does not incorporate this change for the reasons discussed above in response to an identical recommendation from OAG. With respect to the Home Rule Act, there is no D.C. Court of Appeals case law as to whether mandating USAO expungement of records violates the Home Rule Act. D.C. Code § 16-803 specifically authorizes “the prosecutor’s office” to retain any and all records relating to the . . . arrest and conviction in a nonpublic file[.]” However, if omitting reference to D.C. Code § 16-803 violates the Home Rule Act, then the current statute already appears to violate the Home Rule Act. The current possession of a controlled substance statute does not reference D.C. Code not reference § 16-803, or otherwise specifically authorize USAO to maintain non-public records.⁴⁹⁶ The CCRC is not aware of any litigation about a Home Rule Act issue with this provision, but welcomes Advisory Group updates about any such litigation.
- (3) *OAG, App. C at 482, recommends that paragraph (g)(2) be re-drafted to replace the word “him” with “him or her.”*

⁴⁹⁶ The current statute states that “a nonpublic record thereof shall be retained solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, such person qualifies under this subsection[.]” D.C. Code § 48-904.01 (e) (emphasis added). This subsection does not specifically authorize the USAO to retain a non-public record.

- The RCC partially adopts this recommendation by changing the word “him” with the gender neutral word “the person.” This change improves the clarity of the revised statute.
- (4) *OAG, App. C at 482, recommends that paragraph (g)(2) be re-drafted to replace the phrase “any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of failure to recite or acknowledge such arrest, or indictment, or trial in response to any inquiry made of him or her for any purpose” with the phrase “Except as otherwise provided by federal law, any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of failure to recite or acknowledge such arrest, or indictment, or trial in response to any inquiry made of him or her for any purpose.” OAG notes that this change clarifies that this rule cannot apply with respect to statements to federal law enforcement officials, including the USAO.*
- The RCC does not adopt this recommendation at this time because it would change current District law in a way that would undermine the effect of prior District record sealing legislation. The D.C. Council is currently considering new legislation that would potentially include broader changes to record sealing laws in the District. The CCRC may re-visit this issue to determine if further changes are warranted in light of changes to District law governing record sealing. Exempting the USAO would undermine the purpose of this clause, and would require persons to disclose their prior arrests, indictments, or trials even when those cases resulted in dismissal.
- (5) *PDS, App. C at 491, recommends that the RCC include a general provision that allows for judicial dismissal of proceedings for all offenses up to a certain class, similar to the dismissal proceeding under subsection (g) of RCC § 48-904.01a.*
- The RCC does not incorporate this recommendation at this time. However, the CCRC may re-visit the issue at a later time and consider whether other offenses should be subject to judicial dismissals if certain conditions are met.
- (6) *The CCRC recommends amending subsection (g) to specify that discharge or dismissal under subsection (g) “shall not be deemed a conviction for purposes . . . under RCC § 22E-606[.]” This change is intended to clarify that dismissals under subsection (g) do not authorize repeat offender penalty enhancements under RCC § 22E-606.*
- This change improves the clarity and proportionality of the revised criminal code.
- (7) *The CCRC recommends deleting paragraph (g)(3), which specifies that a person who is discharged under this subsection is “entitled to a copy of the nonpublic record retained under paragraph (1) of this subsection[.]” Since non-public records will no longer be kept, this paragraph is unnecessary.*
- This change improves the clarity and consistency of the revised criminal code.
- (7) *The CCRC notes that a technical amendment may be required to the definition of “controlled substance” as defined under D.C. Code § 48-901.02. The term “controlled substance” is subject to several limitations relating to marijuana as*

set forth in D.C. Code § 48-904.01.⁴⁹⁷ The term “controlled substance” as used in the RCC is intended to have the same meaning as under the current D.C. Code, including the limitations set forth in § 48-904.01. The CCRC recommends that the definition of “controlled substance” in § 48-901.02 be amended to include the limitations relating to marijuana that are currently included in § 48-904.01.

- This change improves the clarity of the revised criminal code and the D.C. Code.

⁴⁹⁷ D.C. Code § 48-904.01 states that the terms “controlled substance” and “controlled substances,” shall not include:

“(i) Marijuana that is or was in the personal possession of a person 21 years of age or older at any specific time if the total amount of marijuana that is or was in the possession of that person at that time weighs or weighed 2 ounces or less;

(ii) Cannabis plants that are or were grown, possessed, harvested, or processed by a person 21 years of age or older within the interior of a house or rental unit that constitutes or at the time constituted, such person’s principal residence, if such person at that time was growing no more than 6 cannabis plants with 3 or fewer being mature flowering plants and if all persons residing within that single house or single rental unit at that time did not possess, grow, harvest, or process, in the aggregate, more than 12 cannabis plants, with 6 or fewer being mature, flowering plants; or

(iii) The marijuana produced by the plants which were grown, possessed, harvested, or processed by a person who was, pursuant to sub-subparagraph (ii) of this subparagraph, permitted to grow, possess, harvest, and process such plants, if such marijuana is or was in the personal possession of that person who is growing or grew such plants, within the house or rental unit in which the plants are or were grown.”

RCC § 48-904.01b. Trafficking of a Controlled Substance.

- (1) *USAO, App. C at 518-19, recommends that the CCRC consult with the Department of Forensic Sciences (DFS) regarding subsection (g), to determine whether DFS is able to determine the concentration of a controlled substance included within an edible product.*
- The CCRC contacted DFS to inquire as to the feasibility of performing purity analysis with respect to edible products. DFS provided a written response, in which it stated that while its staff is capable of performing qualitative analysis to determine the presence of controlled substance in edibles, it does not currently have quantitative testing methods in place to measure the amount of controlled substances included in edibles.⁴⁹⁸ DFS stated that while it was interested in expanding its testing capabilities, it would not be able to perform this analysis until it had established new testing methods which may not be possible under its currently available budget. Finally, DFS stated its belief that some nearby laboratories may have protocols that would allow them to conduct quantitative analysis [on contract], but DFS does not have specific information on their capacities or accreditation for such testing.
- (2) *The CCRC recommends deleting paragraph (i)(3), which specified the burden of production and proof for the defenses defined under subsection (i). This paragraph is unnecessary as subsection (k) specifies that the general provisions in Chapters 1 through 6 shall apply to this offense, including RCC § 22E-201 which specifies burdens for all defenses.*
- This change improves the clarity and consistency of the revised criminal code and the D.C. Code.

⁴⁹⁸ In its response, DFS specifically noted that it does not have testing methods in place to test for the quantity of “THC, THC-A, CBD, and CBD-A, which are the typically regulated compounds for edible products.” DFS’s response did not state whether it has testing methods to test for quantity of other controlled substances contained in edibles.

RCC § 48-904.01c. Trafficking of a Counterfeit Substance.

- (1) *PDS, App. C at 491, recommends that the trafficking in counterfeit substance offense also include a provision similar to subsection (g) under the trafficking of a controlled substance, which states that the weight of mixtures and compounds does not include edible products or non-consumable containers.*
- The RCC adopts this recommendation. This language is identical to an analogous subsection in RCC § 48-904.01b. This change improves the consistency and proportionality of the revised statute.

RCC § 48-904.10. Possession of Drug Manufacturing Paraphernalia.

- (1) *OAG, App. C at 483 notes that subsection (b) is missing the word “not.”*
- The RCC adopts this recommendation and adds the word “not” to subsection (b). This change improves the clarity of the revised statute.

RCC § 48-904.11. Trafficking of Drug Paraphernalia.

- (1) *The CCRC recommends re-labeling the exclusion to liability under subsection (b) as a defense. This change does not substantively change the revised offense. Under RCC § 22E-201, under both exclusions and defenses, if there is any evidence at trial then the government bears the burden of disproving all elements of the exclusion or defense beyond a reasonable doubt.*
- This change improves the clarity of the revised statutes.

RCC § 22E-602. Authorized Dispositions.

PDS, App. C at 584, reiterates its previous recommendation, App. C at 491 that the CCRC create a general provision that allows for the judicial dismissal of proceedings for all offenses up to a certain class, similar to the deferred disposition subsection in RCC § 22E-4401(c), 4402 (b), and 48-904.01a (g).

- The RCC now incorporates this recommendation. RCC § 22E-602 is amended to include a new subsection (c) that allows a judge to defer proceedings when a defendant is convicted of any Class C, D, or E offense. Under this subsection, if a defendant is convicted of a Class C, D, or E offense, the judge may defer further proceedings without entering a judgment of guilty, and place the defendant on probation subject to reasonable conditions. If the defendant does not violate the terms of probation, the judge shall dismiss the proceedings against the defendant without entering a judgment of guilty.
- Under current District law and prior versions of the RCC, deferred disposition was only available for possession of a controlled substance (a Class C or Class D offense under the RCC), and prostitution and patronizing prostitution (both Class D offenses under the RCC). This change makes deferred disposition available to all other Class C, D, and E offenses.
- In addition, the CCRC recommends that the deferred disposition provisions be deleted from RCC §§ 22E-4401, 22E-4402, and 48-904.01a. When a defendant is found guilty under either of those statutes, a judge may still defer disposition under RCC § 22E-602.
- This change improves the proportionality and consistency of the revised criminal code.

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

- (1) *PDS, App. C at 531 recommends lowering the statutory maximum for Classes 1, 2, and 3 to 30 years, 28 years, and 26 years, respectively. PDS says that the draft RCC penalty recommendations for these classes “will perpetuate the mass incarceration has caused the United States to have the highest incarceration rate in the world” and “will further an incredible racial disparity in incarceration.” PDS, citing to the epilogue in the Pulitzer prize book “Locking Up Our Own,”¹ says that, “[w]hile reducing sentences for non-violent offenses is an important step in ending the cruelty of mass incarceration, it cannot be undone without reducing sentences for violent offenses.” PDS argues and cites research that most incarcerated people are parents, that individuals “age out” of crime, that the “the overwhelming majority of criminal justice system relies too heavily on incarceration and strongly prefer investments in prevention and treatment to more spending on prisons and jail,”² and that there is no evidence of a meaningful additional deterrent effect between a 60 year and 30 year sentence.*
 - The RCC partially incorporates this recommendation by revising maximum imprisonment penalties for classes 1, 2, and 3 to 45 years, 40 years, and 30 years respectively. The RCC § 22E-603 commentary further explains the rationale for this change. This change improves the proportionality of the revised statutes.
- (2) *USAO, App. C at 552, recommends increasing the penalties for Creating or Trafficking an Obscene Image of a Minor, and for Possession of an Obscene Image of a Minor to “align more closely with federal law.” USAO cites federal statutes providing a mandatory minimum of 15 years and a maximum of 30 years for producing child pornography, and possession of child pornography offenses with maxima of 10 or 20 years depending on the age of the child. USAO does not provide a rationale (deterrence, severity of the offense, etc.) for its recommendation or provide other explanation.*
 - The RCC does not incorporate this recommendation because doing so would result in disproportionate penalties. Federal penalties for child pornography have received sharp criticism from sentencing experts and many federal judges,³ and the CCRC does not seek to change District law to follow federal precedent on this matter.
 - The CCRC notes that court data for 2010-2019 shows that the 97.5% quantile of sentences for all charges under D.C. Code § 22– 3102(b) (Sexual Performance Using Minors (Attend, Transmit, or Possess)) was

¹ James Forman Jr., *Locking Up Our Own: Crime and Punishment in Black America* (2018).

² Alliance for Safety and Justice, *Report: Crime Survivors Speak: The First-Ever National Survey of Victims’ Views on Safety and Justice* (2016). Available at: <https://allianceforsafetyandjustice.org/wp-content/uploads/2019/04/Crime-Survivors-Speak-Report-1.pdf>.

³ See, e.g., Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?*, 22 Stan. L. & Pol’y Rev. 545 (2011).

17.7 months.⁴ The CCRC recommendation here is consistent with current District practice.

(3) *USAO, App. C at 541-542, recommends increasing the maximum possible penalty for a Class 7 felony from 8 years to 10 years. Specific to the RCC robbery statute, USAO states that third degree robbery is “comparable to” armed robbery under current D.C. Code §§ 22-2801, -4502, which has a maximum possible penalty of 30 years incarceration where bodily injury results from a dangerous weapon or to a protected person; and armed carjacking under current D.C. Code § 22-22-2803, which has a maximum possible penalty of 30 years unless other conditions are met that would increase the maximum. USAO states that it “does not believe that the maximum penal[t]y” should be lowered from 10 years’ incarceration to 8 years’ incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*

- The RCC does not incorporate this recommendation because doing so may result in disproportionate penalties. Since the USAO comment was made, robbery with significant bodily injury or involving seizure of a motor vehicle has been re-graded to be second degree robbery, and classified as a Class 8 offense unless the complainant is a protected person (then it is a Class 7 offense), or a dangerous weapon is used or displayed (then it is a Class 6 offense).
- The CCRC penalty recommendations for all revised offenses have been issued in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;⁵ 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;⁶ 5) relative ordering of related RCC offenses;⁷ and 6) national data on sentencing and time served.⁸ Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the extremely high 45 year statutorily authorized penalties for armed robbery armed under current D.C. Code §§ 22-2801 and 22-4502,⁹ and 30+ year statutorily authorized penalties for armed carjacking under D.C. Code § 22-2803, actual practice in the District has been sharply different. Court data for 2015-2019 shows that the 97.5% quantile of all sentences for all forms of robbery, including robberies committed while armed and inflicting *serious* bodily injury

⁴ CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions.

⁵ CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions.

⁶ CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

⁷ CCRC Fourth Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.

⁸ See Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

⁹ Note that D.C. Code 22-4502 provides up to an *additional* 30 years and a mandatory minimum of 5 years for commission of robbery while armed—on the first offense.

(which is classified higher under the RCC as first degree or enhanced first degree robbery) was 96 months (8 years).¹⁰ The 97.5% quantile of unenhanced (not while-armed or a protected person) robbery sentences during this period was 72 months (6 years) and included robberies involving a serious bodily injury (again, the equivalent in the RCC of first degree robbery).¹¹ As for carjacking, it appears virtually all sentences (at least 97.5%) are at the District's current mandatory minimum of 15 years. The CCRC recommendation here is comparable to robbery penalties and significantly lower than current carjacking penalties in current court practice.

(4) *USAO, App. C at 541-542, recommends increasing the maximum possible penalty for a Class 7 felony from 8 years to 10 years. In relevant part, USAO states that the RCC involuntary manslaughter is "comparable to" manslaughter under current D.C. Code § 22-2105, which has a maximum possible penalty of 30 years incarceration. USAO states that it "does not believe that the maximum penalt[y]" should be lowered from 10 years' incarceration to 8 years' incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*

- The RCC does not incorporate this recommendation because doing so may result in disproportionate penalties. While the only comparable statute in the D.C. Code is current D.C. Code § 22-2105, manslaughter, District case law has long recognized a distinction within this offense between voluntary and involuntary manslaughter. Involuntary manslaughter is the less serious of the two forms.
- The CCRC penalty recommendations for all revised offenses have been issued in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;¹² 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;¹³ 5) relative ordering of related RCC offenses;¹⁴ and 6) national data on sentencing and time served.¹⁵ Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the extremely high 30 year statutorily authorized penalties for involuntary manslaughter under current D.C. Code § 22-2105, actual practice in the District has been sharply

¹⁰ CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions.

¹¹ CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions.

¹² CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions.

¹³ CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

¹⁴ CCRC Fourth Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.

¹⁵ See Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

different. Court data for the 2015-2019 term shows the 97.5 quantile of all sentences for involuntary manslaughter was 86.6 months (7.2 years). The CCRC recommendation here is generally consistent with involuntary manslaughter penalties in current court practice.

(5) *USAO, App. C at 542-543, recommends increasing the maximum possible penalty for a Class 6 felony from 12 years¹⁶ to 15 years. In relevant part, USAO states that the RCC enhanced involuntary manslaughter is “comparable to” manslaughter under current D.C. Code § 22-2105, which has a maximum possible penalty of 30 years incarceration. USAO states that it “does not believe that the maximum penalt[y]” should be lowered from 15 years’ incarceration to 12 years’ incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*

- The RCC does not incorporate this recommendation because doing so may result in disproportionate penalties. While the only comparable statute in the D.C. Code is current D.C. Code § 22-2105, manslaughter, District case law has long recognized a distinction within this offense between voluntary and involuntary manslaughter. Involuntary manslaughter is the less serious of the two forms, and under the RCC an enhancement applies primarily when the complainant is a protected person.
- The CCRC penalty recommendations for all revised offenses have been issued in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;¹⁷ 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;¹⁸ 5) relative ordering of related RCC offenses;¹⁹ and 6) national data on sentencing and time served.²⁰ Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the extremely high 30 year statutorily authorized penalties for involuntary manslaughter under current D.C. Code § 22-2105, actual practice in the District has been sharply different. Court data for the 2015-2019 term shows the 97.5 quantile of all sentences for involuntary manslaughter was 86.6 months (7.2 years). The CCRC recommendation here encompasses involuntary manslaughter penalties in current court practice.

¹⁶ The USAO comment actually refers to the RCC recommendation as being “10 year,” however that appears to be a typo. At the time the comment was made (and currently), the RCC recommends Class 6 felonies be subject to a 12 year maximum imprisonment penalty.

¹⁷ CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions.

¹⁸ CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

¹⁹ CCRC Fourth Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.

²⁰ See Danielle Kaebler, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

(6) *USAO, App. C at 543, recommends increasing the maximum possible penalty for a Class 5 felony from 18 years to 20 years. In relevant part, USAO states that the RCC kidnapping is “comparable to” kidnapping under current D.C. Code § 22-2001, which has a maximum possible penalty of 30 years incarceration. USAO states that it “does not believe that the maximum penalt[y]” should be lowered from 20 years’ incarceration to 18 years’ incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*

- The RCC does not incorporate this recommendation because doing so may result in disproportionate penalties. Notably, since the USAO provided its comment the CCRC has recommended a different organization for the offense such that the prior comment referring to “kidnapping” appears to apply to conduct that is now split between both first and second degree kidnapping under RCC § 22E-1401(a) and (b). The RCC now recommends classifying first degree kidnapping as a class 5 offense (18 years max) and a class 7 offense (8 years max).
- The CCRC penalty recommendations for all revised offenses have been issued in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;²¹ 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;²² 5) relative ordering of related RCC offenses;²³ and 6) national data on sentencing and time served.²⁴ Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the extremely high 30 year statutorily authorized penalties for kidnapping under current D.C. Code § 22-2001, actual practice in the District has been sharply different. Court data for the 2015-2019 term shows the 97.5 quantile of all sentences for all kidnapping offenses (including while-armed and protected person complainants which are subject to higher penalties in the RCC) was 204 months (17 years). The CCRC recommendation here is generally consistent with penalties in current court practice.

(7) *USAO, App. C at 543, recommends increasing the maximum possible penalty for a Class 5 felony from 18 years to 20 years. In relevant part, USAO states that the RCC voluntary manslaughter is “comparable to” manslaughter under current D.C. Code § 22-2001, which has a maximum possible penalty of 30 years incarceration. USAO states that it “does not believe that the maximum penalt[y]” should be lowered from 20 years’ incarceration to 18 years’*

²¹ CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions.

²² CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

²³ CCRC Fourth Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.

²⁴ See Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.

- The RCC does not incorporate this recommendation because doing so may result in disproportionate penalties. While the only comparable statute in the D.C. Code is current D.C. Code § 22-2105, manslaughter, District case law has long recognized a distinction within this offense between voluntary and involuntary manslaughter. Voluntary manslaughter is the more serious of the two forms, and under the RCC an enhancement applies primarily when the complainant is a protected person.
 - The CCRC penalty recommendations for all revised offenses have been issued in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;²⁵ 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;²⁶ 5) relative ordering of related RCC offenses;²⁷ and 6) national data on sentencing and time served.²⁸ Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
 - The CCRC notes that notwithstanding the extremely high 30 year statutorily authorized penalties for voluntary manslaughter under current D.C. Code § 22-2105, actual practice in the District has been sharply different. Court data for the 2015-2019 term shows the 97.5 quantile of all sentences for voluntary manslaughter was 180 months (15 years). The CCRC recommendation here encompasses voluntary manslaughter penalties in current court practice.
- (8) *USAO, App. C at 543-544, recommends increasing the maximum possible penalty for a Class 4 felony from 24 years to 30 years. In relevant part, USAO states that the RCC second degree murder is “comparable to”: 1) second degree murder under current D.C. Code § 22-2103 -2104, which has a maximum possible penalty of 40 years incarceration unless aggravators are present; and 2) first degree murder with respect to felony murder under D.C. Code § 22-2101 -2014 which has a maximum possible penalty of 60 years incarceration unless aggravators are present. USAO states that it “does not believe that the maximum penalt[y]” should be lowered from 30 years’ incarceration to 24 years’ incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*

²⁵ CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions.

²⁶ CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

²⁷ CCRC Fourth Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.

²⁸ See Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

- The RCC does not incorporate this recommendation because doing so may result in disproportionate penalties. The RCC does not include felony murder within first degree murder unless the actor also (in addition to committing the murder in the course of a specified felony) has the culpable mental state otherwise required for first degree murder. However, it is unclear from existing court data whether and to what extent what is now sentenced as felony murder would only be prosecutable as second degree murder in the RCC.
 - The CCRC penalty recommendations for all revised offenses have been issued in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;²⁹ 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;³⁰ 5) relative ordering of related RCC offenses;³¹ and 6) national data on sentencing and time served.³² Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
 - The CCRC notes that notwithstanding the extremely high 40 year statutorily authorized penalties for second degree under current D.C. Code § 22-2105, actual practice in the District has been sharply different. Court data for the 2015-2019 term shows the 97.5 quantile of all sentences for all second degree murder, including enhanced penalties, was 324 months (27 years).³³ The 97.5 quantile for unenhanced second degree murder was 308.2 months (25.7 years).³⁴ The CCRC recommendation here is somewhat lower than penalties in current court practice for second degree murder.
- (9) *USAO, App. C at 543-544, recommends increasing the maximum possible penalty for a Class 4 felony from 24 years to 30 years. In relevant part, USAO states that the RCC enhanced voluntary manslaughter is “comparable to” manslaughter under current D.C. Code § 22-2105, which has a maximum possible penalty of 30 years incarceration unless aggravators are present. USAO states that it “does not believe that the maximum penalt[y]” should be lowered from 30 years’ incarceration to 24 years’ incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*
- The RCC does not incorporate this recommendation because doing so may result in disproportionate penalties. While the only comparable statute in

²⁹ CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions.

³⁰ CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

³¹ CCRC Fourth Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.

³² See Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

³³ CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions.

³⁴ CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions.

the D.C. Code is current D.C. Code § 22-2105, manslaughter, District case law has long recognized a distinction within this offense between voluntary and involuntary manslaughter. Voluntary manslaughter is the more serious of the two forms, and under the RCC an enhancement applies primarily when the complainant is a protected person.

- The CCRC penalty recommendations for all revised offenses have been issued in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;³⁵ 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;³⁶ 5) relative ordering of related RCC offenses;³⁷ and 6) national data on sentencing and time served.³⁸ Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the extremely high 30 year statutorily authorized penalties for voluntary manslaughter under current D.C. Code § 22-2105, actual practice in the District has been sharply different. Court data for the 2015-2019 term shows the 97.5 quantile of all sentences for voluntary manslaughter (including sentences with enhancements) was 180 months (15 years). The CCRC recommendation here encompasses voluntary manslaughter penalties in current court practice.

(10) *USAO, App. C at 544-545, recommends increasing the maximum possible penalty for a Class 3 felony from 36 years to 40 years. In relevant part, USAO states that the RCC enhanced second degree murder is “comparable to”: 1) second degree murder under current D.C. Code § 22-2103 -2104 with aggravators under D.C. Code § 24-403.01(b-2), which has a maximum possible penalty of life incarceration; and 2) first degree murder with respect to felony murder under D.C. Code § 22-2101 -2014 with enhancements, which has a maximum possible penalty of life imprisonment. USAO states that it “does not believe that the maximum penalt[y]” should be lowered from 40 years’ incarceration to 36 years’ incarceration. USAO does not state specifically how much higher the revised penalty should be for this offense, or whether it would accept the CCRC recommendation for the offense were the maximum for the penalty classification changed.*

- The RCC does not incorporate this recommendation because doing so may result in disproportionate penalties. The RCC does not include felony murder within first degree murder unless the actor also (in addition to committing the murder in the course of a specified felony) has the culpable mental state otherwise required for first degree murder.

³⁵ CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions.

³⁶ CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

³⁷ CCRC Fourth Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.

³⁸ See Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

However, it is unclear from existing court data whether and to what extent what is now sentenced as felony murder would only be prosecutable as second degree murder in the RCC. Notably, the CCRC now recommends that class 3 felonies be subject to a maximum of 30 years imprisonment.

- The CCRC penalty recommendations for all revised offenses have been issued in light of multiple considerations, including: 1) the current D.C. Code maximum (and minimum) imprisonment penalty; 2) D.C. Court data from recent years on actual sentences imposed for comparable offenses;³⁹ 3) D.C. Voluntary Sentencing Guidelines relative ranking; 4) District voter opinion survey of relative offense seriousness;⁴⁰ 5) relative ordering of related RCC offenses;⁴¹ and 6) national data on sentencing and time served.⁴² Information and analysis has been provided to the Advisory Group and updates will be shared as they become available.
- The CCRC notes that notwithstanding the extremely high life imprisonment authorized penalty for aggravated second degree murder under current D.C. Code § 22-2103, -2104 and D.C. Code § 24-403.01(b-2), actual practice in the District has been sharply different. Court data for the 2015-2019 term shows the 97.5 quantile of all sentences for all second degree murder, including enhanced penalties, was 324 months (27 years).⁴³ The 97.5 quantile for unenhanced second degree murder was 308.2 months (25.7 years).⁴⁴ The CCRC recommendation here is generally consistent with current court practice for second degree murder.

(11) *USAO, App. C at 545, recommends the CCRC codify “codify the CCRC’s intent to have an increased reliance on consecutive sentences, rather than concurrent sentences.” USAO says that: “At the CCRC Advisory Group meeting on May 6, 2020, there was discussion between Advisory Group members and the CCRC about the intent to have increased reliance on consecutive sentences, rather than concurrent sentences. As noted in the minutes from that meeting, the purpose of this is to capture the full scope of a defendant’s conduct, to ensure that one offense is not doing all of the work, and to evaluate each type of criminal behavior involved in the situation. USAO recommends that this intent be codified in the Commentary so that attorneys and judges can understand the CCRC’s intent in this respect when sentencing defendants under the RCC.” USAO does not provide any specific language for its recommendation.*

- The CCRC does not incorporate this recommendation because doing so would make the revised statutes less clear and may result in disproportionate penalties. As the CCRC Director clarified at the June 2020 Advisory Group meeting, the CCRC does not intend that there be

³⁹ CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions.

⁴⁰ CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

⁴¹ CCRC Fourth Draft of Report #41 – Ordinal Ranking of Maximum Imprisonment Penalties.

⁴² See Danielle Kaeble, *Time Served in State Prison 2016*, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 252205 (November 2018).

⁴³ CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions.

⁴⁴ CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions.

increased reliance on consecutive sentencing as described by USAO. Rather, the CCRC has pointed out that consecutive sentencing remains an option under the RCC just as in current law, and that in many cases increased use of consecutive sentencing by District sentencing judges may result in overall imprisonment terms that offset the reduced incarceration terms under the RCC. The CCRC takes no position as to whether a sentencing judge should, in a particular case or in the aggregate, make greater use of consecutive sentencing authority. Moreover, codifying language as suggested by USAO would be extremely difficult to do with clarity as to which cases are or are not suitable for consecutive sentencing and is a matter more appropriate for sentencing guidelines and individual judicial discretion.

(12) *The CCRC recommends changing the maximum imprisonment penalties for felony classes 1 and 2 from 60 and 45 years (respectively) to 45 and 40 years, changing class 3 from 36 to 30 years, changing felony classes 8 and 9 from 5 and 3 years (respectively) to 4 and 2 years, as well as changing the misdemeanor Classes C and D from 90 days and 30 days (respectively) to 60 days and 10 days. The RCC § 22E-603 commentary further explains the rationale for these changes.*

- This change improves the proportionality of the revised statutes.

CCRC Responses and Recommended Revisions Relevant to Multiple RCC Statutes

- (1) *The CCRC recommends specifying “in fact” in several exclusions from liability, defenses, and general provisions in Chapters 2 and 3 to clarify that in those provisions no culpable mental state, as defined in RCC § 22E-205, applies beyond what is specified in the statute (e.g. accomplice liability requires acting with the culpability required for that offense, but there is no additional requirement). This revision was made in the previous compilation and should be done consistently for exclusions and defenses that do not require a culpable mental state.*
 - This change improves the clarity and consistency of the revised statutes.
- (2) *The CCRC recommends replacing references to the “Superior Court for the District of Columbia” with “court” in the following RCC statutes: 1) Civil Provisions on the Duty to Report a Sex Crime (RCC § 22E-1309); 2) Admission of Evidence in Sexual Assault and Related Cases (RCC § 22E-1310); 3) Unlawful Creation or Possession of a Recording (RCC § 22E-2105); and 4) Unlawful Operation of a Recording Device in a Movie Theater (RCC § 22E-2106). For RCC §§ 22E-1309 and 22E-1310, the current D.C. Code equivalent statutes¹²⁰³ use “court” generally and it was an error to specify Superior Court in the RCC statutes. For RCC §§ 22E-2105 and 22-2106, the forfeiture provisions are new and using “court” as opposed to Superior Court is consistent with the similar forfeiture provisions in the RCC¹²⁰⁴ and D.C. Code¹²⁰⁵ Deceptive Labeling statutes. This is a non-substantive drafting clarification.*
 - This change improves the clarity and consistency of the revised statutes.
- (3) *The CCRC recommends adding to commentary entries for defenses or exclusions from liability that refer to “reasonably believes” a statement that: “Any circumstance element or result element that is the object of the phrase “reasonably believes” need not be proven to actually exist.”*
 - This change improves the clarity and consistency of the revised statutes.

¹²⁰³ D.C. Code §§ 22-3020.51 – 3020.54; 22-3021 – 22-3024.

¹²⁰⁴ RCC § 22E-2207.

¹²⁰⁵ D.C. Code § 22-3214.01.

RCC § 22E-102. Rules of Interpretation.

(1) *OAG, App. C at 640-42, recommends adding a new subsection that specifies that when statutes use terms defined in § 22E-701, but are not referenced in that statute's definitions subsection, that "inclusion or exclusion in a cross-reference shall not affect the provision's interpretation." OAG says that, "[t]erms and phrases should be interpreted to be consistent with the plain meaning of the statute." (citing Pannell-Pringle v. D.C. Dep't of Emp't Servs., 806 A.2d 209, 213-14 (D.C. 2002)). OAG proposes specific clarificatory language that would read: "Effect of definitional cross-references. Definitional cross-references that appear at the end of substantive code sections are included to aid in the interpretation of the provisions and unless a different meaning plainly is required, their inclusion or exclusion in a cross reference shall not affect the provision's interpretation."*

- The RCC partially adopts this recommendation by including a new subsection (c) that states: "*Effect of definition cross references. Cross references to definitions located elsewhere in this title, or omissions of such cross references, may aid the interpretation of otherwise ambiguous statutory language.*" This RCC language parallels the language in the prior subsection (b) concerning the effect of captions and titles in the RCC. Commentary further clarifies the meaning and effect of cross references to Title 22E definitions, or omissions of such cross references. This change improves the clarity of the revised statutes.

RCC § 22E-201. Proof of Offense Elements Beyond a Reasonable Doubt.

- (1) *The CCRC recommends replacing the words “all elements” with “at least one element” in paragraphs (b)(1) and (b)(2). Under the prior language, when there was evidence of an exclusion or defense, the government was required to prove the absence of all elements of the exclusion or defense. This rule improperly limits liability.¹²⁰⁶*
 - This change improves the proportionality of the revised statutes.
- (2) *The CCRC recommends changing the defined term “culpability requirement” in subsection (e) to “culpability required” and making conforming changes to the definition of “offense element” in subsection (c). These non-substantive changes make it clear that when there is reference to “culpability required” in later sections of Chapter 2 and 3, the term in subsection (e) is meant. Previously this was only clear in commentary.*
 - This change improves the clarity and consistency of the revised statutes.

¹²⁰⁶ For example, under RCC § 22E-403 self-defense requires that the actor reasonably believes that the actor is in imminent danger of physical harm, and that the actor’s conduct will protect against the harm and is necessary in degree. If the government concedes that the actor reasonably believed that harm was imminent, but proves that the actor’s conduct was not necessary in degree, the defense should not apply. Under the prior language, in this hypothetical the government would not have met its burden and the defense would apply.

RCC § 22E-204. Causation Requirement.

- (1) *The CCRC recommends replacing the phrase “the actor is justly held responsible for the result” with the phrase “there is a close connection between the actor’s conduct and the result[.]” This phrase more closely aligns with language from D.C. Court of Appeals case law pertaining to proximate causation when there is an intervening volitional act by another person. The relevant factors for determining whether an actor may be “justly held responsible for the result” are also relevant in determining whether there is a “close connection” between the actor’s conduct and the result.*
- This change improves the clarity of the revised criminal code.

RCC § 22E-205. Culpable Mental State Requirement.

(1) *The CCRC recommends deleting the phrase “or a comparable mental state specified in this title” from paragraph (b)(1). As the commentary explained, this phrase had been introduced not to make additional terminology in the RCC recommendations a defined “culpable mental state,” but to allow the Council in the future to add to the definition of “culpable mental state” if it wished. However, this placeholder for a possible future change is confusing as to whether other terminology now in the RCC is a “culpable mental state.” The deletion of this phrase does not limit the power of the Council, of course, to add or subtract culpable mental state terminology in the future.*

- This change improves the clarity of the revised statutes.

RCC § 22E-206. Definitions and Hierarchy of Culpable Mental States.

(1) *The CCRC recommends combining the culpable mental state definition of “intentionally” with the definition of “knowingly” in subsection (b) and adjusting subsection numbering for the remainder of the statute accordingly. As previously stated in the commentary, the terms knowingly and intentionally are equivalent in terms of the subjective mental state that must be proven and differ only in how they relate to the objects of the terms and whether those circumstance or result elements have to be proven. Knowingly is used in statutes, consistent with ordinary language, when the following circumstance or result element must be proven to have actually existed or occurred; intent is used in statutes when the following circumstance or result element is inchoate and need not be proven to have actually existed or occurred. In the RCC the only variant of the culpable mental state “intentionally” that is used is “with intent,” and RCC § 22E-205(b) clearly provides that “[t]he object of the phrases ‘with intent’” (and “with the purpose”) are not stand-alone objective elements that must be proven but are rather part of the culpable mental state itself. While the RCC is careful to use “intentionally” only in the form “with intent” and only where the following object is inchoate, the prior draft’s separate subsection for “intentionally” may lend itself to subsequent legislative drafters misusing the term when an inchoate element did not follow. To ameliorate this possibility, to avoid possible confusion as to there being a difference in the subjective mental state requirements as to “knowingly” or “with intent,” and to further make the RCC culpable mental state definitions align with the MPC and other jurisdictions’ four-level distinctions in culpable mental states, the CCRC recommends merging the definition of “intentionally” that previously was in subsection (c) into the definition of “knowingly” in subsection (b). No substantive change as compared to the prior draft is intended by this reorganization.*

- This change improves the clarity and organization of the revised statutes.

(2) *The CCRC recommends in the definitions of “recklessly” and “negligently” referring to consideration of “the nature and motivation for the person’s conduct and the circumstances the person is aware of” instead of the nature and purpose of the person’s conduct and the circumstances known to the person...”. Replacing “purpose of” with “motivation for” and “known to” with “is aware of” avoid confusion about the meaning since “purpose” and “known” are separately defined culpable mental state terms. The RCC intends the new terminology to be functionally equivalent to the prior language for assessing the nature and degree of risk at issue.*

- This change improves the clarity and consistency of the revised statutes.

(3) *The CCRC recommends in the definitions of “recklessly” and “negligently” referring to the disregard or failure to perceive the risk being “a gross deviation from the standard of [conduct] [care] that a reasonable individual would follow in the person’s situation” instead of being “clearly blameworthy.” As compared*

to the prior RCC language, the updated language provides a clearer standard for application and more closely tracks the standard Model Penal Code¹²⁰⁷ language used, with minor variants, in dozens of jurisdictions. The relevant factors for determining whether an actor may be “clearly blameworthy” are functionally the same as under the gross deviation standard and the same examples and commentary apply. The RCC commentary on this point merely substitutes the “gross deviation...” for the clearly blameworthy language.

- This change improves the clarity and consistency of the revised statutes.

¹²⁰⁷ Model Penal Code § 2.02 (“(c) Recklessly. A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation. (d) Negligently. A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.”).

