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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: November 15, 2019

SUBJECT: First Draft of Report #41, Ordinal Ranking of Maximum Imprisonment Penalties

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #41, Ordinal Ranking of Maximum Imprisonment Penalties.[1]

COMMENTS ON THE DRAFT REPORT

OAG's comments will focus on the ranking of specific offenses to provide proportionate penalties and what offenses should be jury demandable.

THE RANKING OF SPECIFIC OFFENSES TO PROVIDE PROPORTIONATE PENALTIES[2]

- The relative ranking of Nonconsensual Sexual Contact and Arranging for a Sexual Conduct with a Minor.

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.
[2] In this memorandum OAG will identify the proposed penalty first with reference to Model 1 followed by a backslash and then by the penalty proposed by Model 2. For example, "a penalty of 3 years/2 years" means that it would be a 3 year offense under Model 1 and a 2 year offense under Model 2.

The offense of First Degree Nonconsensual Sexual Conduct is a class 9 felony with a penalty of 3 years/2 years. The offense of Second Degree Nonconsensual Conduct is a class A misdemeanor with a penalty of 1 year/1 year. Arranging for a Sexual Conduct with a Minor is a class 8 felony with a penalty of 5 years/4 years.

The offense of Nonconsensual Sexual Conduct involves an actor recklessly causing the complainant to engage in a sexual act.[i] The offense of Arranging for a Sexual Conduct with a Minor generally prohibits the actor from arranging for a sexual act or sexual contact with a minor.[ii] There are numerous ways to commit this offense that have varying mental states, and other elements, that depend on the the age of the minor. Notwithstanding that the offense of Nonconsensual Sexual Conduct applies to adults and Arranging for a Sexual Conduct with a Minor applies to children, it seems disproportionate to penalize a person who actually engages in nonconsensual sexual conduct less than someone who merely arranges for someone to engage in sexual conduct. OAG, therefore recommends that the penalty for the offense of Nonconsensual Sexual Conduct be raised to be commensurate with First Degree Arranging for a Sexual Conduct with a Minor.

- The relative ranking of First Degree Check Fraud[iii] with other categories of First Degree fraud.

When analyzing why First Degree Check Fraud, which is a class 9 felony with a penalty of 3 years/2 years, was lower than all of the other First Degree Fraud offenses, we realized that check fraud, unlike the other fraud charges had only a felony offense for when the loss was $5,000 or more and a second degree offense for losses of any amount. The other fraud offenses have five degrees. RCC § 22E-2201, Fraud, has the following penalty structure.[3] If the property lost:

- has a value of $500,000 or more the recommended penalty is a class 7 felony with a penalty of 10 years/8 years (first degree);
- has a value of $50,000 or more the recommended penalty is a class 8 felony with a penalty of 5 years/4 years (second degree);
- has a value of $5,000 or more the recommended penalty is a class 9 felony with a penalty of 3 years/2 years (third degree);
- has a value of $5000 or more the recommended penalty is a class A misdemeanor with a penalty of 1 year/1 year (fourth degree);
- has any value the recommended penalty is a class C misdemeanor with a penalty of 6 months/ months (fifth degree).

[3] RCC § 22E-2202, Payment Card Fraud, has the same five tier structure as RCC § 22E-2201, Fraud, and the proposed penalty for each degree is the same.

The Commission pegged the penalty for First Degree Check Fraud with Fourth Degree Fraud. As Fourth Degree Fraud applies when the loss has a value of $5000 or more, this, on its face, would seem appropriate. However, if the First Degree Check Fraud was for a loss of $50,000 then pegging the penalty to Fourth Degree Fraud seems inappropriate because the amount of the loss would be the same as the amount of loss in Second Degree Fraud. To make the fraud penalties proportionate, therefore, the offense of Check Fraud should have the same degree structure as the other fraud offenses.

- The relative ranking of Benefiting from Human Trafficking and Misuse of Documents in Furtherance of Human Trafficking

The Commission ranked RCC § 22E-1606, First Degree Benefiting from Human Trafficking, as a class 6 felony (15 years/12 years). To commit First Degree Benefiting from Human Trafficking one must knowingly financially benefit by participating in a group of people reckless to the fact that the group is involved in forced commercial sex, trafficking in commercial sex, or sex trafficking of minors. The Commission ranked Second Degree Benefiting from Human Trafficking as a class 7 felony (10 years/8 years). The difference between the degrees of this offense is that in Second Degree Benefiting from Human Trafficking one must derive the benefit reckless to the fact that the group is involved in forced labor or services or trafficking in labor or services rather than from sex trafficking.[iv]

The Commission ranked RCC § 22E-1607, Misuse of Documents in Furtherance of Human Trafficking, as a class 8 felony (5 years/4 years). To commit Misuse of Documents in Furtherance of Human Trafficking one must prevent a person from possessing government identification, including their passport, with the intent to