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

- (1) *The CCRC recommends changing the subsection (b) provision to eliminate unnecessary references to “the existence of the” and “applicable.” No substantive change is intended compared to the prior drafting.*
 - This change improves the clarity of the revised statutes.
- (2) *The CCRC recommends changing the subsection (c) provision regarding mistake or ignorance of law to read “A person remains liable for an offense when they are mistaken or ignorant ...” instead of “A person may be held liable for an offense when they are mistaken or ignorant....” The prior “may” was unclear and “remains” better communicates the point that ignorance of the law is not a defense when elements of an offense are otherwise proven (except as provided in (c)(1) and (c)(2)). No substantive change is intended compared to the prior drafting.*
 - This change improves the clarity of the revised statutes.

RCC § 22E-209. Principles of Liability Governing Intoxication.

- (1) *The CCRC recommends changing the subsection (b) provision to refer to “a result or circumstance element” in each paragraph. No substantive change is intended compared to the prior drafting.*
 - This change improves the clarity of the revised statutes.
- (2) *The CCRC recommends changing the subsection (b) provision to refer to the gross deviation standard now recommended in RCC § 22E-206 (instead of “clearly blameworthy”). No substantive change is intended compared to the prior drafting.*
 - This change improves the clarity and consistency of the revised statutes.
- (3) *The CCRC recommends amending the definition of “self-induced intoxication” in subsection (c) to clarify culpable mental states and make various other non-substantive changes. The revised definition reads: “‘Self-induced intoxication’ means intoxication that, in fact, is caused by a substance that an actor knowingly introduces into their body, negligent as to the tendency of the substance to cause intoxication and, in fact, the substance was not introduced pursuant to medical advice by a licensed health professional or under circumstances that would afford a general defense under Chapters 4 or 5 of this Subtitle.” Regarding mental states, this updated language replaces “should be aware of” in the prior draft with negligent, and specifies strict liability (“in fact”) as to whether the substance was introduced pursuant to medical advice or in circumstances that afford a general defense. RCC definitions almost never use culpable mental states in definitions because of possible confusion over how a culpable mental state that applies to the defined term interacts with the culpable mental states in the definition, as well as concerns about how to construe mental states. However, the only uses of the term in the RCC are in three special liability provisions in murder, manslaughter, and aggravated assault where there are no other culpable mental state requirements. Moreover, for the RCC definition to closely follow the Model Penal Code definition, culpable mental state provisions are necessary.¹²⁰⁸*
 - This change clarifies the revised statutes.

¹²⁰⁸ Model Penal Code § 2.08 (“‘self-induced intoxication’ means intoxication caused by substances that the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of crime.”).

RCC § 22E-210. Accomplice Liability.

- (1) *The CCRC recommends revising subsection (a) of the statute to move out of the prefatory language into paragraphs (a)(1) and (a)(2) the requirement that the actor “acts with the culpability required for that offense.” This organization highlights the importance of proving the relevant culpability. No substantive change is intended compared to the prior drafting.*
 - This change clarifies the revised statutes.
- (2) *The CCRC recommends revising subsection (d) of the statute to state that an accomplice shall be charged and subject to punishment as a principal.*
 - This change clarifies the revised statutes.
- (3) *The CCRC recommends revising subsection (e) of the statute to state: “An actor is liable as an accomplice under this section even though the principal has not been arrested, prosecuted, convicted, adjudicated delinquent, or acquitted for an offense.” This updated language largely tracks the text used in the RCC Contributing to the delinquency of a minor statute and is more concise. The prefatory language that previously was at the beginning of subsection (d) is duplicative of the requirements already articulated in subsection (a). No substantive change is intended. Commentary has been updated to reflect this change, including a statement similar to that in the commentary to contributing to the delinquency of a minor that: “In addition to the language in subsection (d), RCC § 22E-216 establishes that an actor can be liable as an accomplice even if the principal actor is under the age of 12 years and is not subject to criminal liability under the RCC.”*
 - This change clarifies the revised statutes.

RCC § 22E-211. Liability for Causing Crime by an Innocent or Irresponsible Person.

- (1) *The CCRC recommends revising subsection (a) of the statute to move out of the prefatory language into paragraph (a)(2) the requirement that the actor “acts with the culpability required for that offense.” This organization highlights the importance of proving the relevant culpability. No substantive change is intended compared to the prior drafting.*
 - This change clarifies the revised statutes.
- (2) *The CCRC recommends updating the reference to excuse and justification defenses in subsection (b) of the prior draft to refer to general defenses under Chapters 4 or 5 of Subtitle I. The commentary has also been updated to replace the prior language referring to an immaturity defense to note that, apart from the defenses in Chapters 4 and 5, immaturity may also be a basis of being an innocent or irresponsible person. The commentary also cites to RCC § 22E-216, the new minimum age for offense liability provision.*
 - This change improves the clarity and consistency of the revised statutes.
- (3) *The CCRC recommends revising subsection (c) of the statute to state that an actor who is liable under the section shall be charged and subject to punishment as if the actor had directly engaged in the conduct constituting the offense.*
 - This change clarifies the revised statutes.
- (4) *The CCRC recommends revising subsection (d) of the statute to state: “An actor is liable as an accomplice under this section even though the principal has not been arrested, prosecuted, convicted, adjudicated delinquent, or acquitted for an offense.” This updated language largely tracks the text used in the RCC Contributing to the delinquency of a minor statute and RCC § 22E-210, Accomplice Liability, and is more concise.*
 - This change clarifies the revised statutes.

RCC § 22E-212. Exclusions from Liability for Conduct of Another Person.

- (1) *The CCRC recommends adding “in fact” before the terms of this exclusion to clarify that there is no additional culpable mental state requirement.*
 - This change improves the clarity and consistency of the revised statutes.

RCC § 22E-214. Merger of Related Offenses.

- (1) *The CCRC recommends eliminating as unnecessary and potentially confusing prior RCC subsection (b) which states that the section “is inapplicable whenever the legislature clearly expresses an intent to authorize multiple convictions for different offenses arising from the same course of conduct.” If there were to be a conflict between clear legislative intent regarding non-merger that is contrary to the general provisions in RCC § 22E-214, the more specific legislative intent would prevail under general canons of construction. But, even more to the point, the cornerstone of all merger analysis is legislative intent. Even the Blockburger rule merely creates a presumption of legislative intent, and the results it yields can always be overcome by ‘a clearly contrary legislative intent’ manifested by the D.C. Council. Sanchez-Rengifo v. United States, 815 A.2d 351, 354 (D.C. 2002).*
 - This change clarifies the revised statutes.
- (2) *The CCRC recommends revising RCC § 22E-214 procedures to be consistent with the OAG recommendation at App. C at 661 (regarding the parallel merger procedures in RCC § 22E-4119). OAG makes two recommendations: “First, the text of RCC § 22E-4119 (a) and (b) should be amended to state that the trier of fact shall initially enter a judgment for more than one of the listed offenses based on the same act or course of conduct, however, pursuant to RCC § 22E-22E-214 (c) and (d) only the conviction for the most serious offense will remain after the time for appeal has run or an appeal has been decided. Second, to ensure that a defendant does not serve additional time pending an appeal, or for the time to appeal to have expired, OAG also recommends that any sentences issued pursuant to this paragraph run concurrently.” The CCRC agrees that these changes to the merger procedure are warranted, as well as clarification that, as per current RCC § 22E-214, a trial judge should have the option of engaging in merger analysis at initial sentencing (contrary to current Superior Court practice). Accordingly, the RCC has revised the merger procedure to clarify that the sentencing court may either vacate all but one of the offenses that merge prior to initial sentencing, or go ahead and enter judgment and sentence the actor for the offenses that merge. But, if the latter course is chosen the sentences must run concurrently and the convictions for all but one (assuming all are not overturned on appeal) must be vacated after the time for appeal has expired or there is a judgment on appeal.*
 - This change improves the clarity and consistency of the revised statutes.
- (3) *The CCRC recommends amending the subsection (c) rule of priority to refer to “The offense with the higher authorized maximum period of incarceration; or if the offenses have the same authorized maximum period of incarceration, any offense that the sentencing court deems appropriate.” The prior statutory language did not specify “imprisonment” versus other (fine) penalties.*
 - This change clarifies the revised statutes.

RCC § 22E-215. Judicial Dismissal for Minimal or Unforeseen Harms [formerly De Minimis Defense].

- (1) *PDS App C. at 677 notes that the commentary to the de minimis defense references as an example in a footnote an offense that the Council recently repealed. PDS recommends referencing a different code provision that criminalizes a minimal harm.*
- The RCC incorporates this revision by deleting the outdated reference. This change improves the clarity of the revised statutes.
- (2) *The CCRC recommends an array of changes to the draft language to clarify the scope of the statute, improve its consistency with other jurisdictions' statutes (providing persuasive authority on interpretation), and improving the proportionality of the revised statutes.*
- First, the CCRC recommends changing the title of the provision to “Judicial Dismissal for Minimal or Unforeseen Harms.” Latin phrases, however well-established in legal doctrine, do not belong in a modernized D.C. Code.
 - Second, the CCRC recommends changing the language of the provision to provide a more specific, and limited set of situations when the provision applies, tracking Model Penal Code § 2.12 (de minimis) and jurisdictions with nearly identical statutes.¹²⁰⁹ As compared to the prior RCC language which would have codified a non-exhaustive list of factors for consideration when conduct was insufficiently blameworthy, the updated language provides a clearer standard for application. The situations include conduct under a customary license or tolerance despite lack of consent, conduct that doesn’t actually cause or threaten the harm sought to be prevented by the law defining the offense, conduct that does cause the targeted harm but to a trivial extent, and conduct that was not reasonably envisioned by the legislature.
 - Third, the CCRC recommends removing the limitation of RCC § 22E-215 to misdemeanor and felony Class 6, 7, 8, and 9 charges. With respect to one prong of section—regarding the triviality of the harm—it is highly unlikely any major felony would ever meet the requirements of section 215. But other prongs of RCC § 22E-215 may apply to major felonies—e.g., an extremely improbable conspiracy to commit murder may satisfy the requirements of the first prong of section 215(a)(2). This expansion is consistent with the statutes in other jurisdictions and the MPC.
 - Fourth, the CCRC recommends RCC § 22E-215 be amended to make dismissal a matter of judicial discretion, not a defense, with any findings of facts established by a preponderance of the evidence. The MPC and

¹²⁰⁹ See, e.g., Haw. Rev. Stat. § 702-236; N.J. Stat. Ann. 2C:2-11 (2005); Me. Rev. Stat. Ann. 17-A, § 12 (2006); 18 Pa. Cons. Stat. § 312 (1998).

other jurisdictions' de minimis statutes similarly make this a matter of judicial power, while other state jurisdictions provide broad judicial discretion to dismiss prosecutions in the interests of justice.¹²¹⁰ While mixed questions of fact and law arise under RCC § 22E-215, the statute also covers many matters that are purely matters of law.

¹²¹⁰ See, e.g., Anna Roberts, *Dismissals As Justice*, 69 ALA. L. REV. 327, 332 (2017) (collecting statutes from 15 states and Puerto Rico, which employ this approach).

RCC § 22E-301. Criminal attempt.

- (1) *OAG, App. C at 642, recommends that paragraph (d)(1) be edited to replace the words “imprisonment or fine” with the words “imprisonment and fine.” This change will clarify that defendants convicted of attempted offenses may be penalized by both a term of imprisonment and a fine.*
 - The RCC adopts this recommendation. This change improves the clarity of the revised statutes.
- (2) *The CCRC recommends revising subsection (a) of the statute to reorder the requirement that the actor “acts with the culpability required for that offense.” This organization highlights the importance of proving the relevant culpability. No substantive change is intended compared to the prior drafting.*
 - This change clarifies the revised statutes.

RCC § 22E-302. Criminal Solicitation.

- (1) *The CCRC recommends revising subsection (a) of the statute to move out of the prefatory language into paragraph (a)(2) the requirement that the actor “acts with the culpability required for that offense.” This organization highlights the importance of proving the relevant culpability. No substantive change is intended compared to the prior drafting.*
 - This change clarifies the revised statutes.
- (2) *The CCRC recommends reorganizing into its own subsection (b) the portion of the definition of solicitation that refers to the applicable offenses—now both offenses against persons and property offenses. Organizing this requirement as a separate subsection (b) does not change the meaning of the statute, but allows other RCC statutes (e.g., contributing to the delinquency of a minor) to more clearly cross-reference to criminal solicitation without regard to the scope of applicable offenses in § 22E-302.*
 - This change improves the organization of the revised statutes.
- (3) *The CCRC recommends in subsection (b) expanding the scope of offenses subject to criminal solicitation liability to include felony property offenses as defined in Subtitle III of Title 22E. While the RCC already provides accomplice, conspiracy, and attempt liability for conduct that does not result in a property crime, this change would add liability for solicitation of high value property crimes, most forms of burglary, and arson. Current District law provides liability only for crimes of violence as defined in D.C. Code § 23–1331, which includes arson and burglary but no other property offenses. While there is considerable variation across U.S. jurisdictions, this expansion is more consistent with the majority of jurisdictions.¹²¹¹*
 - This change improves the proportionality of the revised statutes.
- (4) *The CCRC recommends in subsection (d) the deletion of the second sub-paragraph of the revised statute providing for possible exceptions to the regular penalty under the first sub-paragraph. As no exceptions are recommended, the entry is extraneous.*
 - This change improves the clarity of the revised statutes.

¹²¹¹ See § 11.1(a) Common law and statutes, 2 Subst. Crim. L. § 11.1(a) (3d ed.).

RCC § 22E-303. Criminal Conspiracy.

- (1) *The CCRC recommends revising subsection (a) of the statute to move out of the prefatory language into paragraph (a)(2) the requirement that the parties to the agreement “act with the culpability required for that offense.” This organization highlights the importance of proving the relevant culpability. No substantive change is intended compared to the prior drafting.*
 - This change clarifies the revised statutes.
- (2) *The CCRC recommends in subsection (d) the deletion of the second sub-paragraph of the revised statute providing for possible exceptions to the regular penalty under the first sub-paragraph. As no exceptions are recommended, the entry is extraneous.*
 - This change improves the clarity of the revised statutes

§ 22E-401. Lesser Harm

(1) *PDS App. C at 677 recommends eliminating the codified exception to the defense when “the conduct constituting the offense is expressly addressed by another available defense, affirmative defense, or exclusion from liability.” PDS says that the policy reasons supporting why such a provision is unnecessary for the duress defense also apply for this defense. PDS says that a defendant should be able to present evidence of all available defenses and notes the government may present alternate theories of liability.*

- The RCC does not incorporate this recommendation because it may create a gap in liability. The exception to this defense where the conduct is expressly addressed by another available offense appropriately recognizes that this defense has broader, more general requirements than other defenses (such as self-defense) and is not intended to supplant the more specific requirements of those defenses.

§ 22E-402. Execution of Public Duty.

(1) *PDS App. C at 677 recommends eliminating the codified exception to the defense when “the conduct constituting the offense is expressly addressed by another available defense, affirmative defense, or exclusion from liability.” PDS says that the policy reasons supporting why such a provision is unnecessary for the duress defense also apply for this defense. PDS says that a defendant should be able to present evidence of all available defenses and notes the government may present alternate theories of liability.*

- The RCC does not incorporate this recommendation because it may create a gap in liability. The exception to this defense where the conduct is expressly addressed by another available offense appropriately recognizes that this defense has broader, more general requirements than other defenses (such as self-defense) and is not intended to supplant the more specific requirements of those defenses.

§ 22E-403. Defense of Self or Another Person.

(1) *OAG, App. C at 667, requests that commentary further clarify what it means to reasonably believe something while acting in the heat of passion.*

- The RCC does not adopt this recommendation. The defense requires that the actor reasonably believes that the conduct will protect against harm and that it was necessary in degree. Reasonableness is a flexible standard that takes into account not just the circumstances that were known the actor, but certain characteristics and traits of the actor. The defense recognizes that a belief that would be unreasonable to a calm observer may have been reasonable to a person making snap decisions in a state of utter terror. OAG’s statement that “[t]he defining characteristic of acting in the heat of passion is that one is not acting reasonably[]” is not entirely accurate. A person in the heat of passion may act unreasonably as compared to a calm individual, but determining whether a person’s belief was reasonable necessarily involves taking in account the actor’s emotional state.
- The commentary already describes when a person in the heat of passion’s belief is reasonable, however, as this determination is highly fact specific it is best left to fact finders to assess in each specific case.

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

(1) *OAG App. C at 642 recommends adding an example to the commentary on the parental defense in RCC § 22E-408(a) of how a babysitter would have liability for punishing a child if they lacked effective consent to engage in punishment. OAG provides a specific example.*

- The RCC adopts the recommendation by adding an example in a footnote to the commentary similar to that recommended by OAG. The example says: “For example, consider a parent who leaves their young child in a babysitter’s care with no instructions as to punishment for misbehavior. While the parent is gone the babysitter punishes the child for a misdeed by spanking, causing a bodily injury. Absent evidence that the babysitter reasonably believed that they had the effective consent of the parent to engage in such punishment, the babysitter could not avail themselves of this defense.” This change improves the clarity of the revised statutes.

RCC § 22E-501. Duress.

(1) *The CCRC recommends replacing the term “custody” with the term “official custody.” As is discussed in this Appendix for RCC § 22E-701, what was previously the definition of “custody” is now the definition of “official custody.” The definition itself is unchanged.*

- This change improves the clarity and consistency of the revised statutes.

RCC § 22E-503. Entrapment.

- (1) The CCRC recommends referring to a “third person” in paragraph (a)(2) to clarify the different persons involved in derivative entrapment.*
 - This change clarifies the revised statutes.
- (2) The CCRC recommends clarifying in the prefatory language in subsection (a) that a person cooperating with the law enforcement officer specifically refers to the previously mentioned “law enforcement officer acting under color or pretense of official right.”*
 - This change clarifies the revised statutes.

RCC § 22E-504. Mental Disability Defense.

(1) USAO App. C at 684 recommends changing the name of the mental disability defense to the prior RCC title of “Mental disease or defect defense.” USAO says that “mental disability” is very similar to “intellectual disability” used in other contexts such as D.C. Code § 7-1301.03(15A). USAO also says that the phrase “mental disease or defect” is used in D.C. Code § 24-531.01(5) (definition of “incompetent” for purposes of competency evaluations and proceedings).

- The RCC partially incorporates the USAO recommendation by suggesting a conforming amendment be made to replace the phrase “mental disease or defect” in D.C. Code § 24-531.01(5) with “mental disability.” This would align the usage of the two terms. The term “mental defect” is rejected as being particularly outdated and stigmatizing. This change improves the clarity and consistency of the revised statutes.

RCC § 22E-505. Developmental Incapacity Defense.

(1) *OAG App. C at 643-644 says that children under 12 years of age “should not be prosecuted in the juvenile justice system.” However, OAG recommends that instead of an affirmative defense the revised statute should state that “a child who is under 12 years of age does not commit a delinquent act.” OAG says that its recommendation is consistent with the language previously in the developmental incapacity defense. Further, OAG says that because Title 16 Chapter 23 of the D.C. Code addresses juvenile delinquency proceedings, the revised statute affecting such proceedings should be located in Title 16.*

- The RCC partially adopts the OAG recommendation by recharacterizing the developmental incapacity defense as an exception to liability for any offense when the actor, in fact, is under 12 years of age. However, the RCC refers more directly to an “offense” rather than to a “delinquent act” a term which is defined in terms of an offense.¹²¹² The revised statute is located in Title 22E which establishes fundamental requirements for liability for all offenses, as stated in App. D2 at 31. However, in App. K the CCRC recommends possible conforming amendments be made to Title 16 Chapter 23. This change improves the clarity and organization of the revised statutes.

(2) *OAG App. C at 643-644 recommends language be added to the revised statute that shields any District public official from civil liability for arrest or seizure of a child under 12 years of age. OAG says that, “because a child is not required to carry identification to show their age, or may lie about their age, police officers may nevertheless inadvertently arrest a child in this age group or may seize the child prior to making an arrest to confirm the child’s age.” OAG also says that it inadvertently “may bring charges against a child who is under the age of 12 and that prosecution would continue until such time as proof of age has been established.” OAG provides specific language¹²¹³ for the civil liability shield.*

- The RCC does not adopt the OAG recommendation at this time. It is not clear why a special liability shield for an improper seizure, arrest, or prosecution is necessary for this provision as compared to other bars on criminal or juvenile proceedings in the RCC or elsewhere in the D.C. Code. It also is not clear whether or how the proposed language may shield a bad faith action by an official.

¹²¹² D.C. Code § 16–2301(7) (“The term “delinquent act” means an act designated as an offense under the law of the District of Columbia, or of a State if the act occurred in a State, or under Federal law. Traffic offenses shall not be deemed delinquent acts unless committed by an individual who is under the age of sixteen.”).

¹²¹³ “Nothing in this section shall be construed as creating a cause of action against the District of Columbia or any public official for seizing, arresting, or prosecuting a child who is under 12 years of age.”

- (3) *OAG App. C at 643-644 reiterates its “strong objection” App. C at 571-573 to the other provisions of the developmental incapacity defense applicable to actors age 12 and 13.*
- The RCC adopts the OAG recommendation by eliminating a developmental incapacity defense for those age 12 or 13 years of age. As described in the updated commentary, the elimination of the defense for persons of these ages appears to change current District law by eliminating, in part, the common law defense of *doli incapax*. This change improves the clarity of the revised statutes and may fill a gap in existing law.
- (4) *OAG App. C at 675 says it does not believe that the RCC commentary entry to the developmental incapacity defense and paragraph (c)(1) of the RCC Contributing to the Delinquency of a Minor (CDM) offense (stating that a person may be convicted even if the minor complainant “has not been prosecuted [or], subject to delinquency proceedings”) adequately clarify that an adult may be prosecuted for CDM based on conduct by a person under 12 years of age. OAG notes that while the revised provision for accomplice liability states that the actor can be convicted even if the other person cannot be convicted, it does not provide that a person can be convicted even if the other person could not be convicted. See also the earlier USAO comment, App. C at 632.*
- The RCC incorporates these recommendations by codifying language alongside the exception to liability for actors under 12 that states: “When otherwise liable for an offense based on the conduct of another, an actor remains liable for the offense notwithstanding the fact that the conduct is committed by a person under 12 years of age.” This provision is intended to clarify that the fact that the actor is themselves not liable, because they are under 12 years of age, does not affect the liability of others based on the conduct of the 12 year old. Liability as an accomplice, for conspiracy, or for the CDM offense based on the conduct of another is the same regardless of the fact that the other person is under 12. This change improves the clarity, consistency, and proportionality of the revised statutes.
- (5) *The CCRC recommends labeling the revised statute (without the defense for those 12 and 13 years of age) as “RCC § 22E-216, Minimum Age for Offense Liability” and locating the provisions in chapter two alongside other basic requirements of offense liability rather than among excuse defenses in chapter 5.*
- This change improves the organization of the revised statutes.

RCC § 22E-602. Authorized Dispositions

(1) *OAG App. C 694-700*¹²¹⁴ objects to the current subsection (c) language and instead “recommends that the judge’s authority to grant a PBJ [probation before judgment], for the designated offenses - over the government’s objection- should be limited to one PBJ in any 10 year period and that if the defendant successfully completes the PBJ, that the law enforcement and court records associated with the PBJ be sealed – not expunged.” OAG says its language is modeled on certain provisions in the Maryland Code and the limitation “ensures that defendants who receive this benefit deserve it.” OAG states: “By limiting the judge’s ability to require a PBJ to once every 10 years, the provision targets defendants whose criminal offenses represent aberrant behavior for them.” OAG says that the broad scope of the statute “improperly impedes on prosecutorial discretion in seeking justice” or, as clarified in a subsequent statement to the CCRC, “impedes upon the exclusive discretion of prosecutors in charting the course of a criminal case.”¹²¹⁵ OAG also recommends an amendment to record sealing provisions in subparagraph (c)(2) so that instead of simply “law,” the sentence refers only to “District law” in light of the fact that the District lacks the authority to control the operation of federal law.”

- The RCC partially adopts the OAG recommendation by revising subsection (c)(2) to provide for record sealing under D.C. Code § 16–803(l) and (m) (rather than expungement) upon successful completion of probation, discharge, and dismissal of proceedings. The maintenance of a non-public file concerning prior utilization of deferred disposition proceedings under RCC § 22E-602(c) may facilitate better decision making by the court and prosecutors regarding use of deferral and diversion mechanisms.¹²¹⁶ This change improves the proportionality of the revised statutes.

¹²¹⁴ On February 2, 2021 OAG stated that it had found an error in the submission in a paragraph at App. C at 699 and wished to revise the language of the Comments as follows: “While OAG disagrees with the proposal to allow judges to grant unlimited PBJ’s for this class of misdemeanors over the government’s objection, we do not oppose a more limited grant of authority. OAG proposes that RCC § 22E-602 be amended to permit a judge to grant a PBJ over the government’s objection only once every 10 years. OAG’s proposal is modeled on provisions in the Maryland Code. See Maryland Code § 6-220 (d).[1] This limitation ensures that defendants who receive this benefit deserve it. By limiting the judge’s ability to grant a PBJ to once every 10 years, the provision targets defendants whose criminal offenses represent aberrant behavior for them. Few jurisdictions grant this authority to judges. OAG is concerned that the broad scope of CCRC’s recommendation impedes upon the exclusive discretion of prosecutors in charting the course of a criminal case. OAG submits that this remedy only be available in exceptional circumstances. For the foregoing reasons, OAG objects to the recommendation as drafted in RCC § 22E-602 and recommends, instead, that the judge’s grant of authority to order a PBJ over the government’s objection be limited to once every 10 years.” The text of Appendix C reflects the written comments that were timely received from Advisory Group members.

¹²¹⁵ *Id.*

¹²¹⁶ However, the CCRC notes two assumptions underlying OAG’s repeated concern that an injustice may happen if a judge might grant a deferral under RCC § 22E-602(c) with an expungement provision—1) the defendant must have successfully completed terms of their probation previously, and 2) any court choosing

- However, the remaining justification offered by OAG for limiting the 22E-602(c) deferral process to one instance for all Class C, D, and E offenses in any 10 year period appears to be an assertion that judicial deferral impedes prosecutorial discretion. Other than noting that the practice is uncommon in other jurisdictions, OAG cites no rationale for the proposition that the Council cannot or should not provide the court with the ability to defer sentencing without prosecutorial agreement. The CCRC notes several points in support of the Council vesting courts with broad authority in this area.
 - First, the purpose of this RCC provision, as stated by the American Law Institute (ALI) regarding its similar (though more expansive) recommendation to provide authority for judicial deferral, is to “promote the rehabilitation and reintegration of the accused individual and the restitution of direct and indirect victims of the crime. Deferred adjudication should be offered to hold the individual accountable for criminal conduct through a formal court process, but justice and public safety do not require that the individual be subjected to the stigma and collateral consequences associated with formal conviction.”¹²¹⁷ Particularly for low-level misdemeanors, there is reason to be concerned that the collateral consequences of conviction (e.g. employment) are severe in relation to the harm caused, and conviction and incarceration may even have a criminogenic effect on future conduct.¹²¹⁸
 - Second, the RCC provision is premised on the belief, inherent in judicial sentencing authority, that, at times, the court may have a different and more accurate perspective than the government as to what disposition will better suit the goals of rehabilitation, reintegration, restitution, public safety and justice. There may be reasonable disagreements between the government and courts as to whether, for example, deferral under RCC § 22E-602(c) should be limited to “defendants whose criminal offenses represent aberrant behavior,” as stated by OAG, or whether use of deferral under RCC § 22E-602(c) may be an appropriate alternative to a criminal conviction and incarceration for some repeat offenders. While it is commendable that OAG pursues diversion and deferral under its

to offer deferral would know that the defendant may have had prior arrests and successfully completed the terms of their probation.

¹²¹⁷ Model Penal Code: Sentencing § 6.02B PFD (2017)

¹²¹⁸ An extensive 2009 review found that the criminogenic effect of imprisonment either nullified or outweighed its incapacitation or deterrence effect. Daniel S. Nagin, Francis T. Cullen & Cheryl Lero Jonson, *Imprisonment and Reoffending*, 38 CRIME JUSTICE 115–200 (2009); *National Research Council, The Growth of Incarceration in the United States: Exploring Causes and Consequences* (2014), <https://doi.org/10.17226/18613>. A 2017 natural experiment study found that “being sentenced to prison rather than probation increases the probability of a future prison admission within 3 y after release by 18–19 percentage points.” David J. Harding et al., *Short- and long-term effects of imprisonment on future felony convictions and prison admissions*, 114 PROC. NATL. ACAD. SCI. 11103–11108 (2017).

own authority, this should not be a barrier to judges' independent exercise of judgment and authority.

- As one legal treatise has noted: “With a few exceptions, the legislature determines which actor may authorize or offer deferred adjudication. Legislatures may delegate the ultimate suitability determination to prosecutors, judges, or some combination of the two, with or without guidance,” (internal citations omitted).¹²¹⁹
- With respect to the Maryland model cited by OAG for its recommended limitation of PBJ to one in a ten year period, the CCRC notes that the Maryland statute’s use of a ten year limitation is the exception to a rule that otherwise does not limit the timeframe or repeat judicial use of deferral proceedings and sweeps much more broadly than the RCC recommendation. The Maryland once in a ten year period rule extends only to certain transportation offenses (e.g. vehicular homicide and driving under the influence of an intoxicant). The Maryland statute also categorically excludes certain sex crimes against minors, moving violations under certain conditions, and repeat controlled substance crimes under certain conditions are categorically excluded from the judicial deferral provision. However, apart from these limited exceptions, the general rule in Maryland does not appear to limit the timeframe or repeat judicial use of deferral proceedings for any offense (misdemeanor or felony). If anything, the Maryland precedent lends support to an expansion of the scope of the RCC § 22E-602(c) provision. The CCRC also notes that legislation is currently under consideration in Maryland to expand its judicial deferral provision to allow the court to impose PBJ prior to a finding of guilt, when the “court finds facts justifying a finding of guilt.”¹²²⁰
- For further discussion of judicial deferral mechanisms in other jurisdictions, see Margaret Love and David Schlusel, *The Many Roads to Reintegration: A 50-State Report on Laws Restoring Rights and Opportunities After Arrest or Conviction* (September 2020) at 62-70 (available online at <https://ccresourcecenter.org/wp-content/uploads/2020/09/The-Many-Roads-to-Reintegration.pdf>).¹²²¹ This recent survey appears to be the most

¹²¹⁹ § 7:22. Deferred adjudication and other diversionary dispositions, Colgate Love, Roberts and Klingele, *Collateral Consequences* § 7:22

¹²²⁰ 2021 Maryland Senate Bill No. 527, Maryland 442nd Session of the General Assembly, 2021, 2021 Maryland Senate Bill No. 527, Maryland 442nd Session of the General Assembly, 2021.

¹²²¹ “19 states now make deferred adjudication broadly available, in many cases for any offense eligible for a probationary sentence and without regard to prior record, leaving it up to the court (and in some states also the prosecutor) to determine the appropriateness of the disposition on a case-by-case basis. Alabama and Georgia are included in this category because of their extensive system of intervention courts that are administered on a county-by-county basis. All but one of these 19 states (Idaho) authorize sealing upon successful completion, though Texas requires a 2-to-5-year waiting period in some cases before the court

on-point and up-to-date compilation available. It is a very fast changing area, with 18 states enacting laws regarding diversionary and deferred dispositions in 2019 alone.¹²²²

- Seven examples¹²²³ of jurisdictions that provide for judicial deferral without government approval include: Cal. Penal Code § 1001.95; Ga. Code Ann. § 42-8-60; La. Code Crim. Proc. Ann. art. 894; Me. Rev. Stat. tit. 17-A, § 1902; Md. Code Ann., Crim. Proc. § 6-220; and Tex. Code Crim. Proc. Ann. art. 42A.102; Vt. Stat. Ann. tit. 13, § 7041.
- The RCC does not at this time adopt the OAG recommendation to refer to “District law” instead of simply “law” in subsection (c)(2) because the statute no longer refers to “law” in (c)(2) (or the new (c)(3)) and instead simply cross-references the current sealing procedures under D.C. Code § 16–803(l) and (m).

(2) *PDS App. C at 708 recommends expanding the deferral mechanism in subsection (c) to include all misdemeanors and low felonies. PDS notes that an analogous provision already exists for first time drug offenders who otherwise face 180 days of incarceration. PDS notes that the deferral provision is “necessary to bring a measure of racial equity to the District’s criminal legal system.” PDS says that, “It is not that white residents do not commit offenses, rather they are diverted out of the system before they ever get to a courtroom.” PDS cites to research indicating that 12 states broadly recognize the judicial capacity to dismiss cases in the interest of justice, and particularly notes the example of New York Criminal Procedure § 170.40, which allows for dismissal of all misdemeanors by the court, on its own authority, “in the interests of justice.”*

- The RCC partially adopts this recommendation by expanding the scope of subsection (c) deferral proceedings to reach Class A and Class B misdemeanors (in addition to the previously included Classes C, D, and E misdemeanors). While many jurisdictions provide a broader judicial power to dismiss charges, the RCC does not adopt such a provision at this time. While a number of jurisdictions provide broader “probation before judgement” (PBJ) authority to courts, including over many or all felony offenses,¹²²⁴ the RCC does not adopt such a provision at this time. While

will issue an Order of Nondisclosure. In many of the 19 states, a court-managed diversion program has existed for years, though programs have recently been expanded or reorganized to target certain populations, like veterans and individuals with mental health needs. The next category of 15 states is distinguishable from the first by varying restrictions on eligibility based on offense charged or prior record and, for many, limits on record relief.” (internal citations omitted).

¹²²² *Id.* at 68 (citing Collateral Consequences Resource Center, *Pathways to Reintegration: Criminal Record Reforms in 2019* at 21, https://ccresourcecenter.org/wp-content/uploads/2020/02/Pathways-to-Reintegration_Criminal-Record-Reforms-in-2019.pdf).

¹²²³ The CCRC has not examined most jurisdictions and, with respect to the examples identified, no case law research was performed to see if there are significant limitations on the plain language conferral of a right solely to the court to decide on deferral.

¹²²⁴ *See, e.g.* Md. Code Ann., Crim. Proc. § 6-220. For a description of other jurisdictions’ similar provisions, see reference to the report by Margaret Love and David Schluskel in the above response to OAG’s recommendation to narrow the availability of subsection (c).

the RCC seeks to appropriately expand alternatives to conviction and incarceration for low-level crimes, the proposed expansion of deferred dispositions to all misdemeanors will be a significant change to current District practice. After review of the effects of the change, inclusion of additional (felony) offenses may be warranted. This change improves the proportionality of the revised statutes.

(3) *USAO App. C at 711-712 recommends there be a clarification that subsection (c) deferral is only available when a Class C, D, or E offense is the most serious offense of which a defendant has been found guilty. USAO notes that under the current draft, “for example, a defendant found guilty of both a felony and a Class C misdemeanor in the same case could theoretically benefit from this deferred disposition in the misdemeanor.” However, USAO says that, “This result would not be justified by the rationale and likely was not intended by the drafters.”*

- The RCC does not adopt this recommendation because it may result in disproportionate penalties in some cases. The RCC provision does not disqualify a person from receiving a judicial deferral under RCC § 22E-602(c) because the person has a prior criminal record or in the instant case is also found guilty of a more severe (felony) offense. As indicated by USAO, a person found guilty of both a felony and a Class C misdemeanor in the same case could benefit in some instances from deferral as to the misdemeanor even though they are found guilty of the felony. In practice, it would seem to be an uncommon case where there is a benefit to the court proceeding to initiate deferral on the misdemeanor even when there is a felony conviction—namely, where the felony sentence is time served or extremely low and the additional conviction for the misdemeanor may result in significant non-incarceration consequences beyond the felony conviction that is unwarranted. However, such a case may arise and, if it does, the revised statute would authorize judicial deferral. But, normally where there is a conviction on a non-qualifying (felony) offense in the same case, there would be incarceration time, supervised release, or at least a suspended sentence with conditions of release for as long or longer than the one year period of probation authorized under RCC § 22E-602(c). To ensure there is no confusion that RCC § 22E-602(c) does not affect proceedings on a nonqualifying (felony) charge in a case, the statutory language is updated in paragraph (c)(1) to authority to “defer further proceedings *on that offense*” (emphasis added). This change clarifies the revised statute.

(4) *USAO App. C 712 recommends increasing the penalties for Class C and D misdemeanors to be 90 days and 30 days, respectively. USAO notes that the lower penalties currently recommended in the RCC, 60 days and 10 days, respectively, would have the effect of lowering the statutory maximum penalty for many offenses in these classifications.*

- The RCC does not incorporate this change because it may result in disproportionate penalties. The Class C and D misdemeanors are

virtually¹²²⁵ the lowest-level crimes in the D.C. Code and principally include charges such as shoplifting, D.C. Code § 22-3213 (brought in lieu of more severe theft charges), disorderly conduct (not meeting the threshold for an attempted assault or attempted property damage), D.C. Code § 22-1321, drug paraphernalia possession, D.C. Code § 48-1103(a), possession of an open container of alcohol, D.C. Code § 25-1001, and unlawful entry of a motor vehicle, D.C. Code § 22-1341. For RCC recommendations for these classes not only would lower the statutory maximum penalties authorized under law, but would significantly lower penalties as compared to current practice.¹²²⁶ The CCRC notes, however, that the incremental increase in punishment of 3 or 4 weeks proposed by USAO is unlikely to have a significant deterrent effect,¹²²⁷ but may significantly employment, family, and other aspects of reentry.

(5) *The CCRC recommends reinserting into RCC § 48-904.01a, possession of a controlled substance, the prior deferred disposition language that provides for expungement, consistent with current District law and notwithstanding the sealing provision in RCC § 22E-602(c).*

- This change improves the clarity of the revised statutes.

(6) *The CCRC recommends retitling subsection (c) as “Judicial deferral and dismissal of proceedings” and clarifying in commentary that the articulation of the procedure in subsection (c) is not intended to affect any other form of diversion or deferral otherwise used by the government or authorized by law.*

- This change improves the clarity of the revised statutes.

(7) *The CCRC recommends the commentary to subsection (c) include a sentence clarifying that the statutory description of a judicial deferral mechanism in subsection (c) is not intended to affect other deferral mechanisms that may be in use by the government or the court. As the comment by OAG indicates, App. C at 696, the government has several procedural means to divert and defer cases that are not intended to be affected by the present judicial mechanism in subsection (c). The CCRC will further research reform recommendations related to deferral mechanisms in the future.*

- This change improves the clarity of the revised statutes.

¹²²⁵ Currently the RCC ranks only one offense, fourth degree parental kidnapping, as a fine-only, Class E offense. See Appendices E, G.

¹²²⁶ See Appendix G - Correspondence of RCC to D.C. Code penalties.

¹²²⁷ National Institute of Justice, *Five Things About Deterrence 2* (2016).

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

(1) *PDS App. C 705-706 recommends an absolute maximum sentence for an offense at no more than 20 years of incarceration. PDS cites other research arguing for a 20 year maximum and says that penalties should not be based on “the possibility that the punishment can be longer than the life of the person being punished.” PDS says that long prison sentences “are imposed almost exclusively on Black residents,” that this “traumatizes families and perpetuates poverty by depriving families of the support and wages of incarcerated family members.” PDS says there is “no evidence that sentences beyond 20 years further community safety” citing research regarding the age-crime curve. PDS says there also is no evidence that the difference in sentencing from 20 years to 45 years deters criminal conduct. PDS says that while incarcerating older individuals “offers diminishing returns from a public safety standpoint, it comes with significant financial costs” and cites a figure on the average cost of incarceration being \$45,000 per year per individual.*

- The RCC does not adopt the PDS recommendation because it may result in disproportionate penalties. While there are many sound policy arguments for sharp reductions in the use of incarceration compared to current levels, even for the most severe crimes such as murder, the CCRC recommendations set the most severe imprisonment penalties at or near a life-long sentence in order to accommodate the very worst forms of crime. The CCRC also has structured the penalties, grading, and offense elements in the RCC cognizant that many types of criminal behavior will create liability under multiple statutes and the total penalty liability must be proportionate to the behavior as a whole—in many cases the aggregation of penalties for crimes arising from one occasion will also approach (or possibly surpass) a de facto life sentence. Imprisonment penalties at this level are expected to rare. For murder, as for all other offenses, it is expected that the District’s sentencing guidelines will provide guidance to help ensure that lower penalties are utilized in less severe circumstances. The RCC recommendation to eliminate mandatory minimum sentences provides judges the discretion to provide punishment tailored to the facts of the particular case, in contrast to the current mandatory minimum sentence of 30 years for all first degree murder convictions. Further reductions in the maximum imprisonment penalties are not recommended at this time.

RCC § 22E-604. Authorized Fines.

(1) *PDS App. C at 677-78 notes that the RCC authorizes increased fines and says that subsection (c) of the revised statute is insufficient to ensure that these fines do not burden the District's poorest residents. RCC § 22E-604(c) states: "Notwithstanding any other provision of law, a court may not impose a fine that would impair the actor's ability to make restitution or deprive the actor of sufficient means for reasonable living expenses and family obligations." PDS says that subsection (c) is subject to interpretation, there is no specified evidentiary process, and no reconsideration provision for circumstances where a fine becomes a greater burden as a result of job or housing loss or illness. PDS says that "[i]f the CCRC truly intends not to subject poor individuals to burdensome fines, it should begin to do so by precluding the imposition of fines on all defendants with court-appointed counsel." Further, PDS recommends creating a separate table for corporate defendants; no specific language is provided.*

- The RCC partially incorporates this recommendation by adding to RCC § 22E-604(c) the clause: “, and a person who is eligible for appointed counsel under D.C. Code § 11-2601 shall not be subject to a fine under subsection (a) of this section.” This additional language clarifies that a person who is indigent under standards for appointment of counsel—whether or not the person proceeds *pro se* or with appointed counsel—is not subject to the fines in subsection (a). However, the revised statute does not preclude other economic sanctions or costs described outside subsection (a). While PDS does not address the matter, categorically barring all fines for District defendants with appointed counsel may preclude assessments for the victims of violent crime fund.¹²²⁸ The increased maximum authorized fines in the RCC fines are not intended to burden poor District residents. In fact, the RCC for the first time provides language, modeled on language in the ALI’s Model Penal Code: Sentencing, that fines shall not deprive the actor of means for reasonable living expenses and family obligations—a significant protection that does not exist in current District law.¹²²⁹ While the updated RCC language regarding persons eligible for appointed counsel adds clarity, the earlier language in subsection (c) was intended to preclude fines in such

¹²²⁸ See D.C. Code § 4-516 “Assessments under this chapter shall be collected as fines. Failure to pay assessments as ordered by the Court will subject a defendant so ordered to sanctions provided pursuant to § 16-706.”); *Lopez-Ramirez v. United States*, 171 A.3d 169, 177 (D.C. 2017) (Judge Beckwith, in dissent, arguing that the “commonsense understanding” of the word fine includes assessments under the VVCCA and they should be treated as fines in the determination of jury demandability in the District).

¹²²⁹ See generally American Law Institute *Model Penal Code: Sentencing*, (2017) 6.06(6) (“No economic sanction may be imposed unless the offender would retain sufficient means for reasonable living expenses and family obligations after compliance with the sanction.”).

instances. The CCRC is well aware that in many jurisdictions burdensome fines are highly problematic, fostering a cycle of poverty and being potentially criminogenic. However, the CCRC is not aware of evidence of unfair imposition of fines being imposed on poor individuals in the District under current law,¹²³⁰ and there is no reason to believe that judges would do so under the new RCC provisions, particularly given the additional protections in RCC § 22E-604(c). The RCC commentary states that the purpose of the raised fines is to provide an alternative punishment for all persons, individuals as well as legal entities like businesses and corporations. Given that the overwhelming majority of criminal defendants are appointed counsel because they are financially unable to obtain adequate representation (D.C. Code Ann. § 11-2601), use of any fines, let alone fines that approach the maximum authorized, are likely to be rare. However, in the case that the more severe fine provisions deter or better punish a wealthy individual (or organization), their authorization is justified.¹²³¹ Notably, the RCC also already provides higher fines for organizational defendants in RCC § 22E-604(b). This change improves the clarity and proportionality of the revised statutes.

(2) *The CCRC recommends changing the word “may” to “shall” in RCC § 22E-604(c). The provision now states: “Notwithstanding any other provision of law, a court shall not impose a fine that would impair the actor’s ability...”. This better communicates that the provision is a requirement, not optional guidance.*

- This change clarifies the revised statutes.

¹²³⁰ The CCRC has reviewed fine data from Superior Court and notes that fines (besides VVCCA assessments) are very rarely imposed.

¹²³¹ American Law Institute *Model Penal Code: Sentencing* (2017) commentary to 6.04 (renumbered 6.06 in final text) (“[T]he Code would preserve, and in some instances expand, the use of economic sanctions for defendants of sufficient means, who might be strongly affected by those penalties without being driven below the threshold of reasonable law-abiding subsistence. While not a majority of offenders, there is a significant subset for whom economic penalties can further such goals as proportionate punishment, victim restitution, general deterrence, specific deterrence, and disgorgement of criminally gotten gains. As the original Code also assumed, some classes of offenses require the availability of muscular financial penalties—albeit often for use in conjunction with other sanctions (in original § 7.02(2)(a), where “the defendant has derived a pecuniary gain from the crime”). Effective criminal-justice response to many kinds of organized crime, corporate offending, environmental crime, and fraudulent financial schemes requires an array of economic penalties that can mete out punishments proportionate to the enormous monetary harms suffered by victims, disgorge illegal profits, lower the ex ante incentives of crimes involving large returns and small risks of detection, and disable the operations of criminal enterprises by depriving them of necessary resources. Indeed, historically, for crimes at the high end of the spectrum of white-collar crime, one serious problem in American law has often been the failure of state codes to authorize economic sanctions of sufficient severity to serve the purposes of deterrence and punishment. When they are enforced with seriousness and do not drive offenders into poverty, economic sanctions have advantages not shared by other forms of criminal punishments.”).

(3) *The CCRC recommends adding footnotes in the Commentary to note that the model of RCC § 22E-604(c) is the Model Penal Code: Sentencing 6.06(6). This provides a useful reference as to the intended scope and considerations behind the RCC subsection (c).*

- This change clarifies the revised statutes.

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

(1) *PDS App. C at 678 and 709 recommends that the RCC limit the government to two enhancements (including this enhancement) for each case. PDS says that: “Without a limitation on the stacking, offense grades and statutory maxima can become grossly disproportionate to the penalties imposed for other more serious offenses.”*

- The RCC does not incorporate this provision because doing so may result in disproportionate penalties. The imposition of more than two enhancements is expected to be extremely rare and, even if imposed, it would be a unique case that would justify maximum imprisonment terms under all applicable enhancements. Nonetheless, circumstances may arise where sentencing involving three or more enhancements are justified. The RCC already has greatly reduced the number and severity of applicable enhancements as compared to the current D.C. Code. Further restrictions as to the use of penalty enhancements to sharply alter the punishment available under the base offense may best be addressed in sentencing guidelines.

(2) *PDS App. C at 679 and 709 recommends elimination of the repeat offender penalty enhancement and the pretrial release penalty enhancement. PDS cites research noting that enhancements for prior convictions target older individuals who may have longer criminal records and are closer to aging out of crime. PDS also says that, if the enhancements are retained, the CCRC clarify that the enhancements are determined based on the classification of the unenhanced, base offense.*

- The RCC partially incorporates this recommendation by clarifying in these two statutes,¹²³² their commentary,¹²³³ and supporting documents¹²³⁴ that the magnitude of each of these enhancements is determined by the classification of the base offense (not an enhanced version of the offense).

¹²³² The RCC has added the following language to RCC § 22E-606 and RCC § 22E-607: “provided that the determination of the offense class under subsection [] of this section shall be based on the offense penalty before application of any additional penalty enhancements.”

¹²³³ A footnote now provides this example: “For example, consider a person who commits offense fourth degree assault under RCC § 22E-1202(d) and that offense is subject to enhancement under RCC § 22E-1202(h)(7) for being against a protected person and under RCC § 22E-608 for being a hate crime. If a [] enhancement is also applied, the calculation would be based on the class of the unenhanced fourth degree assault—not, on the offense classification after application of enhancements in RCC § 22E-1202(h)(7) and/or RCC § 22E-608.”

¹²³⁴ The CCRC has updated Appendices E and G, presenting recommended penalties, to reflect this change.

- The RCC also partially incorporates this recommendation by eliminating prior paragraphs (a)(2) and (b)(3) of RCC § 22E-606 as predicates for the enhancement and imposing a ten year window for prior felony and misdemeanor convictions that are offenses against persons or enhanced burglary. Paragraphs (a)(2) and (b)(3) previously stated that the commission of two or more prior felony convictions (of any type) in the prior 10 years may trigger the repeat offender enhancement for a felony offense against person under Subtitle II or an enhanced burglary offense. The elimination of these paragraphs focuses the repeat offender enhancement on persons who not only are immediately facing a crime against persons or enhanced burglary (while armed), but have a past history of committing such a crime or crimes. For example, two or more prior convictions in the last ten years for felony crimes of distributing any quantity of a controlled substance¹²³⁵ or unauthorized use of a motor vehicle¹²³⁶ no longer trigger the felony repeat offender provision under RCC § 22E-606. The RCC also imposes a ten year limit on prior convictions being used to trigger the felony repeat offender provision under RCC § 22E-606. Research suggests both a low incidence of recidivism after a 7 year gap,¹²³⁷ and a significant drop-off in public support for increasing sentences based on prior convictions as the priors are more than 10 years or so old.¹²³⁸
- Yet, for the reasons provided in response to prior comments, the RCC does not eliminate these enhancements altogether. The CCRC agrees that raising the statutory maximum applicable to a charge under RCC § 22E-606 and also raising sentencing guidelines for a given charge based solely on the criminal history of the defendant may constitute an unfair “double” counting of prior offenses in sentencing. However, whether the D.C. Voluntary Sentencing Guidelines continue to be based solely on the charge and criminal history of the offender is not a matter within the ambit of the CCRC. Clearly the D.C. Voluntary Sentencing Guidelines will

¹²³⁵ D.C. Code § 48-904.01(a)(1).

¹²³⁶ D.C. Code § 22-3215.

¹²³⁷ See Richard S. Frase, *Criminal History Sentencing Enhancements Imprison Too Many Aging, Low-Risk Offenders* (September 20, 2017), online at <https://sentencing.umn.edu/content/criminal-history-sentencing-enhancements-imprison-too-many-aging-low-risk-offenders> (last visited 2/1/2021) citing Piquero, Alex R., David Farrington, and Alfred Blumstein, *Key Issues in Criminal Career Research*, Cambridge University Press (2007).

¹²³⁸ See Julian Roberts, *Public Attitudes Regarding Look-Back Limits: Findings from New Robina Institute Research* (September 20, 2017), online at <https://sentencing.umn.edu/content/public-attitudes-regarding-look-back-limits-findings-new-robina-institute-research> (last visited 2/1/2021) (Reviewing results of a public opinion survey and stating: “The most significant finding is that in the eyes of the public, older prior convictions carry less weight than more recent priors: the public was less punitive when the prior crime was older. In addition, there was substantial public support for look-back limits on counting prior convictions. Two-thirds of respondents were in favour of a policy that restricted judges from considering old offenses, and of those, three quarters believed the time limit should be set at ten years or less.”).

need to be updated should the RCC be adopted in the District, and it may be that the Sentencing Commission will follow the best practices in the American Law Institute (ALI) Model Penal Code: Sentencing in their updates.¹²³⁹ The ALI allows that criminal history scores may be an appropriate consideration in sentencing guidelines, but only in limited circumstances, and with due “consideration to the danger that the use of criminal-history provisions to increase the severity of sentences may have disparate impacts on racial or ethnic minorities, or other disadvantaged groups.”¹²⁴⁰ Whether there ultimately is a conflict between RCC § 22E-606 is not foreseeable and, at this time, does not preclude the CCRC recommendation to the Council for consideration.

- This change clarifies and improves the proportionality of the revised statutes.

(3) *PDS App. C at 710 recommends amending Appendix E (showing penalties for RCC offenses) “so that the main charts only show the class rankings of the offense gradations and not any enhanced rankings.” PDS says that the “problem with ranking unenhanced offenses and enhanced offenses in the same chart is that*

¹²³⁹ Model Penal Code: Sentencing § 6B PFD (2017) (Sentencing Guidelines).

¹²⁴⁰ Model Penal Code: Sentencing § 6B.07 PFD (2017)

“(1) The commission shall consider whether to include the criminal histories of defendants as a factor in the determination of presumptive sentences, as grounds for departures from presumptive sentences, or in other provisions of the guidelines. The commission shall explain and justify any use of criminal history in the guidelines with reference to the purposes in § 1.02(2).

(a) If criminal history is used for purposes of assessing offenders' blameworthiness for their current offenses, the commission shall consider that offenders have already been punished for their prior convictions.

(b) If criminal history is used for purposes of assessing an offender's risk of reoffending, the commission shall consider that the use of criminal history by itself may over-predict those risks.

(c) The commission shall give due consideration to the danger that the use of criminal-history provisions to increase the severity of sentences may have disparate impacts on racial or ethnic minorities, or other disadvantaged groups.

(2) The commission may include consideration of prior juvenile adjudications as criminal history in the guidelines, but only when the procedural safeguards attending the adjudications were comparable to those of a criminal trial. If prior juvenile adjudications are used as criminal history for purposes of assessing an offender's blameworthiness for the current offense, the offender's age at the time of the adjudicated conduct shall be a mitigating factor, to be assigned greater weight for younger ages.

(3) The commission shall fix clear limitations periods after which offenders' prior convictions and juvenile adjudications should not be taken into account to enhance sentence. The limitations periods may vary depending upon the current and prior offenses, but shall not exceed [10] years. The commission should create presumptive rules that give decreasing weight to prior convictions and juvenile adjudications with the passage of time.

(4) The commission shall monitor the effects of guidelines provisions concerning criminal history, any legislation incorporating offenders' criminal history as a factor relevant to sentencing, and the consideration of criminal history by sentencing courts. The commission shall study the experiences of other jurisdictions that have incorporated criminal history into sentencing guidelines. The commission shall give particular attention to the question of whether the use of criminal history as a sentencing factor contributes to punishment disparities among racial and ethnic minorities, or other disadvantaged groups.”).

it is confusing and could allow a practitioner to apply an enhancement based on the classification of an enhanced offense.”

- The RCC partially incorporates this recommendation by moving the Chapter 6 general penalty enhancements from the Appendix E main sheets (listing penalties for RCC offenses) into a separate sheet with a clear text note that, “Penalties for the RCC § 22E-606 and RCC § 22E-607 enhancements apply to the relevant unenhanced gradation of the offense.” However, to present an easily navigable and comprehensive picture of available penalties, Appendix E continues to list enhanced gradations of offenses when the enhancement is offense-specific (i.e., not based on Chapter 6 general enhancements). This change improves the clarity of the revised statutes.
- (4) *USAO App. C at 685 opposes limiting the felony repeat offender penalty enhancement to felony offenses under Subtitle II. USAO recommends that the enhancement apply to other offenses, “particularly to the offenses of Burglary and Arson.” USAO says that burglaries or arsons “are, in many ways, as serious as some felony offenses under Subtitle II.”*
- The RCC partially incorporates this recommendation by adding to the offenses subject to the repeat offender enhancement enhanced first and enhanced second degree burglary under RCC § 22E-2701(a)-(b), (d)(4). These crimes, also included in the RCC definition of “crime of violence,” are sufficiently serious and violent in nature to warrant categorization with other offenses against persons. In contrast, other forms of burglary and arson, which does not require any interaction or endangerment of others, are not violent toward other persons in a comparable way. This change improves the consistency and proportionality of the revised statutes.
- (5) *CCRC recommends amending the statutory language to clarify that qualifying prior convictions must be committed within ten years of the current offense being enhanced and, when two or more prior convictions are required under (a)(2)(B), (b)(1), and (b)(3), the prior convictions cannot be from the same occasion or on the same occasion as the current offense being enhanced. Although the commentary was already clear on these points, the statutory language was ambiguous. The updated language also is consistent with the updated language regarding prior convictions in RCC § 22E-4105, possession of a firearm by an unauthorized person.*
- This change improves the clarity and consistency of the revised statutes.

RCC § 22E-607. Pretrial Release Penalty Enhancement.

(1) *PDS App. C at 678 and 709 recommends that the RCC limit the government to two enhancements (including this enhancement) for each case. PDS says that: “Without a limitation on the stacking, offense grades and statutory maxima can become grossly disproportionate to the penalties imposed for other more serious offenses.”*

- The RCC does not incorporate this provision because doing so may result in disproportionate penalties. The imposition of more than two enhancements is expected to be extremely rare and, even if imposed, it would be a unique case that would justify maximum imprisonment terms under all applicable enhancements. Nonetheless, circumstances may arise where sentencing involving three or more enhancements are justified. The RCC already has greatly reduced the number and severity of applicable enhancements as compared to the current D.C. Code. Further restrictions as to the use of penalty enhancements to sharply alter the punishment available under the base offense may best be addressed in sentencing guidelines.

(2) *PDS App. C at 679 and 709 recommends elimination of the repeat offender penalty enhancement and the pretrial release penalty enhancement. PDS cites research noting that enhancements for prior convictions target older individuals who may have longer criminal records and are closer to aging out of crime. PDS also says that, if the enhancements are retained, the CCRC clarify that the enhancements are determined based on the classification of the unenhanced, base offense.*

- The RCC partially incorporates this recommendation by clarifying in these two statutes,¹²⁴¹ their commentary,¹²⁴² and supporting documents¹²⁴³ that the magnitude of each of these enhancements is determined by the classification of the base offense (not an enhanced version of the offense). However, for the reasons provided in response to prior comments, the RCC does not eliminate these enhancements. The CCRC recognizes that maintaining sentencing guidelines for a given charge based solely on the criminal history of the defendant may constitute an unfair “double” or “triple” counting of prior offenses in sentencing. This may be a

¹²⁴¹ The RCC has added the following language to RCC § 22E-606 and RCC § 22E-607: “provided that the determination of the offense class under subsection [] of this section shall be based on the offense penalty before application of any additional penalty enhancements.”

¹²⁴² A footnote now provides this example: “For example, consider a person who commits offense fourth degree assault under RCC § 22E-1202(d) and that offense is subject to enhancement under RCC § 22E-1202(h)(7) for being against a protected person and under RCC § 22E-608 for being a hate crime. If a [] enhancement is also applied, the calculation would be based on the class of the unenhanced fourth degree assault—not, on the offense classification after application of enhancements in RCC § 22E-1202(h)(7) and/or RCC § 22E-608.”

¹²⁴³ The CCRC has updated Appendices E and G, presenting recommended penalties, to reflect this change.

consideration for the Council, however, whether and how the D.C. Voluntary Sentencing Guidelines continue to be based on criminal history is not a statutory matter currently within the ambit of the CCRC. This change clarifies and improves the proportionality of the revised statutes.

RCC § 22E-608. Hate Crime Penalty Enhancement.

(1) *PDS App. C at 678 recommends that the RCC limit the government to two enhancements (including this enhancement) for each case. PDS says that: “Without a limitation on the stacking, offense grades and statutory maxima can become grossly disproportionate to the penalties imposed for other more serious offenses.”*

- The RCC does not incorporate this provision because doing so may result in disproportionate penalties. The imposition of more than two enhancements is expected to be extremely rare and, even if imposed, it would be a unique case that would justify maximum imprisonment terms under all applicable enhancements. Nonetheless, circumstances may arise where sentencing involving three or more enhancements are justified. The RCC already has greatly reduced the number and severity of applicable enhancements as compared to the current D.C. Code. Further restrictions as to the use of penalty enhancements to sharply alter the punishment available under the base offense may best be addressed in sentencing guidelines.

(2) *OAG App. C at 644-645 suggests amendment of the latest draft to ensure the statutory language is clearly applicable to not only a person or group harmed because of prejudice against a specified attribute of that person or group, but also to any person or group harmed because of prejudice against a specified attribute (e.g. a lawyer or group of supporters for those who have the perceived attribute). OAG notes that the RCC commentary already describes the statute as having this scope, but the latest draft language appears to limit the statute to harms against a person or group that are perceived to themselves have the specified attribute. OAG suggests specific revised language to address this issue and also suggests the statute refer to the “actual or perceived race, color...”*

- The RCC partially incorporates this recommendation by replacing “the” with “a” and reorganizing the statute to clarify that the enhancement is applicable to harms inflicted because of prejudice against a specified attribute, regardless of whether the complainant person or group themselves are perceived to have the attribute. The RCC does not adopt the specific language recommended by OAG because the meaning of “business, personal, or supportive relationship to a person or group [having a specified attribute]” is unclear and may be too narrow.¹²⁴⁴ The RCC also does not adopt the language “actual or perceived” because, while most victims may actually have the perceived characteristic, it is the

¹²⁴⁴ For example, it is unclear that such a relationship exists for passersby in front of a church, mosque, or synagogue who are harmed by a criminal act that was committed because of the actor’s prejudice against the members of the church, mosque, or synagogue.

actor's perception that is critical. This change improves the clarity of the revised statute.

(3) *The CCRC recommends adding to the penalty section language stating that the enhancement is subject to a one class increase "except, for Class 1 offense, the authorized term of imprisonment and fine for an offense increases by 6 years and \$50,000." As there is no higher class than Class 1, this provides a penalty increase equal to that of the RCC repeat offender and offenses committed during release enhancements.*

- This change improves the proportionality of the revised statutes.

(4) *The CCRC recommends moving the statute's cross-reference to the definition of "gender identity or expression" in D.C. Code § 2-1401.02 to subsection (d) and making other clarificatory changes to the language in the penalty and multiple penalty enhancements subsections.*

- This change improves the clarity of the revised statutes.

RCC § 22E-610. Abuse of Government Power Penalty Enhancement.

- (1) *PDS App. C at 678 recommends that the RCC limit the government to two enhancements (including this enhancement) for each case. PDS says that: “Without a limitation on the stacking, offense grades and statutory maxima can become grossly disproportionate to the penalties imposed for other more serious offenses.”*
 - The RCC does not incorporate this provision because doing so may result in disproportionate penalties. The imposition of more than two enhancements is expected to be extremely rare and, even if imposed, it would be a unique case that would justify maximum imprisonment terms under all applicable enhancements. Nonetheless, circumstances may arise where sentencing involving three or more enhancements are justified. The RCC already has greatly reduced the number and severity of applicable enhancements as compared to the current D.C. Code. Further restrictions as to the use of penalty enhancements to sharply alter the punishment available under the base offense may best be addressed in sentencing guidelines.
- (2) *The CCRC recommends that offense-specific provisions be added to the penalty provisions of RCC § 22E-1403, blackmail, and RCC § 22E-1303, sexual abuse by exploitation that prohibit prosecution for violations of those sections and an abuse of government power penalty enhancement in RCC § 22E-610 for the same conduct. Those statutes’ relevant provisions already require as an element that the actor be in a government role.*
 - This change improves the proportionality of the revised statutes.

RCC § 22E-701. Generally Applicable Definitions.

“Amount of damage”

- (1) *The CCRC recommends in the definition of “amount of damage” replacing “before” with “at the time.” With this change, the definition refers to property’s fair market value “at the time it was destroyed” or “at the time it was partially damaged.” “Before” suggested an indeterminate amount of time before the damage or destruction and was unintentionally ambiguous.*
- This change improves the clarity and consistency of the revised statutes.

“Comparable offense”

- (1) *OAG, App. C at 668, regarding the term “comparable offense,” recommends clarifying whether the words “current District offense” refers to an offense “when the RCC was enacted, when the offense took place, when the person was charged, or when the trial took place.”*
- The RCC adopts this recommendation and the commentary will be updated to clarify that the words “current District offense” refers to the time that the comparable offense was committed.
 - This change improves the clarity of the revised statutes.

“Consent”

- (1) *USAO App. C at 685 recommends in the definition of “consent” two changes related to culpable mental states. First, USAO recommends adding “in fact” to subsection (B)(i) “to clarify that the relevant inquiry, for purposes of subsection (B)(i), is whether the person “in fact” is legally incompetent to authorize the conduct, and does not require a higher mental state by the actor.” Second, recommends “replacing the words ‘is believed by the actor to be’ with the words ‘the actor knew or should have known is[.]’” because “[t]he objective reasonableness of the actor’s belief is important.”*
- The RCC partially incorporates this recommendation by striking the current phrase “believed by the actor to be” and relying exclusively on the mental states specified in the particular offense or defense language (the term is used frequently in both situations) where the term consent is used. As a general matter the RCC does not include defined culpable mental states in any definitions because, under RCC § 22E-207 rules of interpretation applicable to culpable mental state requirement, a defined culpable mental state applies to all the following terms until another such culpable mental state is specified. Inserting “knowing” or “in fact” into a definition would have the effect of changing culpable mental states for the following elements in a non-transparent way. As the phrase “believe by the actor to be” may be confusing in this way, it is eliminated in the updated definition. In addition, the updated commentary on the definition of “consent” specifically notes that: “There is no culpable mental state

specified in the definition of consent,¹²⁴⁵ rather the use of the term in particular RCC offenses determines what culpable mental state applies.” As used throughout the RCC, a reasonable belief, recklessness or knowledge is required as to the term “consent” (and “effective consent”) in nearly all instances. This change improves the clarity and proportionality of the revised statutes.

- (2) *OAG App. C at 668-69 recommends deleting from the definition of “consent” subparagraph (C) the phrase “by a subsequent word or act.” OAG say that the language is superfluous.*
 - The RCC does not adopt the recommendation because it would make the statute less clear. There may be confusion as to whether consent or lack of consent is a wholly internal, subjective phenomena akin to “willingness.” Neither the current D.C. Code definition nor the RCC intends such a meaning and inclusion of the words “by a subsequent word or act” helps clarify that point.
- (3) *The CCRC recommends that the definition of “consent” be amended to refer to “mental disability” instead of “mental illness or disorder,” and “legally unable to authorize the conduct” instead of “legally incompetent to authorize the conduct.” Neither change is intended to substantively change the definition. Reference to “mental disability” instead of “mental disease or defect” is consistent with the language in RCC § 22E-504, Mental disability defense, which broadly refers to both short-term and long-term mental conditions affecting cognition and behavioral controls. Reference to “legally unable” clarifies that the provision refers broadly to a person unable to provide consent for any reason (e.g. a court ruling) and not only mental fitness.*
 - This change improves the clarity and consistency of the revised statutes.

“Crime of violence”

- (1) *The CCRC has defined the term “crime of violence” which in the RCC is used solely in the revised RCC § 22E-4105 Possession of a Firearm by an Unauthorized Person statute. The revised definition is similar in scope to the definition of “crime of violence” in current D.C. Code § 23-1331(4). See commentary to “crime of violence” in RCC § 22E-701.*
 - This change improves the clarity of the revised statutes.

¹²⁴⁵ The RCC differs somewhat from the Model Penal Code in this respect, the former potentially allowing for a lower culpable mental state (e.g. recklessness) than the latter’s specification that the lack of reasonable judgment be “manifest” or “known.” See Model Penal Code § 2.11 (“Unless otherwise provided by the Code or by the law defining the offense, assent does not constitute consent if... (b) it is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense[.]”). The RCC approach of not specifying a culpable mental state in the definition of “consent also avoids also avoids changing the culpable mental state applicable to following offense elements after the term. See Rules of Interpretation Applicable to Culpable Mental State Requirement in RCC § 22E-207.

“Deceive” and “Deception”

- (1) *The CCRC recommends in the RCC definition of “deceive” and “deception” deleting “known” from sub-subparagraph (A)(iv). With this change, the sub-subparagraph reads, in relevant part: “For offenses against property in Subtitle III of this title, failing to disclose a lien, adverse claim, or other legal impediment to the enjoyment of property” It is unnecessary to include a culpable mental state in the definition. The relevant RCC property offenses codify any necessary culpable mental states.*
- This change improves the clarity and consistency of the revised statutes.

“Dwelling”

- (1) *PDS App. C 679 recommends that the definition of “dwelling” be amended to include the phrase “at the time of the offense” as per the prior draft. PDS notes that the RCC’s latest revision striking that phrase was intended to be non-substantive, but PDS says that the phrase is: “critical to ensuring that a structure that was originally designed as a dwelling and that might even retain a number of design-elements common to dwellings - e.g., a bathtub in the bathroom - but that no longer serves the actual function of a dwelling would not be included in the definition of ‘dwelling.’”*
- The RCC (re-)incorporates the phrase “at the time of the offense”, as recommended by PDS. The definition now reads: “‘Dwelling’ means a structure that at the time of the offense is either designed or actually used for lodging or residing overnight, including, in multi-unit buildings, communal areas secured from the general public.” The inclusion of this language may help avoid a misconception in this instance. This change improves the clarity of the revised statute.

“Ghost gun”

- (1) *The CCRC recommends adding as a defined term “ghost gun,” with a cross-reference to “the meaning specified in D.C. Code § 7-2501.01.” Addition of this term is necessary due to the inclusion of the term in RCC § 22E-4101, possession of a prohibited weapon or accessory. The term recently was defined and added to D.C. Code § 22-4514 (Definitions [for firearm offenses]) because the term was also added to D.C. Code § 22-4514 (Possession of certain dangerous weapons prohibited; exceptions) by the recently enacted Omnibus Public Safety and Justice Amendment Act of 2020 (projected law date May 18, 2021). Accordingly, the CCRC recommends inclusion of the term in RCC § 22E-701 and the revised possession of a prohibited weapon or accessory statute, RCC § 22E-4101.*
- This change improves the clarity, consistency, and proportionality of the revised statutes.

“Movie theater”

(1) *The CCRC recommends codifying the RCC definition of “movie theater” in RCC § 22E-701 and making the definition applicable to all statutes in the RCC. In the previous RCC draft compilation, the definition of “movie theater” was limited to RCC § 22E-2106, Unlawful Operation of a Recording Device in a Movie Theater (previously Unlawful Operation of a Recording Device in a Motion Picture Theater). The definition has not changed since the previous RCC draft compilation. In the current RCC draft compilation, the only additional RCC statutes that use the term “movie theater” are the obscenity offenses in RCC §§ 22E-1805 – 1810. The commentaries to those offenses discuss the RCC definition of “movie theater.”*

- This change improves the clarity and consistency of the revised statutes.

“Official custody”

(1) *The CCRC recommends replacing the previous definition of “official custody”¹²⁴⁶ with the definition of “custody”—“full submission after an arrest or substantial physical restraint after an arrest.” With this change, the revised definition of “official custody” is now “full submission after an arrest or substantial physical restraint after an arrest.” This change distinguishes custody after an arrest from custody in other contexts in the RCC, such as parental custody. The previous definition of “official custody” is deleted for the reasons discussed in this Appendix for the RCC sexual abuse by exploitation offense (RCC § 22E-1303).*

- This change improves the clarity and consistency of the revised statutes.

“Open to the general public”

(1) *The CCRC recommends revising the definition of “open to the general public” to exclude from the definition locations requiring proof of “identity” and include locations that generally require a “security screening” rather than a “security screening for dangerous items.” The identity requirement in the previous draft*

¹²⁴⁶ RCC § 22E-701 previous defined “official custody” as:

- (A) Detention for a legitimate police purpose, or detention following or pending:
 - (i) Arrest or surrender in lieu of arrest for an offense;
 - (ii) A charge or conviction of an offense, or an allegation or finding of juvenile delinquency;
 - (iii) Commitment as a material witness; or
 - (iv) Civil commitment proceedings, extradition, deportation, or exclusion;
- (B) Custody for purposes incident to any detention described in subparagraph (A) of this paragraph, including transportation, medical diagnosis or treatment, court appearance, work, and recreation.

would categorically include as a category private members-only clubs and similar locations. Because a security screening reasonably might be for things other than dangerous items (e.g., outside food or bottles at an entertainment venue) that provision is expanded and it may include proof of identity. The commentary has an additional sentence added stating: “The term includes location where there is a security screening, such as a District government building, or a location where proof of age is required, such as a restaurant serving alcohol.”

- This change improves the clarity and consistency of the revised statutes.

“Payment card”

(1) *The CCRC recommends editing the definition of “payment card” to remove the phrase “description of the instrument.” The definition includes the number inscribed on a card, and the phrase “description of the instrument” is redundant.*

- This change improves the clarity of the revised statutes.

“Personal identifying information”

(1) *The CCRC, regarding the term “personal identifying information,” recommends replacing the words “shall include the following” with the word “means.” Technically this changes the scope of the definition by indicating that the list of items is exhaustive. However, subsection (N) of the definition is catch-all provision that includes “any information that can be used to access a person’s financial resources, access medical information, obtain identification, act as identification, or obtain property.” With this catch-all provision this change makes little, if any, substantive change to the definition.*

- This change improves the clarity of the revised statutes.

“Position of trust with or authority over”

(1) *PDS, App. C at 679-80, objects to including in the definition of “position of trust with or authority over” in subsection (A) a “child of a parent’s sibling,” or first cousin (“A . . . child of a parent’s sibling, or an individual with whom such a person is in a romantic, dating, or sexual relationship, whether related by: (i) Blood or adoption; or (ii) Marriage, domestic partnership, either while the marriage or domestic partnership creating the relationship exists, or after such marriage or domestic partnership ends.”). PDS states that including first cousins by adoption, marriage, or domestic partnership “extends liability without clear evidence that relationships between first cousins, including cousins who are not biologically related and who may have little family-based contact with another . . . carry a heightened risk of coercion.” PDS states that a “would-be complainant is just as likely to have an independent non-family-based relationship with the child of an aunt or uncle’s ex-spouse” and that criminalizing an otherwise consensual relationship “serves to protect no one.” PDS states that if “the RCC employs this expansive definition, it should also import into the definition . . . a requirement like that in RCC § 22E-1308, incest, that one party obtains the*

- consent of the other by undue influence.” It is unclear whether PDS recommends striking a “child of a parent’s sibling” entirely from the definition or narrowing the provision to biological relationships.*
- The RCC incorporates this recommendation by deleting “a child of a parent’s sibling” from subsection (A). The RCC incest statute would provide liability for a sexual act or sexual contact where a first cousin that is at least 16 years of age obtains the apparent consent of the complainant by undue influence, and, depending on the ages of the parties, there may be liability for first degree, second degree, fourth degree, or fifth degree sexual abuse of a minor. This change improves the clarity, consistency, and proportionality of the revised statutes.
- (2) *PDS recommends in the definition of “position of trust with or authority over” deleting any individual with whom a biological half-sibling is in a romantic, dating, or sexual relationship. PDS states that “there is no evidence-based reason for prohibiting all consensual sexual conduct between one half-sibling and someone with whom another half-sibling is in a romantic, dating, or sexual relationship.” PDS states that if “the RCC employs this expansive definition, it should also import into the definition . . . a requirement like that in RCC § 22E-1308, incest, that one party obtains the consent of the other by undue influence.”*
- The RCC incorporates this recommendation by deleting from subsection (B) an individual with whom a biological half-sibling is in a romantic, dating, or sexual relationship. Subsection (B) is now limited to a half-sibling related by blood. This change improves the clarity, consistency, and proportionality of the revised statutes.
- (3) *OAG, App. C at 669, in the definition of “position of trust with or authority over” objects to replacing “contractor” with “contract employee” in subsection (F). In the previous RCC draft compilation,¹²⁴⁷ the CCRC recommended replacing “contractor” with “contract employee,” stating that “contract employee” “appears more accurate because it refers to the individual hired on a contract basis as opposed to the individual that does that the hiring” and noting that the current D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes include a “contract employee.” OAG states that this change is “not correct” and “blurs the distinction between a contractor and an employee.” OAG further states that “the suggestion that the word ‘contractor’ could refer to the one doing the contracting rather than the person whose services are contracted is incorrect” because “[a] contractor is ‘a person or company that undertakes a contract to provide materials or labor to perform a service or do a job.’” OAG does not discuss the use of “contract employee” in subsection (G) of the definition, or in the RCC sexual abuse by exploitation statute (RCC § 22E-1303).*
- The RCC replaces “contract employee” with “contractor” in subsections (F) and (G) of the definition, as well as in the RCC sexual abuse by exploitation statute (RCC § 22E-1303). This change improves the clarity and consistency of the revised statutes.

¹²⁴⁷ App. D2 at 59.

“Prior conviction”

- (1) *USAO App C at 686 recommends the definition of “prior conviction” be revised to strike the phrase “a conviction that is subject to completion of a diversion program or” in (B). USAO says that: “There could be certain diversion programs whereby, as a result of successful completion of a diversion program, a charge is reduced to a lesser charge, such as a felony charge being reduced to a misdemeanor conviction.” USAO also says: “This misdemeanor conviction would and should still qualify as a “prior conviction” ... [and], in many cases, successful completion of a diversion program would not result in a conviction at all.”*
 - The RCC adopts the USAO recommendation, striking the language as specified. The current RCC language is unclear as to the scope of the reference to diversion, but appears to be overbroad by including convictions that are allowed to stand post-diversion proceedings. This change improves the clarity of the revised statutes.
- (2) *USAO App C at 686 recommends the definition of “prior conviction” be revised to delete the word “clemency.” USAO says that “clemency” includes a commutation, which is a reduction in sentence that does not negate the conviction.*
 - The RCC adopts the USAO recommendation, striking the language as specified. The fact of the prior conviction, left intact by commutation, logically should remain a prior conviction under the definition. This change improves the clarity and may improve the proportionality of the revised statutes.

“Public safety employee”

- (1) *The CCRC recommends replacing what was previously subsection (C) of the revised definition of “public safety employee” (“Any federal, state, county, or municipal officer performing functions comparable to those performed by the District of Columbia employees described in paragraph (A) and paragraph (B)”) with a new subsection (B) (“Any other on-duty firefighter, emergency medical technician/ paramedic, emergency medical technician/intermediate paramedic, or emergency medical technician operating in the District of Columbia”). With this change, the revised definition excludes investigators, vehicle inspection officers, and code inspectors from other jurisdictions unless they are employed by the District (subsection (C)). The revised definition still includes firefighters and EMTs from other jurisdictions as long as they “are operating in the District,” which is consistent with the scope with the RCC definition of “law enforcement officer” as it pertains to members of other jurisdictions’ police forces.¹²⁴⁸*

¹²⁴⁸ Subsection (A) of the revised definition of “law enforcement officer” RCC § 22E-701 is “An officer or member of the Metropolitan Police Department of the District of Columbia, or of any other police force operating in the District of Columbia.” (emphasis added).

- This change improves the clarity, consistency, and proportionality of the revised statutes.
- (2) *The CCRC recommends in the revised definition of “public safety employee” requiring that the specified individuals in subsections (A), (B), and (C) be “on-duty.” This is consistent with the requirement in subsections (B)-(G) of the RCC definition of “law enforcement officer” that specified individuals who are not police officers be “on-duty.”*
- This change improves the clarity, consistency, and proportionality of the revised statutes.

“Revoked or canceled”

- (1) *The CCRC has defined the term “revoked or canceled,” which is used in the revised payment card fraud offense. The definition specifies when a payment card is deemed to have been revoked or canceled, such that its use constitutes payment card fraud. Prior versions of the RCC included this definition within the payment card fraud statute, and the definition has been moved unchanged to RCC § 22E-2202.*
- This change improves the clarity and consistency of the revise statute.

“Value”

- (1) *The CCRC recommends assigning a “value” of \$10.00 to a payment card alone and a “value” of \$10.00 to an unendorsed check alone in subsection (C) of the revised definition of “value.” With this change, subsection (C) reads: “Notwithstanding subsections (A) and (B) of this section, the value of a payment card alone is \$10.00 and the value of an unendorsed check alone is \$10.00.” Subsection (C) was recommended in previous compilations of the draft statutes, but the specific value amount was bracketed for future determination. As is discussed in the commentary to the definition of “value,” assigning a nominal value to a payment card or unendorsed check avoids disparate valuation of these items based upon available credit or money in a bank account. These nominal values do not apply to the use or attempted use of the payment card or check to obtain or attempt to obtain property.*
- This change improves the clarity, consistency, and proportionality of the revised statutes.

RCC § 22E-1101. Murder.

(1) *USAO, App. C at 686-689, recommends including first and second degree criminal abuse of a minor and first and second degree criminal neglect of a minor as predicate offenses for felony murder.*

- The CCRC partially incorporates this recommendation. The second degree murder statute has been amended to include first degree criminal abuse of a minor, when the actor knowingly causes serious bodily injury, but does not include criminal neglect of a minor.
- Including second degree criminal abuse of a minor, or first degree criminal abuse of a minor without requiring that the actor knowingly causes serious bodily injury would improperly broaden the murder statute and impose disproportionately severe penalties. Criminal abuse of a minor covers *recklessly* causing bodily injuries to minors. Because of this culpable mental state difference, including first and second degree criminal abuse of a minor as predicate offenses to felony murder would equate *recklessly* causing the death of a minor with *intentionally* causing the death of a minor. For example, a parent who drives too fast in icy conditions with his child in the backseat resulting in a car crash that causes significant or serious injury to the child may be convicted of first or second degree criminal abuse of a minor. If the child tragically dies from the injuries, the parent is blameworthy, but he is not as culpable as if he had intentionally killed his child. The felony murder rule in general equates accidental homicide with intentional homicide, but all other predicate offenses under the RCC’s murder statute require that the defendant *knowingly* engages in wrongful and dangerous conduct. As USAO has previously noted, “[a]ll felony murders involve ¹²⁴⁹ [intentional]” While this is often true when other predicate offenses that require knowing conduct, it is not the case with criminal abuse of a minor which only requires reckless conduct.
- USAO notes that particularly egregious child abuse cases, for example involving “prolonged period of torture” that result in the death of a child, warrant murder liability. In egregious cases in which a person intentionally or recklessly with extreme indifference to human life causes the death of a child, the RCC provides murder liability subject to penalty enhancements.
- USAO notes that there may be cases in which a person engages in repeated incidents of abuse that cause non-fatal but significant injuries that leave the child more vulnerable to subsequent abuse. For example, USAO notes that if a “child is beaten and has broken ribs or a lacerated liver, the child may not immediately die, but following a subsequent beating, the same conduct may cause the child’s death.” USAO says that in some cases the government may not be able to prove that the defendant intentionally, or recklessly with extreme indifference to human life,

¹²⁴⁹ App. C at 497.

caused the death of the child. While the loss of a young life in these circumstances is tragic, a murder charge against the actor, most likely a parent, who did not intend to cause and was not extremely reckless as to the death of their child is disproportionate. In these cases, the defendant may still be liable for enhanced involuntary manslaughter *and* separate criminal abuse of a minor charges based on the prior separate incidents and the sentencing judge may order the sentences be served consecutively. These penalties provided by the RCC are proportionately severe in cases in which a person did not act intentionally, or recklessly with extreme indifference to human life.

- USAO also recommends that first and second degree criminal *neglect* of a minor should be included as a predicate offense to felony murder. Including these offenses as predicates for felony murder would impose disproportionately severe penalties relative to the defendant's culpability. In the particularly egregious cases cited by USAO, it is likely that alternate theories of murder liability would apply. For example, if parent knows that a child has suffered extremely severe injuries that require medical attention, but refuse to seek medical care, resulting in the child's death, depraved heart murder liability may apply. When a person with a duty of care over a child, such as a parent, fails to act, that *omission* may be sufficient grounds for liability.
- Similarly, USAO cites to a case, *United States v. Morris*, and states that a small child was burned in scalding water, had cigarette burns on her body, and suffered severe blunt force traumas to her head and abdomen, and was strangled and smothered to death. USAO states that in this case, the jury acquitted the defendant of murder and found him guilty of the lesser included offense of involuntary manslaughter. CCRC staff does not have access to the actual evidence presented in this case or the view of the facts as they appeared to defense counsel, but if the facts as described by USAO were actually proven, the CCRC believes such conduct would sustain a depraved heart murder conviction under the RCC, subject to a penalty enhancement. Having available for review only the published D.C. Court of Appeals opinion in *Morris*, the CCRC cannot further assess the facts of the particular case or the USAO summary.
- Although the most egregious cases, such as the ones described in USAO's comments are subject to murder liability under the RCC, USAO's proposal would extend murder liability to serious but much less egregious cases. First and second degree criminal neglect of a minor require the actor recklessly creates a substantial risk that a child would suffer injury or death. If the defendant then *negligently* causes the death of the child, under USAO's proposal murder liability would apply. Consider the following hypothetical: a child falls ill and the child's parent is aware that without medical care there is a substantial risk that complications may arise that require hospitalization. Failure to obtain medical care would constitute second degree criminal neglect. However, the parent genuinely, but mistakenly and unreasonably, believes that there is no risk to the

child's life. If the parent does not obtain medical care, and the child then dies of complications from the illness, under USAO's proposal the parent's conduct would constitute murder. While the parent's behavior in this hypothetical is highly irresponsible and warrants criminal sanction, it would be disproportionate to treat such behavior as equivalent to intentionally killing the child.

- USAO notes that in some cases, it may be difficult to prove that a defendant acted with the requisite intent for murder. While undoubtedly true, that is not a justification for lowering the culpability requirements. Murder is rightly deemed the most serious offense in American criminal law precisely because it requires a high degree of culpability. Reckless or negligent tragedy does not warrant the highest condemnation under criminal law. The RCC provides proportionate penalties in these cases that reflect the defendant's lesser degree of culpability.
- (2) USAO, *App. C at 712-713* says it “continues to oppose lowering the penalty for Murder, particularly for First Degree Murder.” USAO says, “Premeditated first degree murder is the most serious criminal offense that can be committed [and] [t]he penalty for this offense should be commensurate with the seriousness of this offense....” USAO cites a research article which states that, “an emerging theme in the literature is that offenders that are convicted of homicide offenses, including 1st degree murder, are more likely than other offenders to subsequently perpetrate lethal violence relative to offenders that have never committed a homicide.”¹²⁵⁰ USAO says, “[g]iven these findings [by DeLisi], the penalty for first degree murder under current law is essential to protect the community from offenders who are significantly more likely to commit additional murders and other violent offenses.”
- The RCC does not incorporate the USAO recommendation to increase murder penalties to 60 years for unenhanced first degree murder¹²⁵¹ and life without release for enhanced first degree murder¹²⁵² because it may result in disproportionate penalties.
 - USAO's comment does not address the rationale or supporting facts for the RCC setting statutory penalties for enhanced and unenhanced first degree murder at 45 and 40 years, respectively--to provide what are effectively “life with possibility of release.”¹²⁵³ Authorities vary on what imprisonment term constitutes a *de facto* life without parole (LWOP) sentence, but recent case law indicates that a term of 50 years is an effective LWOP sentence for *juvenile* offenders.¹²⁵⁴ The federal Bureau of Prisons (BOP) calculates persons incarcerated for a “life” sentence,

¹²⁵⁰ Matt DeLisi, et al., *Who will kill again? The forensic value of 1st degree murder convictions*, Forensic Science International: Synergy 1 (2019) at 12.

¹²⁵¹ D.C. Code § 22-2104.

¹²⁵² D.C. Code § 22-2104.01.

¹²⁵³ Commentary to RCC § 22E-603.

¹²⁵⁴ See *People v. Contreras*, 4 Cal. 5th 349, 369, 411 P.3d 445, 455 (2018), as modified (Apr. 11, 2018) (“[O]ur conclusion that a sentence of 50 years to life is functionally equivalent to LWOP is consistent with the decisions of other state high courts.”)

including District inmates in BOP custody, as serving a 470 month (39 years and two months) sentence based on their life expectancy.¹²⁵⁵ In the District, the life expectancy of black men is just under 69 years.¹²⁵⁶ The RCC Class 1 and 2 maximum penalties of 45 and 40 years mean that without early release a 25 year old adult could still be incarcerated until they are 70 or 65, in the range of their current life expectancy. An 18 year old without early release could be incarcerated until they are 63 or 58, about five to ten years short of their current life expectancy.

- Establishing the most severe RCC Class 1 and Class 2 penalties as life with the possibility of release is strongly supported by the recent sentencing recommendations of the American Law Institute (ALI).¹²⁵⁷ The *ALI Model Penal Code: Sentencing* recommends that, except in jurisdictions where it is the only alternative to the death penalty, imposition of the most severe penalty in criminal law should be life imprisonment with a “meaningful possibility of release before the prisoner’s natural death.”¹²⁵⁸ The rationale for the ALI rejection of life imprisonment without release is grounded not only in a realistic assessment of life expectancy but in skepticism as to the abilities of a sentencing judge: “Natural-life sentences rest on the premise that an offender’s blameworthiness cannot change substantially over time—even very long periods of time. The sanction denies the possibility of dramatically altered circumstances, spanning a prisoner’s acts of heroism to the pathos of disease or disability, that might alter the moral calculus of permanent incarceration. It also assumes that rehabilitation is not possible or will never be detectable in individual cases. Such compound certainties, reaching into a far-distant future, are not supportable.”¹²⁵⁹

¹²⁵⁵ See United States Sentencing Commission, Sourcebook 2017 Appendix A, at S-166 (“[L]ife sentences are reported as 470 months, a length consistent with the average life expectancy of federal criminal offenders given the average age of federal offenders.”).

¹²⁵⁶ See D.C. Department of Health, *District Of Columbia Community Health Needs Assessment, Volume 1* (March 15, 2013) at 16; Roberts, M., Reither, E.N. & Lim, S. *Contributors to the black-white life expectancy gap in Washington D.C.*, Sci Rep 10, 13416 (2020).

¹²⁵⁷ The ALI is a longstanding, leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law. Its diverse national membership includes judges, scholars, and practitioners of law. Over the course of eight years, the organization drafted and approved an update to the sentencing provisions in the ALI *Model Penal Code*. The *Model Penal Code: Sentencing* was approved April 10, 2017 and the final text is available online at https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/mpcs_proposed_final_draft.pdf.

¹²⁵⁸ *Model Penal Code: Sentencing* (Am. Law Inst., 2017), Comment k(2) at 159. (“With one narrow exception, the revised Code continues the policy judgment of the original Code that the most severe sanction in the criminal law should be a life prison term with a meaningful possibility of release before the prisoner’s natural death. In a departure from the Institute’s previous position, the Code now also concedes the policy advisability of life prison sentences with no prospect of release—the equivalent of “life without parole” in some systems—but only when this sanction is the sole alternative to a death sentence.”). As the District is not a death penalty jurisdiction, the ALI recommendation is to reject a life without possibility of release sentence.

¹²⁵⁹ *Model Penal Code: Sentencing* (Am. Law Inst., 2017), Comment k(2) at 162.

- Data from other jurisdictions indicates that for those in prison for murder and non-negligent manslaughter (combined), 39.6% served less than 10 years before their first release, 50% served 13.4 years or less before their first release, and 69.6% served less than 20 years before their first release.¹²⁶⁰
- In terms of general deterrence of crime, research indicates that lengthy prison sentences—and even the death penalty—do little or nothing to deter criminal behavior.¹²⁶¹ Given the extraordinary length and severity of a 40-45 year sentence an individual released after such a period generally would not be expected to pose a public safety threat.
- In terms of recent District practice, over the 2010-2019 period, all District sentences for all charges other than aggravated first degree murder were for fewer than 40 years as far as the analysis indicates (presenting sentences at the 97.5 quantile).¹²⁶² However, a significant number of aggravated (enhanced) first degree murder sentences were for 40 years or more, and it is reasonable to estimate that up to a quarter of the term-of-years adult sentences for aggravated murder from 2010-2019 were higher than the RCC Class 1 and 2 maximum penalties would allow.¹²⁶³ While the CCRC has not completed an analysis of all aggravated first degree murder convictions receiving sentences for 40 years or more, it appears that many (if not most or all) those sentences were for individuals who faced additional criminal charges and/or convictions for which additional imprisonment time would be authorized under the RCC. Consequently, in practice, it is not clear whether and to what extent individuals convicted of aggravated murder under the current D.C. Code and sentenced to 40 in the RCC would face less incarceration time
- The CCRC recognizes that there may be reasonable disagreement about the appropriate sentences for first degree murder and enhanced first degree murder based on differing opinions about the seriousness of the offenses. Some, contrary to the RCC recommendation and the recommendation of

¹²⁶⁰ U.S. Department of Justice Bureau of Justice Statistics, *Time Served in State Prison, 2016*, NCJ 252205 (November 2018) at 2, 3.

¹²⁶¹ See, e.g., National Institute of Justice, *Five Things About Deterrence* NCJ 247350 (May 2016) at 1, 2 (citing relevant research and summarizing that, “There is no proof that the death penalty deters criminals,” and “Increasing the severity of punishment does little to deter crime.”).

¹²⁶² CCRC Research Memorandum #40 - Statistics on District Adult Criminal Charges and Convictions, Appendix D (Last in Time analysis). Note that 97.5 % (a high as the analysis goes) of sentences for *unenhanced* first degree murder were under 40 years.

¹²⁶³ The same analysis of adult dispositions over the timespan 2010-2019 shows that for other than “felony murder” forms of first degree murder, including both aggravated and unenhanced charges, the 75th quantile of sentences was 40 years, the 90th quantile was 45 years, and 95th quantile was nearly 50 years. The analysis also showed that for “felony murder” first degree murder, including both aggravated and unenhanced charges, the 75th quantile of sentences was 42.5 years, the 90th quantile was 60 years, and 95th quantile was nearly 62 years. Combined, convictions for all forms of first degree murder (felony murder and non-felony murder, enhanced and unenhanced) totaled 168 during the 2010-2019 period. CCRC Research Memorandum #40 - Statistics on District Adult Criminal Charges and Convictions, Appendix D (Last in Time analysis).

the ALI and other authorities, that lifelong imprisonment without release is necessary to reflect the seriousness of an enhanced murder offense. The USAO position on the “seriousness of the offense,” App. C at 712 has support.

- However, the CCRC does not believe that life without release sentences or sentences higher than the 40 and 45 year maximums are necessary for public safety or deterrence. The CCRC disagrees with the USAO assertion that current D.C. Code statutory maximum penalties of 60 years and life without release are “essential to protect the community.” The public safety¹²⁶⁴ and deterrence¹²⁶⁵ rationales for life without release and effective life without release sentences are not supported in expert literature.
- USAO says that, “[a]lthough social science has long shown that the risk an individual will commit a violent offense declines as the individual ages, ‘an emerging theme in the literature is that offenders that are convicted of homicide offenses, including 1st degree murder, are more likely than other offenders to subsequently perpetrate lethal violence relative to offenders that have never committed a homicide.’” App. C at 712. However, this and the following USAO quotations of a recent criminology article by Professor Matt DeLisi et al.¹²⁶⁶ does not establish a public safety need for maximums higher than in the RCC or life without release. CCRC has reviewed the article and notes the following.
 - The DeLisi et al. article cites many prior studies that found no significant correlation between prior and future lethal offending and, to the extent Professor DeLisi’s conclusions find support in other research papers, there are two concerns. First, due to the relative infrequency of murder, most of the studies cited in support had a sample size of about 100 people of whom very few are homicidal recidivists. In fact, even in studies with larger samples, homicidal recidivists were found to be incredibly uncommon. A

¹²⁶⁴ Offenders may recidivate at any age, including after completion of a 40 or 45 year sentence. However, if the risk of recidivism by such older individual justifies 60 year and life without release sentences, a similar standard would need to be applied to those convicted of lesser crimes who, based solely on their age at release, are much more likely to recidivate. See U.S. Sentencing Commission, *The Effects of Aging on Recidivism Among Federal Offenders* (December 2017) at 30 (“Among offenders released younger than age 21, 67.6 percent were rearrested compared to 13.4 percent of those released age 65 or older. The pattern is consistent across age groups, as age increases recidivism by any measure declined. Older offenders who do recidivate do so later in the follow-up period, do so less frequently, and had less serious recidivism offenses on average.”).

¹²⁶⁵ See U.S. Department of Justice, National Institute of Justice, *Five Things About Deterrence*, NCJ 247350 (May 2016) at 1 (“1. The *certainty* of being caught is a vastly more powerful deterrent than the punishment... 2. Sending an individual convicted of a crime to prison isn’t a very effective way to deter crime... 3. Police deter crime by increasing the perception that criminals will be caught and punished... 4. Increasing the severity of punishment does little to deter crime... 5. There is no proof that the death penalty deters criminals.”).

¹²⁶⁶ Matt DeLisi, et al., *Who will kill again? The forensic value of 1st degree murder convictions*, Forensic Science International: Synergy 1 (2019) at 12.

study that was cited in the DeLisi et al. article as a counterargument had a sample size of 1088 convicted murderers and only 3 committed another murder upon release. Second, many of the papers investigate whether the offender had committed, rather than been convicted of, a murder prior to the one they were presently charged with. Based on the length of time between murders described in one of the studies, for example, the offenders had clearly not been convicted of the initial murder. In fact, the RCC's penalty for first degree murder is far longer than the longest gap (11 years) the study had between murders.

- In terms of the research of DeLisi et. al., there are at least four important points. First, the study sample is not representative of the demographics of those charged with murder in D.C.. Only 30 percent of the sample was African American whereas about 90 percent of felony convictions in D.C. are of African Americans. Additionally, historically serial killers are non-African American – meaning that there is likely a higher proportion of serial killers in this sample than among those convicted of murder in DC. Second, the strongest effect on likelihood of future lethal behavior in DeLisi's research was not prior murders but age. Not only was age more strongly correlated with likelihood of future killing (by an order of magnitude) but each additional year of age decreased the odds of committing murder by 4 percent. *Third, the authors found no significant correlation between prior first-degree murder and the likelihood of future murder. The authors say that there are significantly increased odds, but these odds still do not reach statistical significance.* The significant correlation the authors found is between among those currently incarcerated on multiple homicide charges and prior first-degree murder. However, this refers to only about 80 people of their over 680 offender sample and the authors make no comment as to whether this significant correlation was driven by the handful of offenders who are currently incarcerated for five or more murder charges. Fourth, while DeLisi et al. recognize that many convicted murders suffer from mental illnesses, such as schizophrenia and addiction, it appears that no psychiatric data was collected or analyzed as part of the study. Without this data, it is impossible to know whether mental illness has a mediating affect on the relationship between prior and future lethal behavior.

(3) *PDS, App. C at 680-681, objects to applying felony murder liability in cases in which the defendant did not commit the lethal act.*

- The CCRC adopts this recommendation and recommends changing felony murder under the revised second degree murder statute to require that the actor commits the “lethal act”—this updated recommendation reflects an earlier draft that was commented on by the Advisory Group. Under this update, a person may only be convicted as a principal of felony murder if

the person actually committed the lethal act during the course of committing or attempting to commit an enumerated felony. If a person who committed or attempted to commit an enumerated felony who did not cause the lethal act may only be held liable for the death of another under a different theory of liability. The CCRC also recommends deleting paragraph (f)(3), which had provided a defense in cases in which the actor did not commit the lethal act. This defense is unnecessary due to the requirement that the actor commit the lethal act. Upon further examination of the procedural issues involved, the prior (f)(3) defense recommendation does not seem practical and the “lethal act” requirement more directly addresses possible proportionality concerns with the felony murder portion of the statute. This change improves the clarity and proportionality of the revised criminal code.

- (4) *The CCRC recommends amending the murder statute to specify that knowingly causing the death of another constitutes second degree murder. This is a clarificatory change and is consistent with current District law. Knowingly causing the death of another is recognized as a form of second degree murder under current District law, and would have satisfied the requirements of depraved heart murder under the prior version of the murder statute. This change merely clarifies that knowingly causing the death of another constitutes second degree murder.*

- This change improves the clarity of the revised statute.

- (5) *The CCRC recommends adding subsection (g) to the murder statute, which bars accomplice liability for felony murder—this updated recommendation reflects an earlier draft that was commented on by the Advisory Group. Under the principles of accomplice liability established in RCC § 22E-210, a person is guilty as an accomplice if the person purposely assists another in conduct constituting the offense, and has the culpable mental state required for the offense. Because felony murder requires that the actor negligently causes death, a person who purposely assists in the predicate felony with negligence that death could result could be liable as an accomplice to felony murder. A person could be convicted of murder even if that person did not actually kill another person, did not intend that anyone be killed, and was not even aware of a risk that anyone would be killed. Equating this relatively lower degree of culpability to a person who intentionally kills another is disproportionately severe.*

- This change improves the proportionality of the revised criminal code.

- (6) *The CCRC recommends amending the list of predicate offenses for felony murder to include second degree sexual abuse of a minor and first degree assault. These statutes require knowingly or purposely perpetrating a major felony crime and their inclusion is consistent with other offenses that already are predicates for felony murder.*

- This change improves the proportionality of the revised criminal code.

- (7) *The CCRC recommends amending the murder statute with a new subsection (h) to clarify merger of murder and other felonies that arise from a single act or course of conduct. If a person is convicted of felony murder under paragraph (b)(3), the convictions for second degree felony murder and the predicate felony merge and*

the court follows the procedures for merger in RCC § 22E-214(b) and (c). Subsection (h) does not otherwise control merger and the commentary makes clear that, subject to the general merger provision in RCC § 22E-214, there may be multiple convictions for second degree murder under paragraphs (b)(1) or (b)(2) and a predicate offense—and sentences may run consecutive or concurrent as decided by the sentencing judge.

- This change improves the clarity and proportionality of the revised criminal code.

(8) *The CCRC recommends amending subsection (c) of the revised statute to specify the culpable mental state “in fact” as to “the actor was unaware of the risk, but would have been aware had the actor person been sober.” While this subsection is an unusual rule of liability, practically it will be treated as a defense so clarifying what culpable mental states, if any, apply to the subsection is necessary. The updated language clarifies that there is no additional culpable mental state requirement as to being unaware of the risk when the actor would have been so aware if the actor had been sober. Note also that the definition of “self-induced intoxication” in RCC § 22E-209 itself specifies certain culpable mental states that must be proven.*

- This change clarifies the revised statutes.

(9) *The CCRC recommends replacing the term “custody” in subparagraph (d)(3)(C) with the term “official custody.” As is discussed in this Appendix for RCC § 22E-701, what was previously the definition of “custody” is now the definition of “official custody.” The definition itself is unchanged.*

- This change improves the clarity and consistency of the revised statutes.

RCC § 22E-1102. Manslaughter.

- (1) *PDS, App. C at 681, makes the same objection to “felony manslaughter” under paragraph (a)(2) as it does to felony murder under the revised second degree murder statute.*
 - The CCRC adopts this recommendation, as discussed above in commentary for RCC § 22E-1101.
 - This change improves the proportionality of the revised statutes.
- (2) *The CCRC recommends amending the manslaughter statute to specify that knowingly causing the death of another constitutes voluntary manslaughter. This is a clarificatory change and is consistent with current District law. Knowingly causing the death of another is recognized as a form of manslaughter under current District law, and would have satisfied the requirements of depraved heart manslaughter under the prior version of the manslaughter statute. This change merely clarifies that knowingly causing the death of another constitutes voluntary manslaughter.*
 - a. This change improves the clarity of the revised statute.
- (3) *The CCRC recommends amending new paragraph (a)(3), which criminalizes negligently causing the death of another while committing an enumerated felony in accordance with changes to felony murder under the second degree murder statute. For further discussion of these changes, see commentary for RCC § 22E-1101.*
 - a. These changes improve the proportionality and consistency of the revised statutes.
- (4) *The CCRC recommends adding subsection (e) to the murder statute, which bars accomplice liability for felony murder.*
 - a. This change improves the proportionality of the revised criminal code.
- (5) *The CCRC recommends amending the list of predicate felonies under (a)(3) in conformity with changes made the paragraph (b)(3) of the revised murder statute.*
 - a. This change improves the proportionality and consistency of the revised statutes.
- (6) *The CCRC recommends amending subsection (c) of the revised statute to specify the culpable mental state “in fact” as to “the actor was unaware of the risk, but would have been aware had the actor person been sober.” While this subsection is an unusual rule of liability, practically it will be treated as a defense so clarifying what culpable mental states, if any, apply to the subsection is necessary. The updated language clarifies that there is no additional culpable mental state requirement as to being unaware of the risk when the actor would have been so aware if the actor had been sober. Note also that the definition of “self-induced intoxication” in RCC § 22E-209 itself specifies certain culpable mental states that must be proven.*
 - a. This change clarifies the revised statutes.
- (7) *The CCRC recommends amending the manslaughter statute with a new subsection (f) to clarify merger of voluntary manslaughter and other felonies that arise from a single act or course of conduct. If a person is convicted of voluntary*

manslaughter under paragraph (a)(3), the convictions for voluntary manslaughter and the predicate felony merge and the court follows the procedures for merger in RCC § 22E-214(b) and (c). Subsection (f) does not otherwise control merger and the commentary makes clear that, subject to the general merger provision in RCC § 22E-214, there may be multiple convictions for voluntary manslaughter under paragraphs (a)(1) or (a)(2) and a predicate offense—and sentences may run consecutive or concurrent as decided by the sentencing judge.

- a. This change improves the clarity and proportionality of the revised criminal code.

RCC § 22E-1201. Robbery

(1) *OAG, App. C at 645-646, recommends that the robbery statute be amended to include a fourth degree, which would include any taking when the property “is so attached to the victim or their clothing as to require actual force to effect its removal or when the victim is put in fear by the taking.” OAG says that “[t]he Commentary can make clear that the force has to be more than trivial.” OAG recommends the new fourth degree robbery be a Class B misdemeanor (180 days maximum). In support of the expansion of the RCC robbery statute, OAG says it “supports limiting third degree robbery to where actual, as opposed to theoretical force is used[, h]owever, limiting the offense to where the victim was moved or immobilized or when the property was removed from the victim’s hand or arms narrows the offense too much.” OAG says that, “While we agree that third degree robbery should not be broad enough to support a robbery complaint when the victim does not realize that the property was taken, a victim who has had property taken directly from them certainly believes that they have been robbed and, they have been under current law.” OAG does not provide specific statutory language for its recommended fourth degree.*

- The RCC does not incorporate this recommendation because it may result in disproportionate penalties. Robbery under the RCC is intended to criminalize takings from persons that involve the intentional use of force or threats, as distinct from mere pickpocketing or theft from the area around a person. Robbery includes takings by communicating, explicitly or implicitly, that the actor will cause bodily injury.
- OAG raises hypothetical cases in which an actor, without causing pain to the complainant (which would constitute bodily injury), rips property off a person’s clothing or a bag from a person’s arm. In such cases a menacing glare or other gestures may constitute an implicit communication that resistance to the taking will be met with force, enabling the taking and rendering it a robbery under the RCC. While takings from the person may be quite frightening when discovered and merit a criminal sanction, absent the use of force or explicit or implicit threats to effect the taking, labeling such conduct as “robbery” may inaccurately suggest a higher degree of violence than what is involved in these takings. Robbery under the RCC

includes taking property from the complainant's hands a clear, limited exception to this approach, since taking property from someone's immediate grasp may be especially likely to provoke some measure of resistance.

- The CCRC notes that OAG's recommendation is reasonable in that taking property attached to a person's clothing may be nearly as startling or frightening as taking property from a person's hands, and the penalties OAG has proposed are similar to those in the RCC.¹²⁶⁷ However, the CCRC continues to recommend that the robbery offense only criminalize takings that involve intentional uses of force or threats, with the sole exception of taking property from a person's hands or arms. The CCRC declines to apply the "robbery" label to pickpocketing that does not involve intentional use of force or threats. The current D.C. Code and proposed RCC definition of "crime of violence" both refer broadly to "robbery," but under the RCC pickpocketing that doesn't include a threat or bodily injury would be theft from a person and outside the definition of a "crime of violence."
- Many jurisdictions similarly have a crime of "theft from a person" that differentiate non-violent takings from a person, as compared to robbery.¹²⁶⁸

(2) *OAG App. C at 700-701 recommends adding language to the penalty enhancement in subparagraph (e)(5)(B) to read: "Two classes when the actor commits the offense under sub-paragraph (b)(3)(A) or sub-paragraph (c)(1)(A) by recklessly displaying or using what, in fact, is a dangerous weapon and that the display or use of the dangerous weapon directly or indirectly causes the injury to the complainant;" (added language underlined). OAG says that the current text of the statute either does not require that the display of the dangerous weapon directly or indirectly causes the bodily injury, contrary to the commentary, or the statutory text relies on the word "by" for that meaning.*

- The RCC adopts the additional language recommended by OAG, with a slight modification to delete the word "that." This change clarifies the revised statute.

¹²⁶⁷ The current RCC theft from the person as described in OAG's hypotheticals is subject to a maximum term of imprisonment of 1 year under the RCC, but has no offense specific enhancements and is not subject to the general repeat offender enhancement. The OAG proposal would expand the scope of third degree robbery—subject to a Class 9, 2 year penalty, with additional offense-specific and repeat offender enhancements—to include takings of anything, "so attached to the victim or their clothing as to require actual force to effect its removal or when the victim is put in fear by the taking [directly from the person]." The OAG proposal also would create a new fourth degree robbery—subject to a Class B, 180 day maximum, but with an array of additional offense-specific and repeat offender enhancements—to include any takings "directly from a victim" even "when the victim does not realize that the property was taken."

¹²⁶⁸ See, e.g., N.J. Stat. Ann. § 2C:20-2; Tex. Penal Code Ann. § 31.03; and Mich. Comp. Laws Ann. § 750.357.

(3) *PDS App. C at 709 PDS recommends that the explanatory note for robbery include clarification that the enhancements authorized by RCC §22E-606 and §22E-607 enhance the unenhanced robbery gradation.*

- The RCC adopts the PDS recommendation, clarifying in commentary for robbery and other offenses against persons which reference the applicability of Chapter 6 enhancements that, “If general penalty enhancements under RCC §22E-606 or §22E-607 apply to this offense, the penalty for RCC §22E-606 and §22E-607 shall be based on the classification of the relevant unenhanced gradation of this offense.” This change clarifies the revised commentary.

(4) *USAO App. C at 711-712 recommends that the penalty enhancement in subsection (c)(5)(A)(II) increase the penalty classification by two classes, rather than one class. USAO says that, “there should be a single enhancement that increases the penalty classification by two classes where the defendant used or displayed what, in fact, is a dangerous weapon or imitation dangerous weapon.” USAO also says that, “At a minimum, a maximum penalty of 8 years imprisonment (rather than 4 years) is appropriate for all armed robberies.” USAO says this penalty is “consistent with recent Superior Court practice, citing statistics from Appendix G.¹²⁶⁹*

- In addition to its prior responses regarding robbery penalties, the RCC does not adopt the USAO recommendation because it would be inconsistent with other RCC penalty distinctions between brandishing a dangerous weapon and causing injury with the weapon, and may result in disproportionate penalties.
- The CCRC notes that this is one of the few RCC penalty recommendations that would appear to impact more than the top 5-10% of current sentences issued for similar cases in Superior Court practice.¹²⁷⁰ The CCRC

¹²⁶⁹ Specifically, USAO states the following: “For robbery, between 2010 and 2019, the 0.5 quantile for imprisonment was 33 months, the 0.75 quantile for imprisonment was 54 months, the 0.9 quantile for imprisonment was 72 months, the 0.95 quantile for imprisonment was 84 months, and the 0.975 quantile for imprisonment was 108 months. (App. G, Line 157.) 27.7% of convictions were enhanced. (App. G, Line 157.) The bottom of the sentencing guideline range for robbery (a Group 6 offense) for a person with the lowest criminal history score is 18 months, and the bottom of the sentencing guideline range for a person with the highest criminal history score is 42 months. The bottom of the sentencing guideline range for armed robbery (a Group 5 offense) for a person with the lowest criminal history score is 36 months, and the bottom of the sentencing guideline range for a person with the highest criminal history score is 84 months. Moreover, for assault with intent to rob, between 2010 and 2019, the 0.5 quantile for imprisonment was 42 months, the 0.75 quantile for imprisonment was 60 months, the 0.9 quantile for imprisonment was 85.8 months, the 0.95 quantile for imprisonment was 120 months, and the 0.975 quantile for imprisonment was 169.5 months. (App. G, Line 45.) 45.6% of convictions were enhanced. (App. G, Line 45.) Most likely, many of these enhanced convictions for assault with intent to rob would be similar to Enhanced Third Degree Robbery (or Enhanced Second Degree Robbery) under the RCC.”

¹²⁷⁰ For all the discussion of statistics in this entry, see the last-in-time analysis in CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions and Appendix G. Memo #40 also includes important caveats on the CCRC analysis of court data.

estimates that 20-50% of armed robbery sentences currently issued in Superior Court would fall above the new RCC maximum due to this issue raised by USAO about the penalty enhancement in subsection (c)(5)(A)(II). A more precise estimate of the impact of the RCC recommendation is not possible because of how current court statistics (and the current District robbery statute under D.C. Code § 22–2801) are organized. The current statistics and robbery statute do not differentiate between robberies where a person brandishes versus inflicts bodily injury with a dangerous weapon (the difference between a Class 8/4 year and Class 7/8 year penalty) or between any of these instances and cases where the person robbed experiences a significant bodily injury and a dangerous weapon is brandished versus used to inflict the injury (the difference between a Class 7/8 year and Class 6/12 year penalty). It simply isn't known how many cases have these types of facts.

- In assessing court practice there is also a major confounding influence of mandatory minimum penalties for robbery convictions being enhanced with the while-armed enhancement in D.C. Code § 22–4502, preventing judges who otherwise find that a lower penalty would be appropriate from imposing a penalty less than 5 years when a firearm is possessed (used or brandished or hidden entirely) during a robbery. About two-thirds of the enhanced robbery sentences (nearly all of which are for while-armed enhancements) are at or below the 5 year mandatory minimum in D.C. Code § 22–4502 for robbery while possessing a firearm (used or brandished or hidden entirely). The current mandatory minimum statutory requirements also informed the structure of the current voluntary sentencing guidelines' recommendations for sentencing. Per the RCC, there would be no mandatory minimum penalties, and the effect on judicial practice and possible changes to the voluntary sentencing guidelines is unclear.
- Criminal history, which affects judicial application of sentencing guidelines and the availability of repeat offender enhancements, is another factor. Unenhanced third degree robbery is a Class 9 offense, subject to a 180 day repeat offender statutory enhancement under RCC § 22E-606 for a person with a prior history of robbery or any other felony crimes against persons.
- Notably, if the USAO recommendation were adopted, the CCRC estimates the RCC penalties would then accommodate 95-100% of current sentences given in Superior Court practice for armed robbery. Again, there are difficulties in a precise estimate given the operation of current District law, the effect of mandatory minimums, and sentencing guidelines. However, the 8 year (96 month) maximum penalty recommended by USAO for any robbery involving use or display of a dangerous weapon would accommodate 90-95% of all robbery sentences that were enhanced

due to a dangerous weapon—i.e., from 2010-2019, 90-95% of all adult robbery convictions that were enhanced (nearly all of which were because of a while-armed enhancement) had a sentence of 96 months or less. Moreover, the RCC robbery penalties provide more severe maximums where the complainant experiences significant bodily injury or serious bodily injury (up to 18 years), so the 5-10% of armed robbery court sentences that were above 8 years (96 months) are to some undeterminable extent covered by these more severe RCC penalties. It may well be that, with adoption of the USAO recommendation here, there would be no necessary impact on current District sentencing of while armed robbery penalties.¹²⁷¹

- The CCRC also notes that the decision about penalties for this particular aspect of robbery is particularly consequential as robbery is the most common felony offense prosecuted in the District, and more than a quarter of robbery convictions are enhanced (almost all with a while-armed enhancement).
- In sum, the CCRC notes that most current Superior Court armed robbery penalties currently cluster in a fairly narrow band, between 4 years and 8 years in length. As noted above, the CCRC estimates that the current RCC recommendation to raise robbery penalties one class under subsection (c)(5)(A)(II) has the potential to preclude somewhere in the range of 20% or more of current armed robbery sentences, requiring lower sentences as compared to current practice. The CCRC estimates that the USAO recommendation to raise the penalty under subsection (c)(5)(A)(II) by two classes would mean that 0-5% of current armed robbery sentences would have to be reduced under the new maximum penalty. Overshadowing all of current court practice, however, are the current mandatory minimums in D.C. Code § 22-4502, and it is unclear to what extent current judicial practice would be to give lower sentences but for that statutory bar on their assessment of what is proportionate.
- Current practice is only part of the relevant considerations, as critical as it is to assessing how impactful changes to robbery in the RCC may be. The CCRC recommendation regarding subsection (c)(5)(A)(II) is based primarily on a distinction that court data does not track and the USAO recommendation thinks is inapt—the distinction between brandishing a dangerous weapon and using a dangerous weapon to inflict bodily injury during a robbery. The RCC robbery statute, consistent with many other RCC offenses against persons, provides escalating penalties for differences between hidden possession, display, and use of a dangerous

¹²⁷¹ This is not to say that lowering statutory maximums would have no impact on judicial sentencing even if the new maximums would accommodate all current court sentences. Lower statutory maximums could have indirect effects on sentencing through the effects on plea bargaining and charge bargaining.

weapon. All these circumstances merit more severe penalties as compared to crimes without any involvement of a dangerous weapon because there is a risk of greater harm. From the perspective of both the actor and complainant, however, these distinctions as to hidden danger, threatening but no physical harm, and physical harm matter significantly. All RCC robbery penalties, including the lowest levels, are classified as felonies, and the RCC provides heightened penalties in all instances when a dangerous weapon is part of the robbery.¹²⁷²

(5) *USAO App. C at 714 states that it “continues to oppose decreasing the penalty for carjacking.” USAO says that “carjacking is a significant intrusion into a person’s personal space, and a carjacking is a violation of that sense of personal space,” and the offense “also results in the loss of what is often a more significant asset than is lost in another form of robbery.” USAO cites several features of the CCRC analysis of court data and notes that: “The 0.75 quantile and 0.9 quantile, however, reflect instances where the court thought the circumstances of the case merited a higher sentence than was required by the mandatory minimum.” USAO concludes that, “[t]he CCRC’s proposal to make unarmed carjacking punishable by a maximum of 4 years imprisonment (48 months) would therefore have the effect of significantly lowering the maximum penalty available for this offense.” USAO’s current comments do not specify what maximum punishment it would recommend.*¹²⁷³

- The RCC does not adopt the USAO recommendation because it would be inconsistent with other RCC penalties, and may result in disproportionate penalties. The CCRC takes a quite different view of how to interpret current court statistics than that presented by USAO, principally because of the confounding effect of mandatory minimum requirements in current law and the broad scope of conduct covered by the current carjacking statute. The RCC would make a major change to the available statutory penalties for armed and unarmed carjacking-type behavior, but whether and to what extent the CCRC classifications for carjacking/robbery would change current practice is unclear because of the confounding effect of current mandatory minimums.
- In addition to its prior responses regarding robbery penalties (carjacking is treated as a form of robbery in the RCC), the CCRC notes that this is one of the few RCC penalty recommendations that would appear to impact more than the top 5-10% of current sentences issued for similar cases in

¹²⁷² Note that while the RCC robbery statute does not itself have an enhancement for having a hidden dangerous weapon during the robbery, other RCC offenses provide additional liability to the robbery in those possession-type instances. See, e.g., Possession of a Dangerous Weapon During a Crime under RCC § 22E-4104; Carrying a Dangerous Weapon under RCC § 22E-4102.

¹²⁷³ Previously, however, USAO has opposed elimination of mandatory minimum penalties for carjacking. App. C at 548. USAO also has previously recommended carjacking be a class 5 offense and armed carjacking a class 4 offense. App. C at 426.

Superior Court practice.¹²⁷⁴ Many unenhanced and enhanced (armed) carjacking sentences currently issued in Superior Court likely would fall above the new RCC maximum. A more precise estimate of the impact of the RCC recommendation is not possible, however, because of how current court statistics (and the current District robbery statute under D.C. Code § 22–2801 and carjacking under D.C. Code § 22–2803) are organized. The current court statistics and robbery and carjacking statutes do not differentiate between robberies/carjackings that involve bodily injuries of any sort or involve kidnapping-type conduct (where the victim is in the vehicle). Court statistics and current law. The current court statistics and armed robbery and carjacking statutes (enhanced under D.C. Code § 22–4502 and D.C. Code § 22–2803(b)) also do not differentiate between robberies/carjackings that involve mere possession (hidden) of a dangerous weapon, brandishing a dangerous weapon, and use of a dangerous weapon. It simply isn't known how many cases have these different types of facts.

- The RCC provides, for carjacking-type cases the following penalties under the robbery statute (with additional felony penalties under the RCC if there is also a kidnapping or possession but not displaying or using a dangerous weapon, as well as repeat offender and other enhancements)¹²⁷⁵.
 - Second degree robbery (for unarmed carjacking-type activity), maximum 4 years where the taking of the vehicle is by a threat or causing a bodily injury (any pain) or moving a person (e.g., a push).
 - Second degree robbery (for some unarmed carjacking-type activity) enhanced when one or more of the complainants is elderly, a minor, or another type of “protected person,” maximum 8 years.
 - Second degree robbery (for some armed carjacking-type activity) enhanced by using or displaying what is, in fact, a dangerous weapon or imitation dangerous weapon, maximum 8 years.
 - Second degree robbery (for some armed carjacking-type activity) enhanced by inflicting significant bodily injury with a dangerous weapon, maximum 12 years.

¹²⁷⁴ For all the discussion of statistics in this entry, see the last-in-time analysis in CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions and Appendix G. Memo #40 also includes important caveats on the CCRC analysis of court data.

¹²⁷⁵ See RCC § 22E-1401, Kidnapping. Note that while the RCC robbery statute does not itself have an enhancement for having a hidden dangerous weapon during the robbery, other RCC offenses provide additional liability to the robbery in those possession-type instances. See, e.g., Possession of a Dangerous Weapon During a Crime under RCC § 22E-4104; Carrying a Dangerous Weapon under RCC § 22E-4102. See also RCC Chapter 6 general penalty enhancements applicable to robbery/carjacking.

- First degree robbery (for some unarmed or armed carjacking-type activity) where the complainant experiences serious bodily injury, maximum 12 years.
- First degree robbery (for some armed carjacking-type activity) when the complainant experience serious bodily injury by using or displaying what is, in fact, a dangerous weapon or imitation dangerous weapon, maximum 18 years.
- The RCC range of 4-18 years (not counting additional liability for weapon possession and/or kidnapping that may be applicable) is differentiated by factors that are almost entirely ignored under current robbery/carjacking law, which differentiates only on whether the actor had a dangerous weapon available to them at the time of the offense. Consequently, it is hard to make any intelligent estimate of how current court sentences for adult carjacking and armed carjacking, which over a 10 year period have ranged up to a maximum of 16.5 years (97.5% percentile), would map on to the RCC penalty levels. For example, the while-armed distinction in current carjacking law does not give insight as to the degree of injury (if any) experienced during an unarmed carjacking. For many forms of unarmed carjacking, the RCC provides penalties of 8 years or more (and 75-90% of current sentences for unarmed carjacking are 8 years or less).
- Notably, there are relatively few adult convictions for carjacking, armed or unarmed, with about 2 armed and 8 unarmed convictions annually, on average, in the period 2010-2019.
- However, perhaps the most confounding factor to reliance on court sentencing statistics as a basis for what carjacking-type offenses should be is the effect of the mandatory minimum requirements currently in place, 7 years (84 months) for unarmed carjacking and 15 years (180 months) for armed carjacking. For unarmed carjacking, 50-75% of all sentences were at the mandatory minimum; for armed carjacking, 95-97.5% of sentences were at the mandatory minimum. Those statistics strongly suggest that in most cases judges would find a lower penalty proportionate, but for the mandatory minimum requirement in law. The effect of the mandatory minimum also may play an important role in charge and plea bargaining for carjacking-type behavior.
- Current practice is only part of the relevant considerations, as critical as it is to assessing how impactful changes to carjacking/robbery in the RCC may be. The RCC provides felony level penalties for all forms of carjacking, whether or not there is any bodily injury, with escalating penalties depending on the level of physical harm and/or use or display of a firearm, and the victim characteristics. This approach treats carjacking as essentially similar to all other forms of robbery, though involving property of higher value. In the most severe forms of carjacking-type behavior where a person is actually moved by the actor (e.g. confined in

the vehicle), an actor is separately and in addition subject to major felony liability under the RCC kidnapping statute.

RCC § 22E-1202. Assault.

- (1) *The CCRC recommends for third degree and fourth degree assault separating the penalty enhancement for the display or use of an imitation dangerous weapon from the penalty enhancement for the display or use of a dangerous weapon. With this change, recklessly displaying or using what, in fact, is an imitation dangerous weapon receives a penalty increase of one class in both third and fourth degrees, and recklessly displaying or using what, in fact, is a dangerous weapon receives a penalty increase of either two classes (third degree) or three classes (fourth degree). This is consistent with the penalty enhancements for the revised robbery statute (RCC § 22E-1201). It is also consistent with the gradation scheme in the revised assault statute, where the display or use of a dangerous weapon in the lower gradations of the offense receives multiple penalty bumps—either two classes (third degree) or three classes (fourth degree)—to account for the discrepancy between a low-level actual harm and a potentially very serious harm that might have occurred through use of the dangerous weapon. When the item at issue is an imitation dangerous weapon, however, there is a lower likelihood of serious harm and a consistent one class penalty increases is proportionate. The penalty enhancements for second degree assault do not change because they already capped at a consistent one class increase, and there are no penalty enhancements for first degree assault, the most serious gradation of the offense.*

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(2) *OAG App. C at 669 recommends, in a comment on RCC § 22E-1202, Assault, changing all references in exclusions to liability in all offenses from “conduct specifically permitted by a District statute or regulation” to “conduct specifically permitted by a District statute.” OAG says that it “does not oppose codifying an exclusion from liability when District law specifically permits the actor’s actions” but also says “[a]n agency cannot, by rule, carve out an exemption to a criminal statute.” OAG cites no legal authority.*

- The RCC does not adopt the OAG recommendation at this time because it may make the revised statutes less clear and proportionate. The OAG comment does not address the specific regulatory example provided in the commentary: “For example, Title 22, Health, of the current D.C. Municipal Regulations, has regulations that will satisfy the exclusion from liability.¹²⁷⁶” CCRC notes that the OAG comment may be based on general legal doctrine regarding separation of powers and the ability of executive (regulatory) authorities to curtail legislatively-enacted statutes. However, while legal challenges may arise from regulatory efforts to carve unforeseen exceptions to a legislatively-enacted statute, this does not impinge on the right of the legislature to establish rules of criminal liability based on compliance or failure to comply with executive-branch regulations—which is essentially what is being done by the RCC. Though phrased in terms of a defense (an exclusion to liability) rather than an element of an offense, the legislature can affirmatively choose to exclude from criminal liability conduct that is legally authorized by a regulation. The CCRC would welcome the opportunity to review legal authority in support of the OAG position on this matter.

¹²⁷⁶ For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

RCC § 22E-1204. Criminal Threats.

(1) *OAG App C at 646-47 recommends that the Commentary add a hypothetical to show that this offense includes the scenario where a threat is made to person A that they intend to harm person B, even if that threat is not communicated to person B. OAG notes that the relevant Criminal Jury Instruction 4.130, threats say, “Beard v. U.S., 535 A.2d 1373, 1378 (D.C. 1988), makes clear that the defendant need not intend that the threat be communicated to the victim and that it need not actually be communicated to the victim, so long as someone heard the threat. See also U.S. v. Baish, 460 A.2d 38, 42 (D.C. 1983); Joiner v. U.S., 585 A.2d 176 (D.C. 1991).”*

- The RCC incorporates this recommendation by adding to the commentary the statement, with a footnote, that: “However, the government is not required to prove that the target of the threat is the one to whom the communication is made.¹²⁷⁷ This change improves the clarity of the revised statute.

¹²⁷⁷ For example, assuming other elements of the offense are satisfied, it would be enough for the actor to tell a friend that the actor will kill person Z even if the friend never communicates that to person Z and the actor didn't intend the threat to reach person Z. See *Beard v. U.S.*, 535 A.2d 1373, 1378 (D.C. 1988); *U.S. v. Baish*, 460 A.2d 38, 42 (D.C. 1983); *Joiner v. U.S.*, 585 A.2d 176 (D.C. 1991).

RCC § 22E-1205. Offensive Physical Contact.

(1) *USAO, App C at 689-90, recommends revising the commentary for the revised offensive physical contact offense to “clarify that there could still be liability for non-violent sexual touching as Offensive Physical Contact, even if there could no longer be liability for non-violent sexual touching as Assault.” In particular, USAO refers to this text in the Commentary to Subtitle II: “The RCC offensive physical contact statute generally criminalizes offensive physical contacts that fall short of inflicting ‘bodily injury.’ However, the RCC abolishes common law non-violent sexual touching assault that is currently recognized in DCCA case law, and depending on the facts of the case, there may be liability under RCC Chapter 12 offenses, RCC weapons offense, or sex offenses under RCC Chapter 13.” USAO states that “the Commentary to this offense implies that the CCRC may abolish liability under the Offensive Physical Contact provisions for non-violent sexual touching as well.”*

- The RCC incorporates this recommendation by revising the text to read (footnotes omitted):

The RCC offensive physical contact statute generally criminalizes offensive physical contacts that fall short of inflicting “bodily injury.” Offensive physical contact that satisfies the RCC offensive physical contact offense may be sexual in nature. However, depending on the facts of the case, other offenses in the RCC may provide more serious liability for offensive touching that is sexual in nature such as other RCC Chapter 12 offenses, RCC weapons offenses, or RCC sex offenses in Chapter 13. The RCC abolishes common law non-violent sexual touching assault that is currently recognized in DCCA case law.

This change improves the clarity and consistency of the revised statutes.

(2) *USAO, App. C at 690, recommends including in the revised offensive physical contact statute that, for non-violent sexual touching, “Where the complainant is under 16 years of age, or where the complainant is under 18 years of age and the defendant is in a position of trust with or authority over the complainant, consent is not a defense.” For complainants under the age of 16 years, USAO states that this language incorporates the DCCA’s holding in Augustin v. United States, 240 A.3d 816, 828 (D.C. 2020), that “as a matter of statutory interpretation, 16 years is the age of consent for non-violent sexual touching prosecuted as simple assault, so consent is not a defense to non-violent sexual touching when the complainant is under 16 years of age.” For complainants under the age of 18 years, USAO states that its proposed language is contrary to the DCCA’s holding in Augustin,¹²⁷⁸ but, that as a “matter of policy,” the language should be included.*

¹²⁷⁸ USAO states that in *Augustin*, the DCCA held that “as a matter of statutory interpretation, consent is a defense to non-violent sexual touching when the complainant is 16 years of age or older, regardless of

- The RCC does not incorporate this recommendation because it is inconsistent with the requirements for liability in the RCC offensive physical contact offense. Offensive physical contact is not a sex offense, although conduct that is sexual in nature and meets the statutory requirements may satisfy the RCC offensive physical contact offense (RCC § 22E-1205). However, in the case of minors with an adult, such sexual misconduct can be, and generally should be, more proportionately charged under the RCC sexual abuse of a minor (RCC § 22E-1302) and RCC sexually suggestive conduct with a minor (RCC § 22E-1304) offenses, to which consent is not a defense. Also, note that the RCC definition of “consent” does not specify any specific ages, which allows for evaluation of the specific facts of the case (e.g. the conduct involved, the ages of other participants, and the relationship between the participants). But, depending on the circumstances, a person under 16 years of age may be unable to give effective consent as the term is defined.
 - Notably, the kiss at issue in *Augustin* would likely satisfy the RCC sexually suggestive conduct with a minor offense, which prohibits any kissing with the required intent¹²⁷⁹ as opposed to “placing one’s tongue in the mouth of the child or minor,” and if so charged, there would be no consent defense.¹²⁸⁰
- (3) *USAO App C at 711-712 recommends increasing the penalties for offensive physical contact and enhanced versions of the offense all by one penalty class. USAO says that the harm caused by first degree offensive physical contact (causing the complainant to come into contact with bodily fluid or excrement) is similar to fourth degree assault (infliction of bodily injury). USAO also says that second degree offensive physical contact (causing the complainant to come into*

whether the complainant and the defendant are in a significant relationship, as defined in D.C. Code § 22-3001(10).”

¹²⁷⁹ As in current law, the RCC sexually suggestive conduct with a minor statute requires an intent to sexually arouse or gratify that the non-violent sexual touching form of assault does not. *See, e.g., Augustin v. United States*, 240 A.3d at 826 (“stating that “the simple assault offense requires only “the intent to do the proscribed act.””) (quoting *Mungo v. United States*, 772 A.2d 240, 246 (D.C. 2001)).

¹²⁸⁰ As the DCCA noted in *Augustin*:

The simple assault can be committed by sexual touching conduct that does not fall within the [D.C. Code sexual abuse statutes]. The present case illustrates this: appellant could never have been convicted of [misdemeanor sexual abuse of a child or minor] or any other [D.C. Code sexual abuse statutes] offense for kissing A.G. in the manner it was proved he did, because such kissing (even if non-consensual, for sexual gratification, and committed by someone in a “significant relationship” with A.G.) was not “sexually suggestive conduct,” a “sexual act,” or a “sexual contact,” within the meaning of the [D.C. Code sexual abuse statutes].

Augustin, 240 A.3d at 827.

physical contact with that person with the intent that the contact be offensive) is similar to attempted fourth degree assault (attempted infliction of bodily injury). USAO also says that, says “it would be more appropriate for non-consensual sexual touching to be a Class C misdemeanor than a Class D misdemeanor, and for it to be a Class B misdemeanor when committed against a protected person, including a child.”

- The RCC does not incorporate this recommendation because it may result in disproportionate penalties.
- When exposure to bodily fluids causes illness or pain, that is a bodily injury with liability the same as fourth degree assault. Otherwise, causing someone to come into contact with bodily fluid, while highly offensive, does not pose a physical danger. Likewise, physical contact that is designed to be and is offensive is not as serious as purposeful attempts to cause someone bodily injury. The additional months of authorized jail time under the USAO recommendation appear unnecessary and potentially disproportionate. Most adult simple assaults receive three months or lower sentences already, typically with even less time to actual serve (not suspended).¹²⁸¹ While warranting arrest and possible jailtime, these types of offensive physical contact are among the most minor of offenses and should be penalized in classes C and D.
- Regarding non-consensual sexual touching as conduct that may be charged as offensive physical contact, see the above CCRC responses to similar recommendations by USAO. The CCRC repeats again that nonconsensual sexual touching constitutes one of several types of sex crimes for which the RCC, like the current D.C. Code, provides more severe punishment¹²⁸²—typically felony-level.

¹²⁸¹ See analysis by CCRC of Superior Court data in CCRC Research Memorandum #40 - Statistics on District Adult Criminal Charges and Convictions, Appendix D (Last in Time analysis).

¹²⁸² See RCC § 22E-1301, Sexual Assault; RCC § 22E-1302, Sexual Abuse of a Minor; RCC § 22E-1304, Sexually Suggestive Conduct with a Minor; and RCC § 22E-1307, Nonconsensual Sexual Conduct.

RCC § 22E-1301. Sexual Assault.

(1) *OAG App. C at 647-648 recommends both re-inserting language providing liability for second degree sexual assault when the complainant is paralyzed, and “in addition” providing liability under first degree sexual assault for when the complainant is paralyzed. OAG says that the second degree language addressed a scenario where: “A woman has a spinal cord injury that prevents her from being able to move any part of her body...[while] in a long term nursing facility [] her ex-boyfriend comes into her room and has sexual intercourse with her against her will.” OAG says that first degree liability is also appropriate because, “When a victim is paralyzed [], the victim is aware that the rape is taking place and is traumatized to a greater degree [than in instances where a victim is drugged and asleep or unable to appraise the nature of the sexual act]. OAG also recommends comparable changes be made to sexual assaults involving sexual contacts in third and fourth degrees.*

- The RCC partially incorporates this recommendation by adding to second and fourth degree sexual assault new sub-subparagraphs (b)(2)(B)(iv) and (d)(2)(B)(iv) providing liability when the complainant is “substantially paralyzed.” This change ensures liability exists when the complainant is substantially paralyzed, but is capable of communicating willingness or unwillingness and appraising the nature of the sexual conduct (if a complainant is incapable of such communicating willingness or unwillingness, the actor faces liability under (b)(2)(B)(iii) and (d)(2)(B)(iii)). Grading in this manner the penalties for committing a sexual act or contact with a complainant that is substantially paralyzed is consistent with current District law which provides liability in second and fourth degree when the complainant is “incapable of declining participation in that sexual act.”¹²⁸³ The RCC declines to also¹²⁸⁴ include committing a sexual act or contact with a paralyzed complainant as first degree and third degree sexual assault because doing so would be inconsistent with the core gradation distinctions in current District law and the RCC which provide higher penalties for committing the offense by the use of physical force, by threats of bodily harm, or by administering a substance without consent that impairs the complainant. Second and fourth degree sexual assault continue to carry very high penalties under the RCC and the penalties would be subject to the vulnerable adult

¹²⁸³ See D.C. Code § 22-3003, Second degree sexual abuse (“A person shall be imprisoned for not more than 20 years and may be fined not more than the amount set forth in § 22-3571.01, if that person engages in or causes another person to engage in or submit to a sexual act in the following manner: (1) By threatening or placing that other person in reasonable fear (other than by threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping); or (2) Where the person knows or has reason to know that the other person is: (A) Incapable of appraising the nature of the conduct; (B) Incapable of declining participation in that sexual act; or (C) Incapable of communicating unwillingness to engage in that sexual act.”).

¹²⁸⁴ OAG does not offer any rationale for how to differentiate between paralysis liability under first degree and second degree.

enhancement¹²⁸⁵ where the complainant is paralyzed. Where further force or violence is used against the paralyzed complainant, there may also be liability under enhanced first and enhanced third degree sexual abuse. This change improves the clarity and proportionality of the revised statutes and removes a possible gap in liability.

(2) *PDS, App. C at 681, recommends changing the effective consent affirmative defense in subsection (e) to a defense. PDS states that this change would be consistent with D.C. Law 18-88, which changed the D.C. Code consent affirmative defense for the general sexual abuse statutes to a defense due to the difficulty of instructing the jury when consent can be an aspect of the failure to prove force.*

- The RCC incorporates this recommendation by making the effective consent affirmative defense in subsection (e) a defense. This change improves the clarity and consistency of the revised statutes.

(3) *OAG, App. C 670-671, objects to the deletion of what was previously paragraph (e)(3) of the revised sexual assault statute, “The actor is not at least 4 years older than a complainant who is under 16 years of age.” OAG states that the “CCRC should not remove this defense [requirement] because it believes that the DCCA might overrule this holding.”*

- The RCC does not incorporate this recommendation because it risks disproportionate penalties for similar conduct. If the effective consent defense is successful, there is no liability for sexual assault, but there would still be liability for RCC sexual abuse of a minor (RCC § 22E-1302), which does not require force, and relies on the ages and relationship between the parties to impose liability.¹²⁸⁶ In addition, due to the RCC definitions of “effective consent” and “consent,” it is unlikely that very young complainants would be able to give consent to conduct that otherwise satisfies the RCC sexual assault statute. This change improves the clarity, consistency, and proportionality of the revised statutes, and removes unnecessary overlap between the RCC sexual assault statute (RCC § 22E-1301) and RCC sexual abuse of a minor statute (RCC § 22E-1302).

(4) *USAO, App. C at 715 says it “continues to oppose decreasing the penalty for First Degree Sexual Assault and Enhanced First Degree Sexual Assault.” USAO says: “Although the RCC’s proposal would encompass the vast majority of convictions for this offense, the RCC should have a high enough maximum for this offense that it would encompass all recent convictions for this offense.” USAO*

¹²⁸⁵ RCC § 22E-1301(f)(5)(D)(v) (“The actor is reckless as to the fact that the complainant is a vulnerable adult”); RCC § 22E-701 (“Vulnerable adult” means a person who is 18 years of age or older and has one or more physical or mental limitations that substantially impairs the person’s ability to independently provide for their daily needs or safeguard their person, property, or legal interests.”).

¹²⁸⁶ For example, a 20 year old actor has sex with a 15 year old complainant and the complainant gives effective consent to being tied up during sex. If there is a successful effective consent defense, the actor would not have liability for forceful sexual assault (a Class 4 felony), but would have liability for second degree sexual abuse of a minor (a Class 5 felony).

also notes that, “the maximum penalty for an offense should be sufficiently high to account for the worst possible version of an offense.”

- The RCC does not incorporate this recommendation because it risks disproportionate penalties. As USAO notes, the CCRC has proposed a maximum penalty of 288 months for First Degree Sexual Assault, and a maximum penalty of 360 months for Enhanced First Degree Sexual Assault, and with the repeat offender enhancement in RCC § 22E-606, there would be a maximum penalty of 336 months and 408 months, respectively.
- Recent adult sentencing statistics indicate that the RCC penalties would cover 90-100% of court sentences for unenhanced first degree sexual assault, and about 85-90% of enhanced first degree sexual abuse sentences.¹²⁸⁷ As there were 53 convictions for first degree sexual abuse enhanced in the ten year time period analyzed by the CCRC, this indicates there were about 10-12 sentences that appear to exceed the RCC Class designations for first degree and enhanced sexual abuse. The maximum sentence in any of these cases appears to be 480 months (6 years more than the 408 months authorized in the RCC for enhanced first degree sexual abuse with a felony repeat offender enhancement).
- The circumstances of these approximately 10-12 sentences merit further examination as to how the RCC may or may not affect the overall punishment faced by those individuals. To date, the CCRC has identified through a search of public records one case that accounts for two 480 month sentences for enhanced first degree sexual abuse and notes that the case involved many other convictions for conduct related to the sex offenses, including kidnapping and robbery which independently carried dozens of years of additional charges. Overall, the defendant was sentenced to life without release, with over 200 years of various sentences. In this case, any lower of one of the sexual assault sentences by a few years would not change the effective multiple-life sentences faced by the individual.
- As the CCRC has repeatedly stated, the RCC seeks to authorize proportionate punishment for criminal behavior, including the most serious forms of that behavior, but the totality of punishment is not always reflected in one offense. Where, for instance, under current law a person has been sentenced to a term of imprisonment higher than that authorized by the RCC offense that most closely corresponds, it may well be that

¹²⁸⁷ For all the discussion of statistics in this entry, see the last-in-time analysis in CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions and Appendix G. Memo #40 also includes important caveats on the CCRC analysis of court data. The range here depends chiefly on whether prior criminal history of the actor would make them subject to the RCC § 22E-606 felony repeat offender enhancement. Assuming the sentences were compliant with the DC Voluntary Sentencing Guidelines as is common, all the most serious sentences would have been for individuals who have prior convictions such that they would now be subject to the RCC § 22E-606 felony repeat offender enhancement. Consequently, it is likely the RCC authorized sentences will cover about 100% of unenhanced and 90% of enhanced first degree sexual abuse sentences in recent years.

sentencing under current law is using the sentence as a single “lead charge” that represents the time of actual imprisonment to which other charges run concurrent (not further increasing punishment). Looking at the totality of the criminal behavior, charges, and sentencing, however, it is often clear that sentence for the lead charge accounts for other crimes too. This may be the case in many or all the unidentified 8-10 or so most severe sex offense sentences that would exceed the RCC authorized maximums.

- In the RCC it remains that a judge can run sentences consecutive to one another such that a kidnapping, robbery, or other crime committed in the course of the first degree sexual assault can be added to the time sentenced for first degree sexual assault. Consequently, whether in practice the RCC lowered maximums for first degree sexual abuse and enhanced first degree sexual abuse will result in lower overall sentences for offenders in any of these 8-10 worst cases requires further research. The CCRC would welcome USAO or other Advisory Group member assistance in identifying instances where a person has been sentenced to more than 408 months for first degree sexual abuse.

RCC § 22E-1302. Sexual Abuse of a Minor.

(1) *PDS, App. C at 681-82, recommends changing the marriage and domestic partnership affirmative defense for sixth degree sexual abuse of a minor to an exclusion from liability. Under RCC § 22E-201, the government must prove the absence of an exclusion from liability beyond a reasonable doubt, whereas the defendant must prove an affirmative defense by a preponderance of the evidence. PDS states that “[s]ince the offense criminalizes otherwise consensual conduct but for the status of the individuals, marriage should be a preclusion to liability rather than an affirmative defense that the defendant must prove.”*

- The RCC does not incorporate this recommendation because it is inconsistent with the requirements for liability in the offense. Both current District law¹²⁸⁸ and the RCC provide that marriage or domestic partnership is an affirmative defense rather than a defense or exclusion from liability. The circumstances in which a marriage or domestic partnership exists for such a young person with an older adult are rare. The circumstances in which the existence of a marriage or domestic partnership become litigated (and the existence of the marriage or domestic partnership neither preclude an arrest nor dismissal at an early stage of the proceeding) are even more rare. Nonetheless, should such circumstances arise, placing the burden of production and proof to a preponderance on the actor is justified. Marriage or domestic partnership is information the actor likely has that is unrelated to the elements of the offense that the government must prove for liability.

¹²⁸⁸ D.C. Code § 22-3011(b) (“Marriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence, to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, involving only the defendant and the child or minor.”). The current D.C. Code sexual abuse of a minor statutes are codified at D.C. Code §§ 22-3009.01 and 22-3009.02.

RCC § 22E-1303. Sexual Abuse by Exploitation.

- (1) *OAG, App. C at 648-49, recommends revising subparagraphs (a)(2)(A) and (b)(2)(A) so that a semicolon follows the phrase “not including a coach who is a secondary school student” as opposed to a comma. With this change, subparagraphs (a)(2)(A) and (b)(2)(A) will read “The actor is a coach, not including a coach who is a secondary school student; a teacher, counselor, principal, administrator, nurse, or security officer at a secondary school” As previously drafted with a comma, OAG states that it was “ambiguous as to whether the phrase ‘not including a coach who is’ only modifies the phrase ‘is a secondary school student’ or if it also exempts a ‘teacher, counselor, principal, administrator, nurse, coach, or security officer at a secondary school’”*
 - The RCC incorporates this recommendation by replacing the comma with a semicolon in subparagraphs (a)(2)(A) and (b)(2)(A) of RCC § 22E-1303 and makes the same change in the revised definition of “position of trust with or authority over.” This change improves the clarity of the revised statutes.
- (2) *The CCRC recommends replacing “The actor knowingly and falsely represents that the actor is someone else who is personally known to the complainant” (subparagraphs (a)(2)(B) and (b)(2)(B)) with “The actor knowingly and falsely represents that the actor is someone else with whom the complainant is in a romantic, dating, or sexual relationship.” “Personally known” is ambiguous and it is unclear whether it includes any individual with whom the complainant is acquainted or is limited to individuals with whom the complainant is in a relationship. Several RCC statutes use “in a romantic, dating, or sexual relationship,” which tracks the language in the District’s current definition of “intimate partner violence”¹²⁸⁹ and is intended to have the same meaning. The RCC nonconsensual sexual conduct statute (RCC § 22E-1307) provides liability for other instances of misrepresentation of the actor’s identity that satisfy the requirements of the offense.*
 - This change improves the clarity, consistency, and proportionality of the revised statutes.
- (3) *The CCRC recommends replacing “contract employee” with “contractor” in subparagraph (a)(2)(A), sub-subparagraph (a)(2)(D)(i), subparagraph (b)(2)(A), and sub-subparagraph (b)(2)(D)(i), for consistency with an OAG recommendation to the RCC definition of “position of trust with or authority over,” discussed in this Appendix.*
 - This change improves the clarity and consistency of the revised statutes.
- (4) *The CCRC recommends deleting the previous definition of “official custody”¹²⁹⁰ from RCC § 22E-701, previously applicable only to the RCC sexual abuse by*

¹²⁸⁹ D.C. Code § 16-1001(7) (“‘Intimate partner violence’ means an act punishable as a criminal offense that is committed or threatened to be committed by an offender upon a person: (A) To whom the offender is or was married; (B) With whom the offender is or was in a domestic partnership; or (C) With whom the offender is or was in a romantic, dating, or sexual relationship.”).

¹²⁹⁰ RCC § 22E-701 previously defined “official custody” as:

exploitation statute, and instead incorporating the new definition of “official custody” in RCC § 22E-701—“full submission after an arrest or substantial physical restraint after an arrest.” The new definition of “official custody” is narrower than the previous definition, but the RCC sexual abuse by exploitation offense codifies the substance of the previous definition with the possible exceptions of: 1) “Surrender in lieu of an arrest”; and 2) “Custody for purposes incident to any detention described in subparagraph (A) of [the deleted definition of “official custody”], including transportation, medical diagnosis or treatment, court appearance, work, and recreation.” However, subparagraphs (a)(2)(D), (b)(2)(D), (a)(2)(E), and (b)(2)(E) will provide liability for these situations when they also satisfy the requirements of the offense. This revision distinguishes custody after an arrest from custody in other contexts in the RCC, such as parental custody.

- This change improves the clarity, consistency, and proportionality of the revised statutes.

(5) *PDS, App. C at 681-82, recommends changing the marriage and domestic partnership affirmative defense for second degree sexual abuse by exploitation to an exclusion from liability. Under RCC § 22E-201, the government must prove the absence of an exclusion from liability beyond a reasonable doubt, whereas the defendant must prove an affirmative defense by a preponderance of the evidence. PDS states that “[s]ince the offense criminalizes otherwise consensual conduct but for the status of the individuals, marriage should be a preclusion to liability rather than an affirmative defense that the defendant must prove.”*

- The RCC does not incorporate this recommendation because it is inconsistent with the requirements for liability in the offense. Both current District law¹²⁹¹ and the RCC provide that marriage or domestic partnership is an affirmative defense rather than a defense or exclusion from liability. The circumstances in which the existence of a marriage or domestic partnership become litigated (and the existence of the marriage or

“Official custody” means:

- (A) Detention for a legitimate police purpose, or detention following or pending:
- (i) Arrest or surrender in lieu of arrest for an offense;
 - (ii) A charge or conviction of an offense, or an allegation or finding of juvenile delinquency;
 - (iii) Commitment as a material witness; or
 - (iv) Civil commitment proceedings, extradition, deportation, or exclusion; or
- (B) Custody for purposes incident to any detention described in subparagraph (A) of this paragraph, including transportation, medical diagnosis or treatment, court appearance, work, and recreation.

¹²⁹¹ D.C. Code § 22-3017(b) (“That the defendant and victim were married or in a domestic partnership at the time of the offense is a defense, which the defendant must prove by a preponderance of the evidence, to a prosecution under §§ 22-3013 to 22-3016, prosecuted alone or in conjunction with charges under § 22-3018.”). The sexual abuse of ward statutes are codified at D.C. Code §§ 22-3013 and 22-3014 and the sexual abuse of a patient or client statutes are codified at D.C. Code §§ 22-3015 and 22-3016. As is discussed in the commentary to the RCC sexual abuse by exploitation statute, it is unclear whether the marriage or domestic partnership affirmative defense for the current sexual abuse of a child or minor statutes (D.C. Code § 22-3011(b)) applies to the current D.C. Code sexual abuse of a secondary education student statutes (D.C. Code §§ 22-3009.03 and 22-3009.04).

domestic partnership neither preclude an arrest nor dismissal at an early stage of the proceeding) are rare. Nonetheless, should such circumstances arise, placing the burden of production and proof to a preponderance on the actor is justified. Marriage or domestic partnership is information the actor likely has that is unrelated to the elements of the offense that the government must prove for liability.

(6) *The CCRC recommends codifying a new paragraph (d)(3): “A person shall not be subject to prosecution for violation of this section and an abuse of government power penalty enhancement in RCC § 22E-610 for the same conduct.” Under most ways of committing the offense,¹²⁹² the elements of the offense overlap with the requirements of the penalty enhancement, and it would be disproportionate to subject the conduct to the penalty enhancement. For the other provisions in the offense, such as the actor falsely representing to be someone else with whom the complainant is in a romantic, dating, or sexual relationship, there either will be no overlap, in which case the enhancement would not apply anyway, or there will be a rare situation where the actor engages in the conduct under color or pretense of official right and the enhancement should not apply.*

- This change improves the clarity, consistency, and proportionality of the revised statutes.

¹²⁹² See subparagraphs (a)(2)(A) and (b)(2)(A) (complainant is a secondary school student), subparagraphs (a)(2)(D) and (b)(2)(D) (actor works at a specified institution), and subparagraphs (a)(2)(E) and (b)(2)(E) (actor is a law enforcement officer in certain situations).

RCC § 22E-1304. Sexually Suggestive Conduct with a Minor.

(1) *PDS, App. C at 681-82, recommends changing the marriage and domestic partnership affirmative defense for sexually suggestive conduct with a minor to an exclusion from liability. Under RCC § 22E-201, the government must prove the absence of an exclusion from liability beyond a reasonable doubt, whereas the defendant must prove an affirmative defense by a preponderance of the evidence. PDS states that “[s]ince the offense criminalizes otherwise consensual conduct but for the status of the individuals, marriage should be a preclusion to liability rather than an affirmative defense that the defendant must prove.”*

- The RCC does not incorporate this recommendation because it is inconsistent with the requirements for liability in the offense. Both current District law¹²⁹³ and the RCC provide that marriage or domestic partnership is an affirmative defense rather than a defense or exclusion from liability. The circumstances in which a marriage or domestic partnership exists for such a young person with an older adult are rare. The circumstances in which the existence of a marriage or domestic partnership become litigated (and the existence of the marriage or domestic partnership neither preclude an arrest nor dismissal at an early stage of the proceeding) are even more rare. Nonetheless, should such circumstances arise, placing the burden of production and proof to a preponderance on the actor is justified. Marriage or domestic partnership is information the actor likely has that is unrelated to the elements of the offense that the government must prove for liability.

¹²⁹³ D.C. Code § 22-3011(b) (“Marriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence, to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, involving only the defendant and the child or minor.”). The current D.C. Code misdemeanor sexual abuse with a child or minor statute is codified at D.C. Code § 22-3010.01.

RCC § 22E-1305. Enticing a Minor into Sexual Conduct.

(1) *PDS, App. C at 681-82, recommends changing the marriage and domestic partnership affirmative defense for enticing a minor into sexual conduct to an exclusion from liability. Under RCC § 22E-201, the government must prove the absence of an exclusion from liability beyond a reasonable doubt, whereas the defendant must prove an affirmative defense by a preponderance of the evidence. PDS states that “[s]ince the offense criminalizes otherwise consensual conduct but for the status of the individuals, marriage should be a preclusion to liability rather than an affirmative defense that the defendant must prove.”*

- The RCC does not incorporate this recommendation because it is inconsistent with the requirements for liability in the offense. Both current District law¹²⁹⁴ and the RCC provide that marriage or domestic partnership is an affirmative defense rather than a defense or exclusion from liability. The circumstances in which a marriage or domestic partnership exists for such a young person with an older adult are rare. The circumstances in which the existence of a marriage or domestic partnership become litigated (and the existence of the marriage or domestic partnership neither preclude an arrest nor dismissal at an early stage of the proceeding) are even more rare. Nonetheless, should such circumstances arise, placing the burden of production and proof to a preponderance on the actor is justified. Marriage or domestic partnership is information the actor likely has that is unrelated to the elements of the offense that the government must prove for liability.

¹²⁹⁴ D.C. Code § 22-3011(b) (“Marriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence, to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, involving only the defendant and the child or minor.”). The current D.C. Code enticing statute is codified at D.C. Code § 22-3010.

RCC § 22E-1306. Arranging for Sexual Conduct with a Minor or Person Incapable of Consenting.

(1) *OAG, App. C at 671-72, objects to excluding from the offense a parent or other responsible individual that gives effective consent to the minor to engage in sexual activity that is illegal.¹²⁹⁵ OAG states that “[t]here is no reason to permit the parent to be complacent in this form of child of abuse” and, that “[w]hile the CCRC says that the parent might be chargeable as an accomplice, that would only be true if the parent was acting in coordination with the actual perpetrator.”*

- The RCC does not adopt the proposed change because it would change current District law in a way that may result in disproportionate penalties. Current D.C. Code § 22–3010.02, arranging for a sexual contact with a real or fictitious child, does not include the liability that OAG wishes to include—a parent or other responsible individual giving effective consent to the minor to engage in an illegal sexual act or contact. The current statute only prohibits an actor directly arranging to engage in a sex act or contact with a complainant “who is or who is represented” to be a minor, or arranging for a third party to engage in a sex act or contact with a complainant “who is or who is represented” to be a minor. A parent (or other responsible person) only has liability under D.C. Code § 22–3010.02 with respect to their child as an accomplice or if directly arranging to engage in the sex act/contact with their child.
- The RCC likewise provides accomplice liability when a parent “purposely” encourages or facilitates conduct constituting an RCC sex offense and, in some circumstances, liability for RCC sex offenses when the parent “knowingly” (but not purposely) engages in conduct that causes the offense. The RCC, however, is also careful to avoid criminalizing parental conduct that supports their child’s sexuality. The CCRC reincorporates its previous reasoning for this revision (Appendix D2, pages 138-139) and refers to the explanation in the commentary to this statute. The CCRC also emphasizes the extremely unusual nature of this offense, with no comparable offense identified by the CCRC in other jurisdictions.

¹²⁹⁵ OAG includes this comment under its discussion of the RCC sexual assault statute (RCC § 22E-1301), but the relevant RCC offense is RCC § 22E-1307, Arranging for Sexual Conduct with a Minor or Person Incapable of Consenting.

RCC § 22E-1307. Nonconsensual Sexual Conduct.

- (1) *OAG, App. C at 549, recommends revising footnote 6, discussing deception as to the nature of the sexual act or sexual contact and the practice known as “stealthing,” to include two situations specific to female birth control. OAG states that these examples make clear that the provision “is not meant to be gender specific.”*
- The RCC partially incorporates this recommendation by including in footnote 6 the statement “Similar acts may be committed despite the gender of the actor.” This clarifies that deception as to the nature of the sexual act or sexual contact is not gender specific without specific hypotheticals that may limit the scope of this type of deception. This change improves the clarity of the revised statutes.

RCC § 22E-1308. Incest.

- (1) *USAO, App. C at 690-91, recommends deleting the requirement that the actor “obtains the consent of the other person by undue influence” from paragraphs (a)(3) and (b)(3). USAO states that it is “inappropriate” to use the RCC defined term “undue influence”¹²⁹⁶ in the revised incest offense. USAO states that it is “unclear at what point the complainant would no longer be deemed to be acting on their own free will,” particularly in the context of grooming behavior. USAO further states that “it is unclear who would decide if the sexual abuse is ‘inconsistent with his or her financial, emotional, mental, or physical well-being.’” USAO states that “[b]y criminalizing sexual abuse, society has essentially made a value judgment that certain sexual conduct is inconsistent with a child’s financial, emotional, or physical well-being . . . [b]ut a victim often will not internalize such abuse as being detrimental to their well-being . . . [n]or would a parent or guardian necessarily always characterize the abuse as detrimental, particularly where the parent or guardian is the perpetrator.”*
- The RCC does not incorporate this recommendation because it would risk disproportionate penalties for the same conduct. When a minor complainant is under the age of 16 years and the actor is at least 4 years older, the RCC sexual abuse of a minor statute (RCC § 22E-1302) provides more serious penalties than the RCC incest statute, independent of the familial relationship and regardless of apparent consent, based on the ages of the parties. For minor complaints that are over the age of 16 years, but under the age of 18 years, third degree and sixth degree of the RCC sexual abuse of a minor statute criminalize otherwise consensual sexual conduct with many¹²⁹⁷ of the familial relationships in the RCC incest statute if the actor is at least 18 years of age and at least four years older, without an additional requirement of “undue influence.” The “undue influence” element in the RCC incest statute ensures that the revised incest statute does not criminalize otherwise consensual sexual activity between adults or minors that are close in age.
- (2) *PDS, App. C at 682, states that the conjunction between the second and third elements of first degree incest should be “and,” not “or,” which is consistent with the RCC commentary.*
- The RCC agrees that the conjunction should be “and.” However, the correct conjunction appears in the RCC compilation and no changes were made.

¹²⁹⁶ RCC § 22E-701 defines “undue influence” as the “mental, emotional, or physical coercion that overcomes the free will or judgment of a person and causes the person to act in a manner that is inconsistent with the person’s financial, emotional, mental, or physical well-being.”

¹²⁹⁷ As is discussed in this Appendix for the definition of “position of trust with or authority over” in RCC § 22E-701, the definition has been slightly narrowed as compared to the last RCC compilation.

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

- *OAG App. C at 449-50 recommended an amendment to subparagraph (b)(1)(D).*
 - The RCC does not incorporate this recommendation as OAG withdrew the recommendation in a communication to the CCRC on 2/4/21.

RCC § 22E-1310. Admission of Evidence in Sexual Assault and Related Cases.

(1) *The CCRC recommends revising sub-subparagraph (b)(1)(B)(ii) to include “consent.” With this change, the sub-subparagraph reads: “Past sexual behavior with the actor where the consent or effective consent of the complainant is at issue and is offered by the actor upon the issue of whether the complainant gave consent or effective consent to the sexual behavior that is the basis of the criminal charge.” In the previous compilation, the sub-subparagraph was limited to “effective consent.” However, the RCC definition of “effective consent” includes the RCC definition of “consent,” and, in a limited number of RCC sex offenses, it may be relevant whether the defendant gave consent, such as second degree and fourth degree sexual assault. The commentary states that “The use of these terms in the revised admission of evidence statute is not intended to change the scope of D.C. Code § 22-3022 or the scope of the RCC sex offenses.” The current D.C. Code admission of evidence statute refers to the “consent” of the complainant.¹²⁹⁸*

- This change improves the clarity and consistency of the revised statutes.

¹²⁹⁸ D.C. Code § 22-3022(a)(2)(B) (“Past sexual behavior with the accused where consent of the alleged victim is at issue and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which such offense is alleged.”).

RCC § 22E-1401. Kidnapping

- (1) *OAG, App. C at 650-651, recommends that sub-subparagraph (a)(2)(B)(ii) be deleted, and that sub-subparagraph (a)(2)(B)(i)(I) be renumbered and re-drafted to read, “The complainant is an incapacitated individual or a person under the age of 16.” OAG objects to the age requirements for the actor and complainant set forth in sub-subparagraph (a)(2)(B)(ii), which requires that the actor be 18 years of age or older and that the complainant be under the age of 16 and at least 4 years younger than the actor. OAG notes that the RCC’s kidnapping offense does not include a 15 year old holding a 10 year old for ransom, or a 17 year old holding a 15 year old for ransom. OAG states that anytime an actor moves or restrains a person under the age of 16, kidnapping liability should apply (provided the actor had intent to hold the complainant for ransom, use the complainant as a shield or hostage, etc.)*
- The CCRC does not incorporate this recommendation. Sub-subparagraph (a)(2)(B)(ii) provides liability even if the complainant effectively consents to the confinement or movement. Confining or moving a person without effective consent still constitutes kidnapping regardless of the complainant’s age. Under OAG’s hypotheticals, kidnapping liability would apply if the complainant was confined or moved without effective consent, as would be highly likely if the actor is holding the complainant for ransom. In OAG’s hypos, if the actor did have effective consent of the complainant, kidnapping liability would be disproportionately severe.
 - Kidnapping also includes acting with intent to deprive a person with legal authority over the complainant of custody of the complainant, or to confine the person for 72 hours or more. Under OAG’s proposal if one 15 year old convinces a 15 year old friend to run away from home (thereby depriving the friend’s legal guardian of custody), and moves the friend, first degree kidnapping liability would apply. This would be disproportionately severe given the ages of the parties involved.
- (2) *USAO App. C at 711-712 recommends, in subsections (a)(3)(D) and (a)(3)(F), that the CCRC clarify that liability would attach where the defendant intended to cause either serious bodily injury or death. USAO notes that the current RCC language refers only to serious bodily injury.*
- The RCC adopts the USAO recommendation by adding references to “death” alongside serious bodily injury in these provisions. This change improves the clarity and consistency of the revised statutes.
- (3) *The CCRC recommends updating the merger provision in subsection (e) to state that the two offenses must arise from the same act or course of conduct (as well as the confinement or movement being incidental to commission of the other offense) and the merger must follow the procedures in subsections (b) and (c) of the general merger provision in RCC § 22E-214.*
- This change improves the clarity and consistency of the revised statutes.

RCC § 22E-1402. Criminal Restraint.

(1) *OAG, App. C at 651-652, recommends that the defense under subparagraph (b)(2)(B) be deleted. Subparagraph (b)(2)(B) provides a defense to prosecution under paragraph (a)(2) if the actor a person who moves the complainant solely by persuading the complainant to go to a location open to the general public to engage in a commercial or other legal activity. OAG states that this defense is unnecessary, because: “[a] person who persuades a complainant to go to a location has not moved the complainant. The complainant has moved themselves. No force was involved.”*

- The RCC does not incorporate this recommendation because construing “confines or moves” as asserted by OAG would create a gap in liability. The “confines or moves” element in both the RCC kidnapping and criminal restraint statutes does not require direct physical force. Commentary to RCC § 22E-1402 states “Moving a person requires causing that person to move to another location when that person would not have done so absent the actor’s intervention. Moving another person can include either moving a person against his or her will, such as by tying up and carrying away a person, or by causing the person to move by means of persuasion, threat, or deception. Confining a person requires causing that person to remain in a location when that person would not have done so absent the actor’s intervention. Confining another person can include either physically trapping a person in a location against his or her will, such as by locking a person in a room, or by causing the person to remain in a location by means of persuasion, threat, or deception.” The breadth of the “confines or moves” element in the RCC, which OAG opposes, is narrowed by the other elements of the offense, but is necessary to cover some situations that merit criminal liability.
- For example, an adult who lures a young child into his home by truthfully promising to give the child candy has “moved” the child. This is true even though the child entered the home freely on his own accord. The adult has committed criminal restraint if the adult is reckless that a person with legal authority over the complainant (e.g. a parent) who is acting consistent with that authority has not given effective consent to the confinement or movement. This example is no different than a storeowner persuading a child to enter their store except that, per the defense which OAG recommends deleting, the storeowner has no liability when he “moves the complainant solely by persuading the complainant to go to a location open to the general public to engage in a commercial or other legal activity.” Apart from minors and incapacitated persons, the RCC also provides liability for confining or moving by deception and threats—regardless of age.
- Providing kidnapping and criminal restraint liability for verbal, non-physical means of movement or confinement is widely accepted in other

jurisdictions, though articulated in somewhat different ways, particularly with respect to minors and incapacitated persons.¹²⁹⁹

- To clarify the operation of the statute, the CCRC recommends re-drafting kidnapping to break out and list the ways in which a complainant's effective consent is lacking rather than referring to a lack of effective consent. Instead, the kidnapping and criminal restraint offenses require: confining or moving the complainant by means of causing bodily injury or using physical force; making an explicit or implicit coercive threat; deception; or by any means including with acquiescence of the complainant when the complainant is under 16 or an incapacitated individual. This change clarifies the means of confining or moving a person that are criminalized under the kidnapping and criminal restraint statutes. This change also clarifies that there is no liability when an actor confines or moves without the person's affirmative consent someone 16 or older and not incapacitated, and without using force, coercive threats, or deception.
- This change improves the clarity and proportionality of the revised criminal code.

(2) *The CCRC recommends updating the merger provision in subsection (e) to state that the two offenses must arise from the same act or course of conduct (as well as the confinement or movement being incidental to commission of the other offense) and the merger must follow the procedures in subsections (b) and (c) of the general merger provision in RCC § 22E-214.*

- This change improves the clarity and consistency of the revised statutes.

¹²⁹⁹ § 18.1(d)Means, 3 Subst. Crim. L. § 18.1(d) (3d ed.) (“The Model Penal Code also specifies the means by which the asportation or confinement must be accomplished. This is done by the assertion that these actions must be done ‘unlawfully’ and that such is the case (putting aside for the moment the case of the minor or incompetent) if they are ‘accomplished by force, threat or deception.’ Several states have adopted that formulation exactly or have deviated only by stating the third element a bit differently. An even larger number have utilized the ‘force, intimidation or deception’ formulation, which would appear to have precisely the same coverage. A few other states that purport to specify the manner of committing the crime (several do not) appear to be more limited, either by specifically including only force, force plus threats but not deception, or force plus deception but not threats. The Model Penal Code definition of ‘unlawfully’ goes on to include as asportation or confinement, ‘in the case of a person who is under the age of 14 or incompetent, if it is accomplished without the consent of a parent, guardian or other person responsible for general supervision of his welfare.’ Nearly half of the states have a provision along these lines, although there is considerable variation in the age level set for minors among the following: 13, 14, 16, 18. This manifests considerable disagreement with the Model Penal Code's judgment that 14 is the proper age because it is ‘just below the point in adolescence when youngsters commonly begin to exercise independent judgment as to choice of companions and freedom of movement.’” (internal citations omitted)).

RCC § 22E-1403. Blackmail.

(1) *OAG, App. C at 652-654, recommends deleting the effective consent defense under paragraph (c)(2). OAG states that if the blackmail involves a false allegation, no person would ever consent, but if the allegation is true the defense under paragraph (c)(1) applies. Additionally, OAG questions whether a person can possibly consent to being coerced.*

- The RCC does not incorporate this recommendation. OAG is correct that there is overlap between the defenses under (c)(1) and (c)(2). However, there may be instances in which a person consents to conduct that does not necessarily fall within (c)(1). Consider the following hypothetical: A has an affair and wants to return to his spouse but worries that he may not be faithful again in the future. He asks a close friend, B, to help prevent any future acts of infidelity, including by threatening to tell his spouse about other unrelated embarrassing secrets. If the B acts at A's direction, the defense under (c)(1) would not necessarily apply.
- The hypothetical also demonstrates how a person can consent to being "coerced." People may not trust their own will power in the future, and consent to the use of some coercive measures. Consent can be withdrawn at any time, but if an actor reasonably believes that he or she acted with the effective consent of the complainant, the defense appropriately bars liability.
- *The CCRC recommends adding the words "in fact" to subparagraph (c)(1)(A), which establishes an element of an affirmative defense to the blackmail offense. This change clarifies that there is no culpable mental state requirement as to whether the actor reasonably believes the threatened official action to be justified, or the accusation, secret, or assertion to be true, or that the photograph, video, or audio recording is authentic.*
 - This change improves the clarity and consistency of the revised statutes.
- *The CCRC recommends codifying a new paragraph (d)(2): "A person convicted under subparagraph (a)(2)(A) of this section shall not be subject to an abuse of government power penalty enhancement in RCC § 22E-610 for the same conduct." Under subparagraph (a)(2)(A) (taking or withholding action as an official, or causing an official to take or withhold action), the elements of the offense overlap with the requirements of the penalty enhancement, and it would be disproportionate to subject the conduct to the penalty enhancement.*
 - This change improves the clarity, consistency, and proportionality of the revised statutes.

RCC § 22E-1605. Sex Trafficking of a Minor or Adult Incapable of Consenting.

(1) *The CCRC recommends replacing the words “with recklessness that” with “reckless” in subsection (a)(3). This change clarifies that the complainant must actually be under 18 years of age, incapable of appraising the nature of the commercial sex act or of understanding the right to give or withhold consent to the commercial sex act, or incapable of communicating willingness or unwillingness to engage in the commercial sex act.*

- This change improves the proportionality of the revised statutes.

RCC § 22E-1801. Stalking.

(1) *OAG, App. C at 672-673, asks whether an actor's reasonable belief that the actor had effective consent necessarily means that the actor was not negligent as to lacking effective consent.*

- The commentary entry OAG quotes is generally an accurate description of law under the RCC, though the terms are not equivalent or co-extensive. Reasonable belief that a circumstance exists negates negligence as to the circumstance. Negligence as to a circumstance requires that the actor should have been aware that the circumstance exists and that the failure to perceive the risk is a gross deviation from the standard of conduct that a reasonable individual would observe in the person's situation. If a person reasonably believes that a circumstance exists, that person categorically cannot be negligent as to the circumstance not existing.

RCC § 22E-1803. Voyeurism

(1) *OAG App. C at 673 describes a commentary entry for this offense stating that the word “breast” would exclude the chest of a transmasculine man. OAG says it “is not certain this carve-out is consistent with the ordinary meaning of the word ‘breast’ in this context.” OAG says that, “To the extent that the CCRC believes a transmasculine man’s breast, should they have any, not be covered by this offense, this carve-out needs to be incorporated into the statutory text.” In a footnote, OAG says that “[o]nce concepts of being transgender are incorporated into the code, which OAG certainly does not object to, then the CCRC may want to consider defining what it means to be ‘female.’”*

- The RCC does not incorporate this recommendation because it may make the revised statutes less clear. The issue of gender arises from the current D.C. Code voyeurism statute¹³⁰⁰ treating the “female” breast differently from other breasts, a feature of current law that the revised voyeurism statute replicates. The voyeurism statute also makes other categorical distinctions as to which body parts have a heightened privacy protection, though not based on gender. The RCC commentary entry regarding a transmasculine man merely makes the point, should the case arise, that the breast of such a person should not be considered “female.” Codification of this clarificatory point is not necessary. OAG’s suggestion that there be a definition of gender may be appropriate in the future, but this RCC statute and RCC § 22E-1804, Unauthorized Disclosure of a Sexual Recording, are the only places where a gender distinction arises.

¹³⁰⁰ D.C. Code § 22-3531(a)(2) (“‘Private area’ means the naked or undergarment-clad genitals, pubic area, anus, or buttocks, or female breast below the top of the areola.”). See also § 22-3051, Non-consensual Pornography (“‘Private area’ means the genitals, anus, or pubic area of a person, or the nipple of a developed female breast, including the breast of a transgender female.”).

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

- (1) *PDS App. C at 682 recommends providing an affirmative defense to this offense when the actor: “With intent, exclusively and in good faith, to ... permanently dispose of the image or audio recording distributed the image or audio recording to a person whom the actor reasonably believes is a law enforcement officer, prosecutor, or attorney, or a teacher, school counselor, school administrator, or a person with a responsibility under civil law for the health, welfare, or supervision of a person who is depicted in the image or audio recording or involved in the creation of the image or audio recording.” PDS says that this provision would be similar to the temporary possession defense at RCC § 22E-502(a)(2)(F).*
- The RCC does not incorporate this recommendation because it may make the statute less clear. While it is true that RCC § 22E-502(a)(2) provides a defense to possession or distribution in certain weapon and drug offenses when the possession or distribution is “with intent, exclusively and in good faith, to...permanently dispose of the item,” the elements of 22-1804, unauthorized disclosure of a sexual recording require proof that the distribution was either with a specified bad intent (e.g. to alarm or sexually abuse the complainant), to receive financial gain, or the actor came into possession of the image or recording by committing a crime. Proof to a preponderance (or a lesser standard) that the exclusive and good faith reason for distributing the image was to destroy it would undermine proof of the elements of the offense of 22-1804. A separate affirmative defense on this matter is therefore unnecessary and confusing.
- (2) *USAO App. C at 716 recommends updating the penalty language in subsection (d)(2) to reflect a two class enhancement (to Class 9) as per the commentary and penalty recommendation in Report #69.*
- The RCC incorporates this recommendation, updating the penalty language in the statute to match the penalty recommendation in Report #69. The prior reference to a one class increase was an error. This change improves the clarity of the revised statutes.

RCC § 22E-1805. Distribution of an Obscene Image.

(1) *PDS App. C at 682 recommends providing an affirmative defense to this offense when the actor: “With intent, exclusively and in good faith, to ... permanently dispose of the image or audio recording distributed the image or audio recording to a person whom the actor reasonably believes is a law enforcement officer, prosecutor, or attorney, or a teacher, school counselor, school administrator, or a person with a responsibility under civil law for the health, welfare, or supervision of a person who is depicted in the image or audio recording or involved in the creation of the image or audio recording.” PDS says that this provision would be similar to the temporary possession defense at RCC § 22E-502(a)(2)(F).*

- The RCC does not incorporate this recommendation because it may make the statute less clear and consistent. While it is true that the temporary possession defense of RCC § 22E-502(a) provides a defense to possession or distribution in certain weapon and drug offenses when the possession or distribution is “with intent, exclusively and in good faith, to...permanently dispose of the item,” the elements of 22-1805, distribution of an obscene image require proof that the distribution was knowingly done without the complainant’s effective consent. That element is present because the primary harm being addressed by the offense is an imposition of the obscene image on another. Proof to a preponderance (or a lesser standard) that the exclusive and good faith reason for distributing the image was to destroy it, while not strictly negating the element of lack of effective consent, is in tension with that element. Also, more basically, unlike the firearm and drug offenses that are addressed by temporary possession defense of RCC § 22E-502, the safe disposal of an obscene image or recording is not a difficult or lengthy process—for digital files it requires clicks of a button, and for physical files (print or audio tape) shredding or waste disposal. There simply isn’t an underlying need to distribute in order to dispose of the object because self-disposal is readily accomplished. A separate affirmative defense on this matter is therefore unnecessary and confusing.

RCC § 22E-1806. Distribution of an Obscene Image to a Minor.

(1) *PDS App. C at 682 recommends providing an affirmative defense to this offense when the actor: “With intent, exclusively and in good faith, to ... permanently dispose of the image or audio recording distributed the image or audio recording to a person whom the actor reasonably believes is a law enforcement officer, prosecutor, or attorney, or a teacher, school counselor, school administrator, or a person with a responsibility under civil law for the health, welfare, or supervision of a person who is depicted in the image or audio recording or involved in the creation of the image or audio recording.” PDS says that this provision would be similar to the temporary possession defense at RCC § 22E-502(a)(2)(F).*

- The RCC does not incorporate this recommendation because it may make the statute less clear. While it is true that RCC § 22E-502 provides a defense to possession or distribution in certain weapon and drug offenses when the possession or distribution is “with intent, exclusively and in good faith, to...permanently dispose of the item,” the elements of 22-1806, distribution of an obscene image to a minor, require proof that the distribution was to a complainant under 16 years of age. It is extremely unlikely that a person of such an age would have one of the described roles (e.g. attorney). See the related recommendation below to delete the affirmative defense in subsection (c)(2) in its entirety. A separate affirmative defense on this matter is therefore unnecessary and confusing.

(2) *The CCRC recommends eliminating the affirmative defense in subsection (c)(2). The defense reads: “It is an affirmative defense to liability under this section, that the actor with intent, exclusively and in good faith, to report possible illegal conduct or seek legal counsel from any attorney distributed the image or audio recording to a person whom the actor reasonably believes is a law enforcement officer, prosecutor, or attorney, or a teacher, school counselor, school administrator.” Inclusion of this defense was a CCRC error and deletion is recommended because it is extremely unlikely that a minor under the age of 16 would be in such a role (e.g., an attorney) listed in the defense, yet distribution to a minor under 16 years of age is an element of the defense.*

- This change improves the clarity of the revised statutes.

RCC § 22E-1807. Creating or Trafficking an Obscene Image of a Minor.

(1) *OAG, App. C at 654-55, recommends limiting the affirmative defense for actors under the age of 18 years in paragraph (d)(2) to when “there is [no more than] a four year age difference” between the actor and a minor who is, or will be, depicted in the prohibited image. With this change, an actor that is under the age of 18 years would be guilty of creating or trafficking an obscene image of a minor when a minor complainant is more than four years younger than the actor. OAG states that it “agrees with the CCRC that youth who are of similar age should not be prosecuted for engaging in consensual activity.” However, OAG states that the RCC Developmental Incapacity Affirmative Defense (now the Minimum Age for Offense Liability provision in RCC § 22E-215) excludes children under the age of 12 years from prosecution for criminal offenses and that “[t]here is tension between the proposition that a child may be developmentally incapacitated, yet have the requisite ability to give effective consent.” OAG gives as a hypothetical an actor that is 17 years of age that convinces a 10 year old complainant and an 8 year old complainant into performing oral sex in front of an audience.¹³⁰¹ OAG states that, as written, the affirmative defense in paragraph (d)(2) “would apply because the actor and both victims are under the age of 18 years” and that it should not apply. OAG states that its recommended age difference requirement is consistent with other RCC sex offenses involving persons under the age of 18 years or 16 years.*

- The RCC does not incorporate this recommendation because it is inconsistent with the scope of the offense. If successful, the affirmative defense in paragraph (d)(2) of the offense precludes liability for a minor actor that engages in creating, distributing, or displaying a prohibited image of a minor. The affirmative defense ensures that the offense targets predatory adults. The affirmative defense also does not apply to selling admission to or advertising a prohibited image of a minor (subparagraphs (a)(1)(E) and (b)(1)(E)); a minor actor can be liable for this conduct.
- The hypothetical posed by OAG would entail much more serious liability under other statutes for the underlying sexual activity with other minors. For example, in OAG’s hypothetical, the 17 year old actor still appears to face liability as a principal under the RCC sexual abuse of a minor statute (RCC § 22E-1302) based on the ages of the parties.
- In addition, the affirmative defense in paragraph (d)(2) requires that the actor “reasonably believe” that a minor who is, or who will be, depicted in the image, gives “effective consent” to the conduct. The RCC definitions of “effective consent” and “consent” exclude consent that is given by a person that, “[b]ecause of youth . . . is unable to make a reasonable

¹³⁰¹ OAG’s hypothetical is specific to the RCC arranging a live sexual performance of a minor statute (RCC § 22E-1809), but OAG makes this recommendation for all RCC obscenity offenses with this affirmative defense. For purposes of this discussion, it is irrelevant whether the prohibited conduct involves an image or a live performance or broadcast, and the live performance hypothetical is used, even though RCC § 22E-1807 is specific to images.

judgment as to the nature or harmfulness of the conduct to constitute the offense or to the result thereof.” These definitions may preclude a factfinder from concluding that an actor reasonably believed that a complainant under the age of 18 years gives consent to the creating, distribution, or display of prohibited images, particularly in OAG’s hypothetical with an older minor actor (17 years) and two very young complainants.

(2) *PDS App. C at 682 recommends providing an affirmative defense to this offense when the actor: “With intent, exclusively and in good faith, to ... permanently dispose of the image or audio recording distributed the image or audio recording to a person whom the actor reasonably believes is a law enforcement officer, prosecutor, or attorney, or a teacher, school counselor, school administrator, or a person with a responsibility under civil law for the health, welfare, or supervision of a person who is depicted in the image or audio recording or involved in the creation of the image or audio recording.” PDS says that this provision would be similar to the temporary possession defense at RCC § 22E-502(a)(2)(F).*

- The RCC does not incorporate this recommendation because it may make the statute less clear. Unlike the firearm and drug offenses that are addressed by temporary possession defense of RCC § 22E-502, the safe disposal of an obscene image or recording is not a difficult or lengthy process—for digital files it requires clicks of a button, and for physical files (print or audio tape) shredding or waste disposal. There simply isn’t an underlying need to distribute in order to dispose of the object because self-disposal is readily accomplished. A separate affirmative defense on this matter is therefore unnecessary and confusing.

RCC § 22E-1808. Possession of an Obscene Image of a Minor.

(1) *OAG, App. C at 654-55, recommends limiting the affirmative defense for actors under the age of 18 years in paragraph (d)(2) to when “there is [no more than] a four year age difference” between the actor and a minor who is depicted in the prohibited image. With this change, an actor that is under the age of 18 years would be guilty of possessing an obscene image of a minor when a minor complainant is more than four years younger than the actor. OAG states that it “agrees with the CCRC that youth who are of similar age should not be prosecuted for engaging in consensual activity.” However, OAG states that the RCC Developmental Incapacity Affirmative Defense (now the Minimum Age for Offense Liability provision in RCC § 22E-215) excludes children under the age of 12 years from prosecution for criminal offenses due to developmental incapacitation and that “[t]here is tension between the proposition that a child may be developmentally incapacitated, yet have the requisite ability to give effective consent.” OAG gives as a hypothetical an actor that is 17 years of age that convinces a 10 year old complainant and an 8 year old complainant into performing oral sex in front of an audience.¹³⁰² OAG states that, as written, the affirmative defense in paragraph (d)(2) “would apply because the actor and both victims are under the age of 18 years” and that it should not apply. OAG states that its recommended age difference requirement is consistent with other RCC sex offenses involving persons under the age of 18 years or 16 years. OAG does not recommend specific language for this revision.*

- The RCC does not incorporate this recommendation because it is inconsistent with the scope of the offense. If successful, the affirmative defense in paragraph (d)(2) of the offense precludes liability for a minor actor that possesses a prohibited image of a minor. However, the minor actor still has liability if the actor engaged in or caused the underlying sexual activity with other minors that are in the image. For example, in OAG’s hypothetical, the 17 year old actor would be liable for first degree sexual abuse of a minor (RCC § 22E-1302), based on the ages of the parties. The affirmative defense ensures that the offense targets predatory adults.
- In addition, the affirmative defense in paragraph (d)(2) requires that the actor “reasonably believe” that a minor who is depicted in the image gives “effective consent” to the conduct. The RCC definitions of “effective consent” and “consent” exclude consent that is given by a person that, “[b]ecause of youth . . . is unable to make a reasonable judgment as to the nature or harmfulness of the conduct to constitute the offense or to the result thereof.” These definitions may preclude a factfinder from

¹³⁰² OAG’s hypothetical is specific to the RCC arranging a live sexual performance of a minor statute (RCC § 22E-1809), but OAG makes this recommendation for all RCC obscenity offenses with this affirmative defense for actors that are under the age of 18 years. For purposes of this discussion, it is irrelevant whether the prohibited conduct involves an image or a live performance or broadcast, and the live performance hypothetical is used, even though RCC § 22E-1807 is specific to possessing images.

concluding that an actor reasonably believed that a complainant under the age of 18 years gives consent to the actor possessing a prohibited image, particularly in OAG's hypothetical with an older minor actor (17 years) and two very young complainants.

(2) *PDS App. C 682 recommends inclusion of an affirmative defense to this statute for when a person acts with intent, exclusively and in good faith, to permanently dispose of the item. PDS says such a provision would be comparable to that in the general temporary possession defense.*

- The RCC incorporates this recommendation by adding an affirmative defense in (d)(6) for possessing an image: "With intent, exclusively and in good faith, to permanently dispose of the item; and in fact, the actor does not possess the item longer than is reasonably necessary to permanently dispose of the item. Given the ease of disposal of an image, digital or paper, this defense covers only a very narrow band of behavior, but may avoid unjust liability in some instances. This change improves the proportionality of the revised statute.

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

(1) *OAG, App. C at 654-55, recommends limiting the affirmative defense for actors under the age of 18 years in paragraph (c)(2) to when “there is [no more than] a four year age difference” between the actor and a minor that is, or will be, depicted in the live sexual performance. With this change, an actor that is under the age of 18 years would be guilty of arranging a live sexual performance of a minor when the minor complainant is more than four years younger than the actor. OAG states that it “agrees with the CCRC that youth who are of similar age should not be prosecuted for engaging in consensual activity.” However, OAG states that the RCC Developmental Incapacity Affirmative Defense (now the Minimum Age for Offense Liability provision in RCC § 22E-215) excludes children under the age of 12 years from prosecution for criminal offenses due to developmental incapacitation and that “[t]here is tension between the proposition that a child may be developmentally incapacitated, yet have the requisite ability to give effective consent.” OAG gives as a hypothetical an actor that is 17 years of age that convinces a 10 year old complainant and an 8 year old complainant into performing oral sex in front of an audience. OAG states that, as written, the affirmative defense in paragraph (c)(2) “would apply because the actor and both victims are under the age of 18 years” and that it should not apply. OAG states that its recommended age difference requirement is consistent with other RCC sex offenses involving persons under the age of 18 years or 16 years. OAG does not recommend specific language for this revision.*

- The RCC does not incorporate this recommendation because it is inconsistent with the scope of the offense. If successful, the affirmative defense in paragraph (c)(2) of the offense precludes liability for a minor actor that engages in creating, directing, or selling admission to live sexual performances of a minor. However, the minor actor still has liability for the underlying sexual activity with other minors. For example, in OAG’s hypothetical, the 17 year old actor would be liable for first degree sexual abuse of a minor (RCC § 22E-1302), based on the ages of the parties. The affirmative defense ensures that the offense targets predatory adults. The affirmative defense also does not apply to selling admission to or advertising a live performance with a minor (subparagraphs (a)(1)(C) and (b)(1)(C)); a minor actor can be liable for this conduct.
- In addition, the affirmative defense in paragraph (c)(2) requires that the actor “reasonably believe” that a minor who is, or who will be, depicted in the live sexual performance, gives “effective consent” to the conduct. The RCC definitions of “effective consent” and “consent” exclude consent that is given by a person that, “[b]ecause of youth . . . is unable to make a reasonable judgment as to the nature or harmfulness of the conduct to constitute the offense or to the result thereof.” These definitions may preclude a factfinder from concluding that an actor reasonably believed that a complainant under the age of 18 years gives consent to the creation or selling of live sexual performances, particularly in OAG’s hypothetical with an older minor actor (17 years) and two very young complainants.

RCC § 22E-1810. Attending or Viewing a Live Sexual Performance of a Minor.

(1) *OAG, App. C at 654-55, recommends limiting the affirmative defense for actors under the age of 18 years in paragraph (c)(2) to when “there is [no more than] a four year age difference” between the actor and a minor who is, or will be, depicted in the live performance or live broadcast. With this change, an actor that is under the age of 18 years would be guilty of attending or viewing a live sexual performance of a minor when the minor complainant is more than four years younger than the actor. OAG states that it “agrees with the CCRC that youth who are of similar age should not be prosecuted for engaging in consensual activity.” However, OAG states that the RCC Developmental Incapacity Affirmative Defense (now the Minimum Age for Offense Liability provision in RCC § 22E-215) excludes children under the age of 12 years from prosecution for criminal offenses due to developmental incapacitation and that “[t]here is tension between the proposition that a child may be developmentally incapacitated, yet have the requisite ability to give effective consent.” OAG gives as a hypothetical an actor that is 17 years of age that convinces a 10 year old complainant and an 8 year old complainant into performing oral sex in front of an audience. OAG states that, as written, the affirmative defense in paragraph (c)(2) “would apply because the actor and both victims are under the age of 18 years” and that it should not apply. OAG states that its recommended age difference requirement is consistent with other RCC sex offenses involving persons under the age of 18 years or 16 years. OAG does not recommend specific language for this revision.*

- The RCC does not incorporate this recommendation because it is inconsistent with the scope of the offense. If successful, the affirmative defense in paragraph (c)(2) of the offense precludes liability for a minor actor that attends or views a live sexual performance or live broadcast of a minor. However, the minor actor still has liability if the actor engaged in or caused the underlying sexual activity with other minors that are in the performance or broadcast. For example, in OAG’s hypothetical, the 17 year old actor would be liable for first degree sexual abuse of a minor (RCC § 22E-1302), based on the ages of the parties. The affirmative defense ensures that the offense targets predatory adults.
- In addition, the affirmative defense in paragraph (c)(2) requires that the actor “reasonably believe” that a minor who is, or who will be, depicted in the live sexual performance, gives “effective consent” to the conduct. The RCC definitions of “effective consent” and “consent” exclude consent that is given by a person that, “[b]ecause of youth . . . is unable to make a reasonable judgment as to the nature or harmfulness of the conduct to constitute the offense or to the result thereof.” These definitions may preclude a factfinder from concluding that an actor reasonably believed that a complainant under the age of 18 years gives consent to the actor attending or viewing live sexual performances, particularly in OAG’s hypothetical with an older minor actor (17 years) and two very young complainants.

RCC § 22E-2101. Theft.

(1) *USAO App. C at 716-717 says it, “continues to recommend decreasing the monetary thresholds for Theft, Fraud, and related offenses.” USAO recommends maintaining the current threshold for felony (Class 9) theft, fraud, and other offenses be set at \$1,000. USAO recommends there be only one misdemeanor gradation for these offenses (any value), a crime involving \$5,000 or a motor vehicle be a Class 8 crime, and a crime involving \$50,000 or more be a class 7 crime. USAO says, “although these offenses do not involve physical violence, theft, fraud, and related offenses may cause far-reaching and irreparable harm to victims, and could result in them being unable to put food on the table, pay rent, or lose their homes.”*

- The RCC does not adopt the USAO recommendation because it may result in disproportionate penalties. The RCC property gradations make a theft: of any amount a class C offense (2 month): of \$500 or more, or from a person, a class A offense (12 months); of \$5,000 or more a class 9 offense (2 years); of \$50,000 or more a class 8 offense (4 years); and of \$500,000 or more a class 7 offense (8 years). In addition to the reasons previously given in responses, the CCRC notes again the following.
- The USAO recommendation to maintain the felony theft threshold at its current level (\$1,000) and make theft of \$5,000 or a motor vehicle (or fraud involving \$5,000 subject to a Class 8, 4 year penalty would continue to authorize punishments well in excess of current District sentencing practice.¹³⁰³ CCRC analysis indicates that 75-90% of all first degree theft sentences in recent years were for 2 years or less (equal to or less than the Class 9 RCC penalty), with the 97.5% for all theft offenses being 41.7 months (under the 48 months for a Class 8 RCC penalty). Fraud penalties are substantially lower in current court practice, with 75-90% of sentences for first degree fraud (involving \$1,000 or more) receiving sentences of 12 months or less (at or under the 12 month penalty for a Class A RCC misdemeanor). At the 97.5% of current sentences, the penalties for first degree fraud are 23.7 months (under the Class 9 RCC penalty).
- Because the court statistics do not provide a record of the amount of the property involved, it is unclear how current practice will map on to the RCC penalties. However, it is reasonable to estimate that RCC penalties will lower available penalties for a substantial number of thefts, beyond 0-10% of affected cases under most RCC penalty recommendations. Perhaps up to a quarter or a third of all cases would be affected—the estimate depends heavily on the unknown number of first degree theft cases that

¹³⁰³ For all the discussion of statistics in this entry, see the last-in-time analysis in CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions and Appendix G. Memo #40 also includes important caveats on the CCRC analysis of court data.

currently are in the range of \$1,000-\$5,000 (the range of the changed felony threshold). The amount that current cases would be lowered is also unclear, but given the availability of a 12 month penalty for thefts of \$500 or more (below the current D.C. Code felony theft threshold), and that 75-90% of all current first degree theft sentences are for 24 months or less, the expected reduction in sentences generally would be 12 months or less for these crimes. For fraud, by contrast, the RCC penalty recommendations may not curtail current sentencing practice much if at all (0-10%).

- Current court practice, however, is just one indicator of an appropriate penalty. As the CCRC has pointed out, a consistent result of the public polling the agency conducted is that thefts of \$5,000 are rated to be of a seriousness almost exactly between a bodily injury assault (Class B) and a significant bodily injury assault (Class 9)—the equivalent of the RCC 1 year misdemeanor (Class A).¹³⁰⁴ The RCC nonetheless penalizes such thefts or destruction of property of \$5,000 at a higher, Class 9 felony.
- Lastly, the CCRC notes again that research indicates that raising the amount of the felony theft threshold is not correlated with property and theft rates.¹³⁰⁵ Several jurisdictions, including Texas with a \$2,500 threshold, have felony theft thresholds higher than the District's current \$1,000 threshold which USAO recommends.¹³⁰⁶

¹³⁰⁴ Advisory Group Memo #27 (Public Opinion Surveys on Ordinal Ranking of Offenses).

¹³⁰⁵ Pew Charitable Trusts, *The Effects of Changing Felony Theft Thresholds* (April 2017) at 1 (“This chartbook, which updates and reinforces an analysis published in 2016, illustrates three important conclusions: Raising the felony theft threshold has no impact on overall property crime or larceny rates. States that increased their thresholds reported roughly the same average decrease in crime as the 27 states that did not change their theft laws. The amount of a state’s felony theft threshold—whether it is \$500, \$1,000, \$2,000, or more—is not correlated with its property crime and larceny rates.”).

¹³⁰⁶ Pew Charitable Trusts, *The Effects of Changing Felony Theft Thresholds* (April 2017) at 3.

RCC § 22E-2106. Unlawful Operation of a Recording Device in a Movie Theater.¹³⁰⁷

- (1) *OAG, App. C at 655, recommends clarifying that the offense includes intending to record part of a motion picture. Specifically, OAG recommends revising paragraph (a)(3) to read “With the intent to record a motion picture, or any part of it.”*
- The RCC incorporates this recommendation by revising paragraph (a)(3) to read “With the intent to record a motion picture, or any part of it.” This change improves the clarity of the revised statute.

¹³⁰⁷ This offense was previously “Unlawful Operation of a Recording Device in a Motion Picture Theater.”

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

(1) *The CCRC recommends replacing the words “with recklessness that” with “reckless” in paragraph (e)(3). This change clarifies that the complainant must actually be a vulnerable adult or elderly person.*

- This change improves the proportionality of the revised statutes.

RCC § 22E-2601. Trespass

- (1) *OAG App C at 656-57 recommends that paragraph (d)(1) be amended to state: “An actor does not commit an offense under this section by violating a barring notice issued for District of Columbia Housing Authority properties, unless the bar notice is lawfully issued pursuant to the District of Columbia Municipal Regulations on an objectively reasonable basis.” OAG says that this will clarify that no change in law was intended to limit the issuance of a bar notice to DCHA officials. Correspondingly, OAG recommends that the commentary be redrafted to state: “Paragraph (d)(1) codifies the proof requirements in cases alleging unlawful entry onto the grounds of public housing. Where the government seeks to prove unlawful entry premised on a violation of a barring notice for District of Columbia Housing Authority (“DCHA”) property, it must prove that the barring notice was issued for a reason described in DCHA regulations. Additionally, the government must offer evidence that the individual who issued the barring notice had an objectively reasonable basis for believing that the criteria identified in the relevant regulation were satisfied. Even if sufficient cause for barring in fact exists, the issuance of the barring notice without objectively reasonable cause will render the notice invalid. [footnotes omitted]*
- The RCC adopts the language recommended by OAG, both for (d)(1) and the commentary. This change clarifies the revised statutes.

RCC § 22E-2701. Burglary.

- (1) *OAG App. C at 657 recommends burglary be amended to make an exception to the requirement that the victim directly perceive the perpetrator when the burglary is in a dwelling. OAG says it disagrees with the requirement that an actor is only guilty of third degree burglary when they are inside an occupied home but are not directly perceived by the victim. OAG does not provide specific language.*
 - The RCC does not adopt further changes because the text already specifies that entry into any dwelling without a privilege or license to do so under civil law, whether or not occupied and whether or not the intruder is perceived, constitutes second degree burglary—a felony offense. Commentary makes this point too.
- (2) *OAG App. C at 701 recommends an increase by one class of the penalties for first degree burglary and enhanced first degree burglary, from 4 and 8 years to 8 and 12 years. OAG says its recommendation is to “recognize the seriousness of a burglary of an occupied residence, including the trauma and potential harm to a victim” and cites to the current statutory penalty for burglary of up to 30 years for unarmed first degree burglary and 5-60 years for armed first degree burglary. OAG does not cite any other authority for its position.*
 - The RCC does not incorporate this recommendation because it may result in disproportionate penalties.
 - OAG does not respond to the prior rationales offered by the CCRC in responses to comments by OAG and USAO regarding the penalty for burglary, and does not compare its proposed classification to other offenses. In addition to repeating its prior responses, the CCRC notes the following:
 - The RCC first degree burglary and enhanced first degree burglary statutes, like current District law, do not require any threat or bodily injury be experienced by the occupant of a dwelling, nor any taking or damage to property. The gravamen of the offense is an invasion of privacy and fear of a victim who perceives a person in their dwelling. The RCC ranks that harm as a felony offense that may receive years of incarceration without any physical injury, threat, or damage. However, more severe punishment would be disproportionate.
 - Critically important for assessing the proportionality of burglary penalties is the fact that the offense overlaps with attempts to commit, or successful completion of, a wide array of RCC crimes. These predicate crimes that a person attempts or commits in the course of a burglary carry their own penalties and must be considered in establishing proportionate penalties. The RCC authorizes proportionate punishment for criminal behavior, including the most serious forms of that behavior, but the totality of punishment is not always reflected in one offense. This change clarifies and improves the proportionality of the revised statute.

- A recent Bureau of Justice Statistics (BJS) report provided to Advisory Group members found that nationally, for burglary, 78.3% of prisoners served less than 3 years, 91.5% of prisoners served less than 5 years, and 98.1% of prisoners served less than 10 years before release, when burglary was the most serious crime (so presumably not concurrent to another penalty).¹³⁰⁸ These BJS statistics appear to include all forms of burglary, including enhanced forms of burglary due to prior convictions or presence of a weapon. The National Corrections Reporting Program (NCRP) data that are the basis of the BJS report indicate that, the percentage of inmates who served at least five years in prison for burglary was higher in DC than in 37 of the 43 other reporting states, and, conversely, the proportion of D.C. residents serving less than two years for a burglary charge was lower than that of 31 of the 43 other states.¹³⁰⁹
- Despite the District’s current broad definition of burglary including less-serious conduct, the District’s authorized maximum statutory penalties are among the harshest maximum penalties in the U.S. A 2014 review¹³¹⁰ of statutes found that D.C. is tied for second in longest imprisonment penalty for what was categorized as simple¹³¹¹ burglary, as well as tied for third in longest imprisonment penalty for what was categorized as aggravated¹³¹² burglary—and that was without accounting for the District’s many penalty enhancements such as the mandatory minimum and additional 30 years for burglary while armed, D.C. Code § 22–4502.
- Not only does the District have statutory maximums for burglary higher than most other states, but persons convicted of burglary in D.C. spend more of their sentence behind bars than their counterparts in other states. In 2018, the Bureau of Justice Statistics released a report using data collected through the National Corrections Reporting Program (NCRP) on Time-Served in state prisons – the amount of time “from their date of initial

¹³⁰⁸ U.S. Department of Justice Bureau of Justice Statistics, *Time Served in State Prison, 2016*, November 2018.

¹³⁰⁹ CCRC recently contacted BJS and obtained access to the underlying data. These percentages are based on CCRC analysis of the NCRP data.

¹³¹⁰ Phillip Kopp, *Is Burglary A Violent Crime? An Empirical Investigation Of Classifying Burglary As A Violent Felony And Its Statutory Implications* 119 (2014).

¹³¹¹ *Id.* “Simple burglary” was defined as “when an actor *enters or remains in a structure with the intent to commit any crime therein.*” Four states were tied for first in sentence length for simple burglary with a max of 20 years, followed by the District’s second-degree burglary.

¹³¹² *Id.* “Aggravated burglary” definitions varied by state with elements such as whether the structure was residential and/or occupied, whether there was the presence or threatened use of a weapon, and whether there was a threat or use of violence elevating simple burglary to aggravated burglary. Two states are tied for second longest with a maximum of 40 years while one state carries a maximum of 50 years for aggravated burglary.

admission to their date of initial release.”¹³¹³ Based on the NCRP data, as of 2016, the percentage of inmates who served at least five years in prison for burglary was higher in DC than in 37 of the 43 other reporting states.¹³¹⁴ Conversely, the proportion of D.C. residents serving less than two years for a burglary charge was lower than that of 31 of the 43 other states.

- The OAG recommendation would punish first degree burglary the same as an aggravated assault that causes serious bodily injury, risking death. Such a ranking is out of step with polling of District voters comparing burglary hypotheticals to causing serious bodily injury. More generally, while the commission of crimes in a dwelling or building merits an increased penalty, this increase is quite modest and is almost entirely washed out by the effect of the predicate offense committed inside for aggravated assault and more violent felonies. See the responses to survey questions in Advisory Group Memo #27 (Public Opinion Surveys on Ordinal Ranking of Offenses).¹³¹⁵ Critically, the polling questions asked for an assessment of a hypothetical individual’s behavior as a whole, not “burglary” specifically, and there would be additional liability for other crimes under the RCC.
- National opinion research also indicates that most people rank burglary at a much lower severity level compared to violent crimes (rape, assault, robbery, and murder). A survey of 50,000 participants conducted by the Bureau of Justice Statistics, found that respondents ranked the severity of burglarizing a home and stealing up to \$100 as even less severe than someone knowingly passing a bad check.¹³¹⁶ Unsurprisingly, as the level of violence coincident with the burglary went up, so did the severity ranking. However, in burglary scenarios that did not coincide with a separate crime of violence (e.g., rape, murder), severity rankings were in the bottom twenty percent among mean severity scores.

¹³¹³ Danielle Kaeble, *Time Served in State Prison, 2016*, BUR. JUSTICE STAT. (2018).

¹³¹⁴ “New Mexico, North Dakota, and Oregon did not submit any NCRP data for 2016. Vermont did not submit prison release records. Alaska and Idaho could not distinguish between admission types. In addition, admission types were not reported in Virginia’s 2016 NCRP release file.” *Id.*

¹³¹⁵ Question 3.27 provided the scenario: “Entering an occupied home intending to steal property while armed with a gun. When confronted by an occupant, the person displays the gun, then flees without causing an injury or stealing anything.” Question 3.27 had a mean response of 6.8, less than one class above the 6.0 milestone corresponding to felony assault, currently a 3 year offense in the D.C. Code. Question 1.07 provided the scenario: “Entering an occupied home intending to steal property, and causing minor injury to the occupant before fleeing. Nothing is stolen.” Question 1.07 had a mean response of 6.1, just barely above the 6.0 milestone corresponding to felony assault, currently a 3 year offense in the D.C. Code. Question 1.08 “Entering an occupied home with intent to cause a serious injury to an occupant, and inflicting such an injury.” Question 1.08 had a mean response of 8.5, just a half-class above the 8.0 milestone corresponding to aggravated assault (causing a serious injury), currently a 10-year offense in the D.C. Code.

¹³¹⁶ Marvin E Wolfgang et al., *National Survey of Crime Severity* 186 (1985).

- (3) *The CCRC recommends reordering all the subsections to place the “with intent” clause first.*
- This change improves the clarity of the revised statutes.
- (4) *The CCRC recommends reordering the subsections in first degree burglary to match the order of elements in second and third degree.*
- This change improves the clarity of the revised statutes.
- (5) *The CCRC recommends reordering the language within subsection (a)(3) and sub-paragraph (b)(1)(B)(ii) to first reference entering with the actor then someone already being inside who, in fact, directly perceives the actor while inside. The culpable mental state of “in fact” means that there need be no proof as to the actor’s awareness of being perceived.*
- This change improves the clarity of the revised statutes.

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

- (1) *OAG App. C at 673 repeats its recommendation to redraft the statute in (b)(2) to state, “Knowingly leaves custody without the effective consent of the law enforcement officer” instead of “Knowingly, without the effective consent of the law enforcement officer, leaves custody.” OAG says its “concern with the CCRC’s current formulation is that, since the ‘without the effective consent’ phrase is a prepositional phrase that follows ‘knowingly,’ it’s not clear whether ‘knowingly’ applies to it.”*
- The RCC does not incorporate this change because it may make the statute less clear and consistent. RCC § 22E-207 clearly states that: “Any culpable mental state or strict liability specified in an offense applies to all subsequent result elements and circumstance elements until another culpable mental state or strict liability is specified.” This is a foundational rule of drafting in the RCC and there is no exception for prepositional phrases. Commentary also leaves no doubt on the point.
- (2) *USAO App. C at 711 says it “continues to recommend that the CCRC increase the penalty classifications for Escape.” USAO says it recommends, “at a minimum,” that the penalty classification for 3rd degree escape be increased. USAO doesn’t in this comment say what the new penalty should be but notes that it previously recommended that all gradations of escape be felonies. USAO says the CCRC recommendation, particularly with respect to making RCC third degree escape a Class C (60 day maximum) offense, would be “substantially lower than current sentencing practice in Superior Court.” USAO notes several statistics from the Appendix G provided by the CCRC and says that “[m]ost likely, many of the convictions categorized under D.C. Code § 22-2601 and D.C. Code § 22-2601(a)(1) would involve conduct similar to the conduct proscribed by the RCC’s proposal for 3rd Degree Escape.”*
- The RCC partially incorporates this change by raising the penalty classification for third degree escape to a Class B misdemeanor (6 month maximum). This change improves the proportionality of the revised statutes.
 - The extent to which the RCC penalties accommodate current court sentences appears to turn principally on whether, as USAO asserts, the court statistics in Appendix G that come from the court with a general code of D.C. Code § 22-2601 and the code for D.C. Code § 22-2601(a)(1) correspond to the RCC third degree escape—which is specifically for halfway houses and failure to return or report to a correctional facility when on work release and similar situations. The RCC first degree escape covers any other situation than reporting to or failing to return to a correctional facility, as well as secure juvenile facilities, and carries a much higher Class 9 (24 month) penalty. (Second degree is a Class A (12 month) misdemeanor.)

- The CCRC is not aware of evidence that “[m]ost likely, many of the convictions categorized under D.C. Code § 22-2601 and D.C. Code § 22-2601(a)(1)” corresponds to third degree escape. However, even if some conduct categorized under D.C. Code § 22-2601 and D.C. Code § 22-2601(a)(1) corresponds to RCC third degree assault, the updated Class B penalty for third degree would encompass between the 25th and 50th quantile of sentences for those provision.¹³¹⁷ As third degree conduct presumably would be the least serious under D.C. Code § 22-2601 and D.C. Code § 22-2601(a)(1) (compared to escape from a correctional facility or officer), it appears the RCC penalties generally cover most, if not all, current sentences under those provisions.
 - With respect to court codes for 22DC2601(a)(2) and 22DC2601(a)(3), the CCRC notes that there are relatively few convictions for these offenses and the RCC penalties appear to cover between 75th and 90th quantile of sentences for each of those provisions.
- (3) *The CCRC recommends replacing the term “custody” in paragraphs (b)(1) and (b)(2) with the term “official custody.” As is discussed in this Appendix for RCC § 22E-701, what was previously the definition of “custody” is now the definition of “official custody.” The definition itself is unchanged.*
- This change improves the clarity and consistency of the revised statutes.

¹³¹⁷ For all the discussion of statistics in this entry, see the last-in-time analysis in CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions and Appendix G. Memo #40 also includes important caveats on the CCRC analysis of court data.

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

- (1) *USAO App. C at 691 recommends removing subsection (b), which states: “The restriction on divulging detection device information from the Pretrial Services Agency for the District of Columbia under D.C. Code §23-1303(d) shall not apply to this offense.” USAO says that this RCC language, added based on a USAO comment in App. C at 358, is confusing and suggests that D.C. Code §23-1303(d) precludes PSA from divulging detection device information in other contexts.*
 - The RCC adopts the recommendation by striking subsection (b). This change clarifies the revised statute.
- (2) *The CCRC recommends changing the culpable mental state in paragraph (a)(2) from “intentionally” to “knowingly” (applicable through use of “knows” in paragraph (a)(1)) to clarify that the elements in subparagraphs (a)(2)(A) and (a)(2)(B) are not inchoate and must be proven. The use of “intentionally” was in error and the updated language is consistent with the prior commentary.*
 - This change clarifies the revised statutes.

RCC § 22E-4101. Possession of a Prohibited Weapon or Accessory.

(1) *The CCRC recommends adding to first degree a subparagraph that lists a “ghost gun” as within the scope of the offense, and adding a cross-reference to the term in subsection (f). The term recently was defined and added to D.C. Code § 22–4514 (Definitions [for firearm offenses]) and D.C. Code § 22–4514 (Possession of certain dangerous weapons prohibited; exceptions) by the recently enacted Omnibus Public Safety and Justice Amendment Act of 2020 (projected law date May 18, 2021). Accordingly, the CCRC recommends inclusion of the term in RCC § 22E-701 and the revised possession of a prohibited weapon or accessory statute, RCC § 22E-4101.*

- This change improves the clarity, consistency, and proportionality of the revised statutes.

RCC § 22E-4103. Possession of a Dangerous Weapon with Intent to Commit Crime.

(1) *PDS, App. C at 682-683, recommends barring attempt liability when the actor does not actually possess a dangerous weapon. PDS agrees that attempt liability is appropriate if an actor possesses an object falsely believing that the object is a dangerous weapon. However, if the defendant does not actually possess the weapon, or object that the defendant believes is a weapon, then attempt liability is unwarranted.*

- The CCRC adopts this recommendation by adding a new subsection to RCC § 22E-4103 that bars attempt liability in cases in which the actor did not actually possess an item with intent to use it to commit an offense. If an actor possesses an item falsely believing it is a weapon prohibited under RCC §22E-4103, attempt liability may still apply.¹³¹⁸
- Possession of a Dangerous Weapon with Intent to Commit Crime is a semi-inchoate offense, which criminalizes *potentially* harmful conduct. Attempt liability under RCC § 22E-301 requires that the actor comes “dangerously close” to completing the offense. RCC § 22E-4103 broadens the scope of liability by providing criminal penalties when a person possesses a weapon with intent to use it to commit an offense, even if the person is not “dangerously close” to committing the offense.

¹³¹⁸ For example, if a person purchases what he believes is a bomb, with intent to use the bomb to commit an offense, attempt liability may still apply even if the item is not actually a bomb.

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

- (1) *OAG App. C at 659 recommends subsection (c) be amended to say: “A person does not commit an offense under this section for possession of a firearm within the first 24 hours of the prior conviction or service of the protection order, unless the judicial officer sentencing the actor or issuing the protection order specifically orders a shorter period of time for the actor to retrieve and safely transport the firearm or relinquish ownership.” OAG says that while a person should have a reasonable time to dispossess themselves of a firearm there may be special circumstances where the judicial officer finds reason to give less than 24 hours.*
 - The RCC adopts this recommendation, changing the subsection (c) statutory language to read: “An actor does not commit an offense under this section for, in fact, possessing a firearm within the first 24 hours of the prior conviction or service of the protection order, or, when the judicial officer sentencing the actor or issuing the protection order specifically orders a shorter period of time for the actor to retrieve and safely transport the firearm or relinquish ownership, within the time specified by the judicial officer.” Commentary is adjusted accordingly. This change improves the proportionality of the revised statutes.
- (2) *PDS App. C at 683 recommends switching the word order “so ‘is a fugitive from justice’ is at (A) and the prior conviction paragraph is at (B).” PDS says that this will ensure that the culpable mental state “knowingly” applies to the phrase “is a fugitive from justice,” consistent with the commentary. The current drafting, contrary to the commentary’s description, seems to indicate that strict liability applies to the status as a fugitive from justice.*
 - The RCC adopts this recommendation, switching the word order as recommended. This change clarifies the revised statutes.
- (3) *USAO App. C at 691-692 recommends changing the words “sexual conduct” to “a sexual act, a sexual contact” and notes that “sexual conduct” is not a defined term and not used as an element in RCC offenses.*
 - The RCC adopts this recommendation, replacing the word “sexual conduct” with “a sexual act, a sexual contact.”
- (4) *USAO App. C at 692 recommends changing the type of judicial orders referenced in subsection (b)(2)(C) of the offense. USAO recommends expanding the scope of the provision to include “stay away orders imposed as part of a criminal case, either as a condition of release pending trial or as a condition of probation.” USAO also notes that stay away orders could also be imposed as part of civil anti-stalking orders. USAO recommends specific language, including reference in its proposed language to requiring either actual or personal notice.*
 - The RCC partially adopts this recommendation by adding to subsection (b)(2)(C) the language “or a final anti-stalking order issued under D.C. Code § 16-1064.” This language treats new anti-stalking orders as equivalent to civil protection orders that are no-contact and No HATS orders (both covered by the RCC reference to a final protection order). However, the revised statute does not extend subsection (b)(2)(C) to

include other court orders in criminal cases, which would seem to be a different approach than under current law. Current D.C. Code § 22-4503(A)(5)(B) does not appear to reach criminal cases, as evidenced by its reference to a "petitioner." The revised statute also does not include specific language regarding "personal notice" being sufficient for a hearing at which an order is issued; the revised statute maintains the notice requirements for protection orders under D.C. Code § 16-1005 and anti-stalking orders under D.C. Code § 16-1064. This change improves the clarity and consistency of the revised statutes.

- (5) *The CCRC recommends deleting "in fact" from sub-paragraph (b)(2)(C) because it is duplicative of the "in fact" mental state in sub-paragraph (b)(2)(B).*
 - This change improves the clarity of the revised statutes.
- (6) *The CCRC has defined the term "crime of violence" which is used in the revised RCC § 22E-4105 statute. The revised definition is similar in scope to the definition of "crime of violence" in current D.C. Code § 23-1331(4). See commentary to "crime of violence" in RCC § 22E-701.*
 - This change improves the clarity of the revised statutes.
- (7) *The CCRC recommends amending the statutory language to clarify that qualifying prior convictions must be for offenses committed within ten or five years of the current possession of a firearm. The prior statutory language and commentary set the time period based on the date of conviction rather than commission of the offense. However, as the primary aim of the statute is to punish possession of a firearm within a window of time after the actor engages in a specified criminal act (and there may be heightened dangerousness), the more appropriate starting point for the five or ten year window is the date of commission of a crime. Liability for other firearm offenses (e.g., § 7-2502.01A, Possession of an Unregistered Firearm, Destructive Device, or Ammunition) is available for firearm possession outside this window of time. The updated language also is consistent with the updated language regarding prior convictions in RCC § 22E-606, Repeat Offender Penalty Enhancement.*
 - This change improves the clarity and consistency of the revised statutes.

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

(1) *OAG App. C 659-660 recommends that the nuisance provision in this section be amended to include an antique firearm. OAG says that “RCC § 22E-701 states, in relevant part, that a “firearm” “has the meaning specified in D.C. Code § 7-2501.01. However, D.C. Code § 7-2501.01 excludes an antique firearm from the definition of a firearm.”*

- The RCC does not adopt further changes because the text, in the definition of “firearm” in RCC § 22E-701¹³¹⁹ already includes an “operable antique firearm.” An inoperable antique firearm is not a nuisance.

¹³¹⁹ “Firearm” has the meaning specified in D.C. Code § 7-2501.01, except that in Chapter 41 of this title the term “firearm”:

- (A) Shall not include a firearm frame or receiver;
- (B) Shall not include a firearm muffler or silencer; and
- (C) Shall include operable antique pistols.

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

- (1) *OAG App. C 660-661 recommends that (1) the text of RCC § 22E-4119 (a) and (b) should be amended to state that the trier of fact shall initially enter a judgment for more than one of the listed offenses based on the same act or course of conduct, however, pursuant to RCC § 22E-22E-214 (c) and (d) only the conviction for the most serious offense will remain after the time for appeal has run or an appeal has been decided. Second, to ensure that a defendant does not serve additional time pending an appeal, or for the time to appeal to have expired, and (2) any sentences issued pursuant to this paragraph run concurrently. OAG says this will clarify how practice will proceed under the revised statute.*
- The RCC adopts this recommendation, amending RCC § 22E-4119 as well as RCC § 22E-214 to clarify that the sentencing court may either vacate all but one of the offenses that merge prior to initial sentencing, or go ahead and enter judgment and sentence the actor for the offenses that merge. But, if the latter course is chosen the sentences must run concurrently and the convictions for all but one (assuming all are not overturned on appeal) must be vacated after the time for appeal has expired or there is a judgment on appeal. This change improves the clarity and consistency of the revised statutes.
- (2) *OAG App. C 660-662 recommends redrafting the commentary “to make it clear that the unit of prosecution and conviction for possessing an unregistered firearm remains each weapon.” OAG says that the commentary incorrectly states in one location that “Under current District case law, multiple convictions for a possession of an unregistered firearm merge ...” while in footnote 11 the commentary cites Hammond v. United States, 77 A.3d 964, 968 (D.C. 2013) for the holding that “the unit of prosecution for possessing an unregistered firearm is each weapon.” OAG says it would be disproportionate to limit convictions with multiple unregistered firearms to a single conviction.*
- The RCC adopts this recommendation by deleting the incorrect sentence indicating that multiple convictions for a possession of an unregistered firearm merge, and moving the first sentence of the cited footnote into the body of the commentary. The CCRC did not intend to change this unit of prosecution case law and the sentence was in error. This change clarifies the revised statutes.
- (3) *OAG App. C 662 recommends amending the statute to permit multiple convictions for possession of an unregistered firearm and one or more of the following based on the same act or course of conduct. Carrying a Dangerous Weapon under RCC § 22E-4102, Possession of a Dangerous Weapon with Intent to Commit Crime under RCC § 22E-4103, or Possession of a Dangerous Weapon During a Crime under RCC § 22E-4104. OAG argues that multiple convictions should be*

permitted for possession of an unregistered firearm and other offenses because the interests to society are different.

- The RCC does not incorporate this recommendation because it may result in disproportionate penalties. The RCC clearly recognizes that there is a distinct and significant social interest in failure to register a firearm by codifying as a separate offense possession of an unregistered firearm under RCC § 7-2502.01A, for which a person may be convicted and sentenced to the same imprisonment time as under current law. However, the purpose of RCC § 22E-4119, limitation on convictions for multiple related weapon offenses, is to address imprisonment penalties to ensure that overall punishments for similar weapon offenses remain proportionate. The CCRC does not believe, upon review of court data and public opinion surveys, that it would be proportionate to stack penalties for possession of an unregistered firearm on top of felony penalties for these other offenses which involve possessing a firearm in circumstances where the firearm isn't displayed or used.
- OAG's recommendation concerns subsection (a) of RCC § 22E-4119 which addresses weapon offenses where the weapon was not actually used or displayed to a person. Possession of an unregistered firearm under RCC § 7-2502.01A notably does *not* merge with offenses involving use/display (see subsection (b) of RCC § 22E-4119). The other offenses in subsection (a) that OAG recommends allowing multiple convictions for all carry felony imprisonment penalties for a firearm, so the practical effect of OAG's recommendation would be to allow stacking of the one-year maximum penalty for RCC § 7-2502.01A (unregistered firearm) on top of these other felony penalties for possessory crimes that do not involve use/display.
- OAG's comment makes no reference to penalties in its comment and does not discuss whether stacking imprisonment terms for RCC § 7-2502.01A on top of other (felony) firearm offenses that don't involve actual use or display of the firearm is proportionate. Analysis of court data over 2010-2019 indicates that about 18% of convictions for possession of an unregistered firearm were sentenced consecutive to any other offense,¹³²⁰ although analysis of what those sentences were and whether the sentences were suspended is not available. So, depending on what proportion of this 18% of consecutive sentences involve other charges targeting possession or carrying of a firearm, there may be a small but limited practical effect that results from inclusion of unregistered firearm alongside other felony charges in RCC § 22E-4119(a).

¹³²⁰ See CCRC Advisory Group Memo #40 - Statistics on District Adult Criminal Charges and Convictions for a more complete description of this analysis. Memo #40 also includes important caveats on the CCRC analysis of court data.

- (4) *PDS, App. C at 683, recommends that the statute refer to penalty enhancements. PDS notes that under prior versions of specific offenses using or displaying a weapon was an element of higher penalty grades, whereas more recent versions apply a penalty enhancement for using or displaying a weapon.*
- The RCC adopts this recommendation. The statute will be amended to clarify that the limitation on convictions applies to offenses that have penalty enhancements for using or displaying weapons. This change improves the clarity of the revised statute.
- (5) *PDS, App. C at 683 recommends that § 22E-4119(b)(3) should apply to all offenses under the RCC, not just offenses under Subtitle II. PDS notes that “while the limitation on convictions at §22E-4119(b)(3) applies only to Subtitle II of Title 22E, the offense of possession of a dangerous weapon with intent to commit a crime at §22E-4103 allows for liability when the actor intends to commit an offense under Title III of Title 22E.” PDS says “[t]his appears to be an oversight as there is no statement in the commentary to explain why offenses against persons would merge with possession of a dangerous weapon with intent to commit a crime but a property offense would not.”*
- The RCC partially adopts this recommendation by revising (b)(3) to include all offenses under Subtitle II and III with such a display or use of a dangerous weapon gradation or enhancement. At present, only one Subtitle III offense, RCC § 22E-2701, burglary, is included by this reference to Subtitle III. This change improves the proportionality of the revised statutes.

RCC § 22E-4120. Endangerment with a Firearm

(1) *USAO App. C 711 says it “continues to recommend increasing the penalty for Endangerment with a Firearm.” USAO quotes part of a prior CCRC response which in part said, “For example, increasing the penalty class for this offense by one class would punish endangering a person with a firearm (which does not require inflicting any fear or injury) more severely than using a firearm to cause a significant bodily injury.” USAO then says that, “causing significant bodily injury (Third Degree Assault) would be a Class 9 felony, and using a firearm to cause a significant bodily injury (Enhanced Third Degree Assault) would be a Class 7 felony. Thus, USAO’s proposal to increase the penalty for this offense (for example, to a Class 8 felony) would not punish endangering a person with a firearm more severely than using a firearm to cause a significant bodily injury, and would more adequately represent the substantial danger posed by a person who fires a gun.”*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The particular example previously used by CCRC was not on point, and USAO is correct that its proposal to raise RCC § 22E-4120, endangerment with a firearm to a Class 8 penalty would still be lower than the Class 7 penalty for assaulting someone and causing bodily injury with a dangerous weapon which is a Class 6 offense under the RCC. However, it remains that heightened punishment for RCC § 22E-4120, endangerment with a firearm, would be disproportionate for multiple reasons.
 - First, CCRC notes that while the RCC § 22E-4120, endangerment with a firearm offense is primarily a new offense, its closest counterpart in the current D.C. Code is § 22–4503.01, Unlawful discharge of a firearm, which carries a one year penalty, is more regulatory in nature, and requires only negligently mishandling a firearm. The CCRC believes raising penalties in this instance, from a misdemeanor to a felony, is justified where a person knowingly discharges a firearm in a manner that creates a substantial risk of death or serious bodily injury, or otherwise occurs in a public place. A felony is appropriate for such a terrifying event, even though no one is harmed.
 - However, this offense is intended to cover lower-level conduct that falls short of attempted assaults or murders or threatening with a gun, and raising the penalty as recommended by USAO would allow the government to effectively circumvent the requirements of those offenses. This endangerment with a firearm offense has a lesser culpability requirement than such attempts (which require the actor *plan* to commit the harm) and doesn’t require an intent to threaten. More severe penalties such as those requested by USAO

are available under other RCC offenses, e.g. for attempted second degree assault (trying but not actually causing someone serious bodily injury) which carries a 4 year penalty (equal to the USAO proposed Class 8 penalty for this offense). Attempted murder by shooting a firearm at another person carries much higher penalties still, potentially dozens of years. Another similar offense, enhanced first degree threats, provides a Class 8 penalty, the level here requested by USAO, when a person knowingly engages in an enhanced criminal threat of another person with a firearm under RCC § 22E-1204. This offense, while similar to such attempts and threats, is broader in scope and serves to capture any knowing shooting in an area where someone might be seriously injured.

RCC § 22E-4201. Disorderly Conduct

- (1) *OAG App. C at 662 says in a footnote that it believes the word “criminal” in the disorderly conduct and rioting statutory text is a typo and should be stricken as unnecessary.*
 - The RCC does not adopt the OAG recommendation because it would make the statute less clear and proportionate. The commentary discusses the use of the word criminal, noting the example: “Consider, for example, a person who becomes afraid that a repossession officer will tow away their car, due to delinquent payments. That harm (alone) is not a criminal taking of property and, without more, the officer’s conduct is not disorderly.” Part of one footnote in the commentary to the disorderly offense did misleadingly indicate that there would need to be fear of a particular criminal offense, versus a criminal harm generally, and that part of the footnote has been deleted.
- (2) *OAG App. C at 662-663 recommends¹³²¹ the statute be amended to provide liability in a location that is inside a public conveyance or a station for a public conveyance. OAG says that this expanded scope recognizes that being inside the fare gates of a metro station or on a bus (which requires payment to enter) is still an area generally considered open to the public where disorderly conduct can occur. OAG also notes that the current D.C. Code disorderly statute includes a provision regarding public conveyances.¹³²²*
 - The RCC adopts the OAG recommendation by adding a new sub-paragraph (a)(1)(B) that reads: “Inside a public conveyance or a rail transit station;”. In RCC § 701, the RCC already specifies: “‘Public conveyance’ means any government-operated air, land, or water vehicle used for the transportation of persons, including any airplane, train, bus, or boat” and “‘Rail transit station’ has the meaning specified in D.C. Code § 35-251.” This change improves the clarity and proportionality of the revised statutes.
- (3) *OAG App. C at 663 recommends that either of the RCC offenses of disorderly conduct or public nuisance “add back some of the language...from the current law, so that it continues to be an offense to engage in disruptive conduct, which reasonably impedes or disrupts the lawful use of a public conveyance.” OAG says that it “is concerned about behavior on METRO trains and buses that prevent its passengers from peaceably enjoying their travel, notwithstanding that the behavior does not rise to the level of potential harm required by paragraphs*

¹³²¹ By email to the CCRC on 2/4/21 the OAG representative indicated that OAG’s preferred language for updating the scope of disorderly conduct in paragraph (a)(1) is to include sub-paragraph (B) as follows:

(1) In fact, is in a location that is:

- (A) Open to the general public at the time of the offense;
- (B) Inside a public conveyance or a train station servicing a public conveyance; or
- (C) A communal area of multi-unit housing;

¹³²² D.C. Code § 22-1321(c) (“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.”).

(a)(2) of this offense. For example, OAG has seen cases where youth hang from bars on buses and trains preventing passengers from getting to their seats or exiting at their stop.” OAG says that its “recommendation does not include the term “disturbs” as we want to make clear that this offense should be reserved more than mere disturbance,” but does not further clarify what specific language from current law it wishes to insert.

- The RCC does not adopt the OAG recommendation to further add in language from current law because it may make the revised statute less clear and proportionate. The specific scenario discussed by OAG, if significant, is already addressed by RCC § 22E-4202, public nuisance. (“An actor commits public nuisance when the actor purposely causes significant interruption to ... a person’s lawful use of a public conveyance.”)

RCC § 22E-4202. Public Nuisance.

(1) *OAG App. C at 663 recommends that either of the RCC offenses of disorderly conduct or public nuisance “add back some of the language...from the current law, so that it continues to be an offense to engage in disruptive conduct, which reasonably impedes or disrupts the lawful use of a public conveyance.” OAG says that it “is concerned about behavior on METRO trains and buses that prevent its passengers from peaceably enjoying their travel, notwithstanding that the behavior does not rise to the level of potential harm required by paragraphs (a)(2) of this offense. For example, OAG has seen cases where youth hang from bars on buses and trains preventing passengers from getting to their seats or exiting at their stop.” OAG says that its “recommendation does not include the term “disturbs” as we want to make clear that this offense should be reserved more than mere disturbance,” but does not further clarify what specific language from current law it wishes to insert.*

- The RCC does not adopt the OAG recommendation to further add in language from current law because it may make the revised statute less clear and proportionate. The specific scenario discussed by OAG, if significant, is already addressed by RCC § 22E-4202, public nuisance. (“An actor commits public nuisance when the actor purposely causes significant interruption to ... a person’s lawful use of a public conveyance.”)

RCC § 22E-4203. Blocking a Public Way.

- (1) *OAG App. C 663-664 recommends including in commentary a reference to prior Council legislative history providing examples of when having a prior warning for blocking is sufficiently related to current conduct to provide for liability.*
 - The RCC incorporates the Council legislative history recommended by OAG,¹³²³ placing the language in a footnote in the commentary. This change clarifies the revised statute.
- (2) *OAG App. C 664-65 recommends amending paragraph (a)(2) to include “the blocking of entrances and exits to private property.” OAG says that it is a common situation that, for example, “a person stands on the sidewalk in front of a CVS drug store blocking people from entering and exiting the store.” OAG says that, “[b]ecause the CVS is not located in a government building, this offense does not apply[, h]owever, because the person is standing on the sidewalk, the offense of trespass does not apply.”*
 - The RCC does not incorporate the OAG recommendation because the statutory language already covers the scenario described by OAG. Contrary to the OAG assertion, the plain language of the statute applies to blocking any street, sidewalk, bridge, path, entrance, exit, or passageway, whether or not it goes to private or public property. The statute does require that the actor be on government land (such as a sidewalk) or in a government building but the adjective “government” is not in paragraph (a)(1). To clarify this point a sentence and footnote explaining it has been added to the commentary on (a)(1): “The location blocked may be a privately owned location, so long as the other requirements of the offense are met.”¹³²⁴

¹³²³ Committee on the Judiciary and Public Safety, Report on Bill 18-425, the Disorderly Conduct Amendment Act of 2010 (Nov. 18, 2010) at 7 (“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.”).

¹³²⁴ For example, RCC § 22E-4203 is applicable when the actor is on a public sidewalk immediately abutting a private entrance on private land (or in a private building), effectively blocking the entrance to the private entrance (or building). The list of locations that may be blocked in paragraph (a)(1) is not limited to government property, however the actor must themselves be on government land or in a government building under paragraph (a)(2).

RCC § 22E-4206. Indecent Exposure.

(1) *OAG, App. C at 665, recommends deleting the exclusion from liability for a person under the age of 12 years (previously paragraph (c)(1)). OAG states that it is unnecessary because the Developmental Incapacity Affirmative Defense (now Minimum Age for Offense Liability in RCC § 22E-216) “relates to all criminal conduct.”*

- The RCC incorporates this recommendation by deleting what was previously paragraph (c)(1) from the revised indecent exposure statute. This change improves the clarity and consistency of the revised statutes.

RCC § 22E-4401. Prostitution.

- (1) *OAG App. C at 674 repeats the CCRC response to the prior OAG comment at App. C at 558-560 and states: “the Council cannot regulate the records kept by a federal agency, or the form in which they are kept. That applies to current law as surely as it does to this provision. We would also emphasize, here and in the patronizing prostitution statute, that the expungement provisions cannot regulate federal agencies, or say that a person shall not be held guilty of a federal crime; it can only reach District agencies and District offenses.”*
 - The RCC does not adopt the OAG prior or repeated recommendation regarding changes to record sealing provisions at this time, for the reasons previously stated. The CCRC has noted this in Appendix K as an issue that needs addressing in the future.
- (2) *The CCRC recommends deleting the deferred disposition provision (previously subsection (c)) from the revised prostitution statute and instead relying on the general deferred disposition provision in RCC § 22E-602. The provisions are largely identical, the main difference being the deferred disposition provision in RCC § 22E-602 permits sealing instead of expungement upon successful completion of probation, discharge, and dismissal of proceedings. In the previous RCC compilation, only the revised prostitution, patronizing for prostitution, and drug possession statutes had a deferred disposition provision and it permitted expungement because it was modeled on the current D.C. Code drug possession statute. Now, however, RCC § 22E-602 has a general deferred disposition provision that applies to all Class A, B, C, D, and E offenses in the RCC and provides for record sealing under D.C. Code § 16–803(l) and (m) upon successful completion of probation, discharge, and dismissal of proceedings. The maintenance of a non-public file concerning prior utilization of deferred disposition proceedings under RCC § 22E-602(c) may facilitate better decision making by the court and prosecutors regarding use of deferral and diversion mechanisms.*
 - This change improves the proportionality of the revised statutes.

RCC § 22E-4402. Patronizing Prostitution.

(1) *The CCRC recommends deleting the deferred disposition provision (previously subsection (b)) from the revised patronizing prostitution statute and instead relying on the general deferred disposition provision in RCC § 22E-602. The provisions are largely identical, the main difference being the deferred disposition provision in RCC § 22E-602 permits sealing instead of expungement upon successful completion of probation, discharge, and dismissal of proceedings. In the previous RCC compilation, only the revised prostitution, patronizing for prostitution, and drug possession statutes had a deferred disposition provision and it permitted expungement because it was modeled on the current D.C. Code drug possession statute. Now, however, RCC § 22E-602 has a general deferred disposition provision that applies to all Class A, B, C, D, and E offenses in the RCC and provides for record sealing under D.C. Code § 16–803(l) and (m) upon successful completion of probation, discharge, and dismissal of proceedings. The maintenance of a non-public file concerning prior utilization of deferred disposition proceedings under RCC § 22E-602(c) may facilitate better decision making by the court and prosecutors regarding use of deferral and diversion mechanisms.*

- This change improves the proportionality of the revised statutes.

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

- (1) *OAG, App. C at 674-75, recommends revising subparagraphs (a)(3)(A) and (a)(3)(B) to read “a District offense, a violation of D.C. Official Code § 25-1002, or a comparable offense or violation in another jurisdiction” or something similar. The subparagraphs currently read, in relevant part, “a District offense, including a violation of D.C. Code § 25-1002, or a comparable offense in another jurisdiction,” based on a previous OAG recommendation.¹³²⁵ OAG states that “by classifying something subject to civil penalties as an ‘offense,’ it implies that every other use of the word ‘offense’ in this provision sweeps in offenses punishable only by civil penalties.”*
 - The RCC incorporates this recommendation by revising subparagraphs (a)(3)(A) and (a)(3)(B) to read, in relevant part, “a District offense, a violation of D.C. Code § 25-1002, or a comparable offense or violation in another jurisdiction.” This change improves the clarity and consistency of the revised statutes.
- (2) *OAG, App. C at 676, recommends revising the exclusion from liability in subsection (b) so that “during a demonstration” modifies the remaining requirements. With this revision, the exclusion now reads: “An actor does not commit an offense under this section when, in fact, during a demonstration, the complainant’s conduct constitutes, or, if carried out, would constitute, a trespass under RCC § 22E-2601, a public nuisance under RCC § 22E-4202, blocking a public way under RCC § 22E-4203, an unlawful demonstration under RCC § 22E-4204, an attempt to commit such an offense, or a comparable offense in another jurisdiction.”*
 - The RCC adopts this recommendation. This change improves the clarity and consistency of the revised statutes.
- (3) *The CCRC recommends codifying an exclusion in paragraph (b)(2): “An actor does not commit an offense under this section when, in fact, the actor satisfies the requirements specified under D.C. Code § 7-403.” This is consistent with current law,¹³²⁶ although the current D.C. Code contributing to the delinquency of a minor*

¹³²⁵ App. D2 at 293.

¹³²⁶ D.C. Code § 7-403 states that contributing to the delinquency of a minor under current D.C. Code § 22-811(a)(2) and (b)(1) “shall not be considered crimes and shall not serve as the basis for revoking or modifying a person’s supervision status” when healthcare is sought for an overdose:

(a) Notwithstanding any other law, the offenses listed in subsection (b) of this section shall not be considered crimes and shall not serve as the sole basis for revoking or modifying a person's supervision status:

(1) For a person who:

(A) Reasonably believes that he or she is experiencing a drug or alcohol-related overdose and in good faith seeks health care for himself or herself;
(B) Reasonably believes that another person is experiencing a drug or alcohol-related overdose and in good faith seeks healthcare for that person; or
(C) Is reasonably believed to be experiencing a drug or alcohol-related overdose and for whom health care is sought; and

statue doesn't reference D.C. Code § 7-403. Both the commentary to the revised contributing to the delinquency of a minor statute and the Appendix K that accompanies this review note that D.C. Code § 7-403 will need conforming amendments to reflect the revised contributing to the delinquency of a minor statute.

- This change improves the clarity and consistency of the revised statutes.

(2) The offense listed in subsection (b) of this section arises from the same circumstances as the seeking of health care under paragraph (1) of this subsection.

(b) The following offenses apply to subsection (a) of this section:

...

(5) Provided that the minor is at least 16 years of age and the provider is 25 years of age or younger:

(B) Contributing to the delinquency of a minor with regard to possessing or consuming alcohol or, without a prescription, a controlled substance as prohibited by § 22-811(a)(2) and subject to the penalties provided in § 22-811(b)(1)”

D.C. Code § 7-403(a), (b)(5)(B).

RCC § 7-2502.01A. Possession of an Unregistered Firearm, Destructive Device, or Ammunition.

(1) *The CCRC recommends amending the commentary to RCC § 7-2502.01A to clarify the burden of proof for the listed exclusions from liability. The commentary in two places incorrectly referred to the burden of proof being on the defendant and had not been updated to reflect the general provision in RCC § 22E-201(b)(1) that “If there is any evidence of a statutory exclusion from liability at trial, the government must prove the absence of at least one element of the exclusion from liability beyond a reasonable doubt.”*

- This change improves the clarity and consistency of the revised statutes.

RCC § 7-2502.15. Possession of a Stun Gun

(1) *OAG App. C 665 recommends deletion of paragraph (e)(2) which states: “The Attorney General for the District of Columbia may, in its discretion, offer an administrative disposition under D.C. Code § 5-335.01 et seq. for a violation of this section.” OAG says that the provision is “at best redundant to OAG’s authority, or at worst, the failure of other offenses to contain this reference could be viewed as a limitation on OAG’s authority to grant post-and-forfeits as a way of resolving its other offenses.”*

- The RCC incorporates the OAG recommendation by deleting the provision. This change clarifies the revised statutes.

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

(1) *OAG App 666 recommends adding the phrase “whichever is least” to subparagraph (4)(A). OAG says that this will ensure the rule of lenity does not apply to that part of the statute, noting that the commentary makes the statement: “A person carries a pistol unlawfully if they are outside their home or business and have conveniently accessible and within reach more ammunition than will fully load the pistol twice or if they have more than 20 rounds of ammunition, whichever is least.”*

- The RCC partially incorporates this recommendation by deleting the phrase “whichever is least” in the commentary sentence cited. The plain language specifies that the government can meet its burden either way. Deleting “whichever is least” from the commentary makes the entry more consistent with the statutory language. This improves the clarity and consistency of the revised statutes.

§ 16–710. Suspension of imposition or execution of sentence.

(1) *PDS App. C at 707 recommends the RCC reduce the length of probation to a maximum of two years. PDS notes that the RCC at present does not address probation. PDS further says that, “to increase the positive impacts of probation and minimize intrusive, unproductive, and lengthy supervision, the RCC should consider tying the length of probation to completion of a goal rather than an arbitrary amount of time.” PDS also recommends that there should be a one-year review of probation with a presumption that probation should be terminated absent a compelling reason for continuance. PDS cites relevant research by the Pew Institutes.*

- The RCC does not incorporate this recommendation at this time. The CCRC may issue future recommendations regarding probation.

RCC § 16-1022. Parental Kidnapping.

(1) *PDS, App. C at 666, recommends that the exclusion to liability under paragraph (e)(1) be amended to require that the parent reasonably believes he or she is fleeing from imminent physical harm.*

- The RCC adopts this recommendation. This change improves the clarity and proportionality of the revised statute.

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

(1) *USAO App. C 692 says that it opposes the RCC proposal that three years after enactment all offenses punishable by imprisonment be jury demandable. USAO says it “incorporates its arguments made in previous submissions regarding the significant expansion of jury trials proposed by the CCRC.”*

- The RCC does not incorporate this recommendation for the reasons stated in prior responses to USAO and described in the commentary. Only a dozen states do not provide a jury trial for all crimes carrying an imprisonment penalty. A three year delay in implementation gives ample time for the court and practitioners to adjust to possible changes in caseflow and capacity.

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

(1) *USAO App. C 693 recommends eliminating the element requiring that the defendant “fail to make reasonable efforts” to appear or remain for a hearing. USAO says that it is unclear how the government could meet its burden for this element given that many relevant facts (e.g. bus delay or a technological problem connecting to a virtual hearing, or hospitalization) are uniquely within the knowledge of the defendant. In the alternative, USAO says that if the CCRC wishes to account for such situations the RCC could make it an affirmative defense “that the defendant made all reasonable efforts to appear or remain for the hearing.” USAO says an affirmative defense is more appropriate than a defense because the defendant typically will be the only party able to provide proof that they made all reasonable efforts to appear.*

- The RCC partially incorporates this recommendation by eliminating the requirement that the defendant “knowingly fails to make reasonable efforts to appear or remain for the hearing,” requiring knowledge as to failure to appear or remain, and creating a defense for when the actor, “in fact, makes good faith, reasonable efforts to appear or remain for the hearing.” The RCC adopts the same approach in both the revised D.C. Code § 23-586 and D.C. Code § 23-1327, as both address failure to appear circumstances. While USAO rightly points to difficulty in proving as an element whether reasonable efforts were made to appear, simply striking the subsection would leave a strict liability requirement as to the failure to appear, contrary to current law. Also, the USAO recommended language that the defendant take “all reasonable efforts” (as opposed to merely “reasonable efforts”) to appear invites speculation as to overlooked means by which appearance could have been secured. The revised statute, accordingly, refers to “good faith, reasonable efforts.” As to whether the defense should be an affirmative defense, the CCRC notes that the current case law on the meaning of “willfulness” as used in D.C. Code § 23-586 and D.C. Code § 23-1327, statutory presumptions about prima facie evidence in D.C. Code § 23-1327, and the burden of production in the court-recognized “special circumstances defense”¹³²⁷ to the provision in D.C. Code § 23-1327—while far from clear—appear to impose an initial burden of production on the defendant but do not clearly establish the

¹³²⁷ *Raymond v. United States*, 396 A.2d 975, 978 (D.C.1979); *Laniyan v. United States*, 226 A.3d 1146, 1151 (D.C. 2020) (“Our cases hold that where, as here, a defendant presents special circumstances explaining his failure to appear as inadvertent, the judge (in a bench trial) must either discredit the defendant's evidence or credit some or all of it while pointing to other evidence overcoming it. In other words, if a defendant puts forward a colorable defense to a finding of willfulness, and if the judge credits that defense, then the judge must discuss in sufficient detail the proffered reasons for failing to appear and what other evidence overcomes those reasons, in order to find the defendant's failure to appear willful. In those situations, the judge cannot simply rely on the statutory inference alone.”).

defense as an affirmative defense with a preponderance standard. The CCRC notes that, as is described in the commentary, voluntariness may often be decisive in instances where unexpected external events (e.g. bus delay) cause the failure to appear. This change improves the clarity and proportionality of the revised statutes.

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

(1) *USAO App. C 693 recommends eliminating the element requiring that the defendant “fail to make reasonable efforts” to appear or remain for a hearing. USAO says that it is unclear how the government could meet its burden for this element given that many relevant facts (e.g. bus delay or a technological problem connecting to a virtual hearing, or hospitalization) are uniquely within the knowledge of the defendant. In the alternative, USAO says that if the CCRC wishes to account for such situations the RCC could make it an affirmative defense “that the defendant made all reasonable efforts to appear or remain for the hearing.” USAO says an affirmative defense is more appropriate than a defense because the defendant typically will be the only party able to provide proof that they made all reasonable efforts to appear.*

- The RCC partially incorporates this recommendation by eliminating the requirement that the defendant “knowingly fails to make reasonable efforts to appear or remain for the hearing,” requiring knowledge as to failure to appear or remain, and creating a defense for when the actor, “in fact, makes good faith, reasonable efforts to appear or remain for the hearing.” The RCC adopts the same approach in both the revised D.C. Code § 23-586 and D.C. Code § 23-1327, as both address failure to appear circumstances. While USAO rightly points to difficulty in proving as an element whether reasonable efforts were made to appear, simply striking the subsection would leave a strict liability requirement as to the failure to appear, contrary to current law. Also, the USAO recommended language that the defendant take “all reasonable efforts” (as opposed to merely “reasonable efforts”) to appear invites speculation as to overlooked means by which appearance could have been secured. The revised statute, accordingly, refers to “good faith, reasonable efforts.” As to whether the defense should be an affirmative defense, the CCRC notes that the current case law on the meaning of “willfulness” as used in D.C. Code § 23-586 and D.C. Code § 23-1327, statutory presumptions about prima facie evidence in D.C. Code § 23-1327, and the burden of production in the court-recognized “special circumstances defense”¹³²⁸ to the provision in D.C. Code § 23-1327—while far from clear—appear to impose an initial burden of production on the defendant but do not clearly establish the

¹³²⁸ *Raymond v. United States*, 396 A.2d 975, 978 (D.C.1979); *Laniyan v. United States*, 226 A.3d 1146, 1151 (D.C. 2020) (“Our cases hold that where, as here, a defendant presents special circumstances explaining his failure to appear as inadvertent, the judge (in a bench trial) must either discredit the defendant's evidence or credit some or all of it while pointing to other evidence overcoming it. In other words, if a defendant puts forward a colorable defense to a finding of willfulness, and if the judge credits that defense, then the judge must discuss in sufficient detail the proffered reasons for failing to appear and what other evidence overcomes those reasons, in order to find the defendant's failure to appear willful. In those situations, the judge cannot simply rely on the statutory inference alone.”).

defense as an affirmative defense with a preponderance standard. The CCRC notes that, as is described in the commentary, voluntariness may often be decisive in instances where unexpected external events (e.g. bus delay) cause the failure to appear. This change improves the clarity and proportionality of the revised statutes.

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

- (1) *OAG App. C at 702-704 recommends that subsection (a) delete the phrase “committed on or after August 5, 2000” which limits the scope of the purposes of sentencing that follows in subsection (a). OAG says few people are likely to be sentenced for offenses committed at least 22 years before the RCC, there is no reason that an indeterminate sentence should not reflect the stated goals, and by removal of the date “we avoid an issue concerning how people should be sentenced for offenses that were committed between August 2000 and the effective [date] of the RCC.” OAG also recommends that commentary clarify that the removal of the date is not intended to require resentencing.*
- The RCC does not incorporate the OAG recommendation at this time. In the future the CCRC may recommend broader reform recommendations as to the purposes of sentencing in D.C. Code § 24-403.01. Notably, the current articulation of purposes—unrevised in the RCC amendments to D.C. Code § 24-403.01—specifically refers to “criminal history” and lacks reference to a principle of parsimony and other goals, contrary to the best practice recommendation in the recent model language issued by the American Law Institute.¹³²⁹ While it is certainly true that very few cases are likely to arise from pre-2000 acts, the CCRC is not willing to expand the current D.C. Code articulation of the purposes of sentencing to any more offenses without further analysis. Also, while the OAG comment says that it is not saying “that the remainder of D.C. Code § 24-403.01 should apply to offenses that occurred before the RCC is enacted,” the elimination of the date reference in subsection (a) may give rise to that appearance.
- (2) *PDS App. C at 707-708 recommends reducing the time required to spend on supervised release and set two years as the maximum period of supervision. PDS says that “[l]ong periods of supervision are not only demeaning to individuals, they feed a system of mass incarceration through which supervision officers use minor violations to send individuals to prison for infractions that could be better addressed through community programs or a problem-solving approach.” PDS cites national statistics and also cites data from the Criminal Justice*

¹³²⁹ See Model Penal Code: Sentencing § 1.02(2) PFD (2017) (“The general purposes of the provisions on sentencing, applicable to all official actors in the sentencing system, are: (a) in decisions affecting the sentencing of individual offenders: (i) to render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders; (ii) when reasonably feasible, to achieve offender rehabilitation, general deterrence, incapacitation of dangerous offenders, restitution to crime victims, preservation of families, and reintegration of offenders into the law-abiding community, provided these goals are pursued within the boundaries of proportionality in subsection (a)(i); (iii) to render sentences no more severe than necessary to achieve the applicable purposes in subsections (a)(i) and (a)(ii); and (iv) to avoid the use of sanctions that increase the likelihood offenders will engage in future criminal conduct.”).

Coordinating Council that, in February 2021 “nearly 13 percent of non-federal detentions at the DC Department of Corrections were for alleged parole and supervised release violations.” PDS also states concern about supervision requirements because they must be enforced by the Court Services Offender Supervision Agency (CSOSA), a federal agency following “federal prerogatives that have often run afoul of local interests.”

- The RCC does not incorporate this recommendation at this time because it may result in disproportionate penalties. The RCC revises D.C. Code § 24-403.01 to make the length of supervised release imposed under subsection (b)(2) a matter of judicial discretion. However, it is unclear how further changes to the length of supervised release may affect judicial decision making with respect to imprisonment time. The maximum possible length of supervised release may be reexamined in concert with further review of sentencing procedures by the CCRC and, perhaps, feedback based on the change to making the length of supervised release discretionary rather than mandatory.
- (3) *USAO App. C at 711 recommends removing subsection (b)(2)(C) which states that the court If the court imposes a sentence of more than one year, the court shall impose a term of supervised release of not more than 1 year, if the maximum term of imprisonment authorized for the offense is less than eight years. USAO recommends that up to three years of supervised release be permitted or required for these low-felony offenses. USAO says that these offenses “can be relatively serious” and “a 1-year term of supervision may not be a sufficient period of supervised release.” USAO says that the “fact that a 1-year period of supervision may not be sufficient in all cases was implicitly recognized by the DC Council in the recent passage of the “Intrafamily Offenses and Anti-Stalking Orders Amendment Act of 2020” (B23-181).” USAO says, “). In that act, which is pending congressional review, the DC Council modified the term of a civil protection order from an initial term of up to 1 year to an initial term of up to 2 years” and “[t]his logic applies equally—if not more forcefully—to felony offenses.” USAO also says, “it would not be consistent for a period of supervision in a civil protection order (that could stem from a misdemeanor offense) to last up to 2 years with the possibility of extension, and for a period of supervision in a felony case to last only up to 1 year.”*
- The RCC does not incorporate this recommendation because it may result in disproportionate penalties. The CCRC does not agree that the Council “implicitly recognized” that a period of supervised release of less than two years after conviction for stalking or other low felonies is inappropriate, nor that the “logic” in the civil protection order for stalking context should be applied to the criminal context. The CCRC is not aware of any such statement or reasoning in the legislative record of the Intrafamily Offenses and Anti-Stalking Orders Amendment Act of 2020” (B23-181), and none is cited by USAO.
 - A civil protection order is an entirely different level of intervention than criminal supervised release—and may still be ordered by the court in addition to any imprisonment or supervised release. The very fact that the

CPO remedy exists and has been lengthened under the recent Council legislation cuts against the need for lengthy criminal supervised release conditions. Anti-stalking legislation (D.C. Code 16-1062(a)) is tailored to provide an immediate civil remedy—a protection order—that lasts up to two years and possibly extended. But, this civil remedy is available against the alleged stalker only if the petition is within 90 days of an incident; it is an immediate response that starts the clock very shortly after the alleged behavior. In contrast, for any of the felony convictions described in subsection (b)(2)(C), the actor is subject to 2 or 4 years (Class 8 or 9) imprisonment before the term of supervised release even begins. The criminal sanctions, imprisonment and supervised release, recommended for RCC Class 8 and 9 offenses is proportionate to the severity of these crimes and operates in addition to the robust civil protection order system the District has for such offenses.

- There are a wide range of views on the necessity, length, and costs and benefits of post-release supervision. Some states, e.g. Virginia, do not have any general requirement for post-release supervision. Some experts, such as the former New York Commissioner of Corrections have recommended¹³³⁰ an end to all post-release supervision in favor of greater provision of transitional services. Other states and experts recommend long, mandatory periods of supervised release. Reasonable differences of opinion on this matter exist; the CCRC’s recommendations seek to authorize a significant, proportionate period of supervised release during the period when a person is most likely to recidivate.

(4) *The CCRC recommends changing references in the statute from “offender” to various other terminology—“person,” “incarcerated person,” and “person found guilty.”*

- This change clarifies the revised statutes.

¹³³⁰ Martin F. Horn, *Rethinking Sentencing*, 5 Correctional Management Quarterly 34, 16 38 (2001).

D.C. Code § 24-403.03. Modification of an imposed term of imprisonment.

(1) *The CCRC recommends updating the text to reflect changes to the statute Omnibus Public Safety and Justice Amendment Act of 2020, Act A23-0568 (Projected Law Date, May 18, 2021) except that, consistent with the prior recommendation to make the second look procedure available to persons of all ages at the time of their offense, the updated text strikes the under 25 age references in the Omnibus text in: 1) the title of the section; 2) the prefatory language in subsection (a); 3) paragraph (b)(1); and subparagraph (b)(3)(B). No other changes to the text of the Omnibus are recommended.*

- This change improves the clarity of the revised statutes.

RCC § 48-904.10. Possession of Drug Manufacturing Paraphernalia.

- (1) *The CCRC recommends amending subsection (b) to include as an exclusion to liability that the actor satisfies the requirements under D.C. Code § 7-403. Under current law, D.C. Code § 7-403 applies to Unlawful use or possession with intent to use drug paraphernalia as prohibited by § 48-1103(a)[.]” The prior version of RCC § 48-904.10 did not include reference to D.C. Code § 7-403 as an exclusion to liability.*
- This change improves the clarity and proportionality of the revised statutes.

RCC § 48-904.01b. Trafficking of a Controlled Substance.

(1) *The CCRC recommends replacing the words “with recklessness that” with “reckless” in subparagraph (h)(6)(C). This change clarifies that the actor must enlist, hire, contract, or encourage a person who is actually under the age of 18.*

- This change improves the proportionality of the revised statutes.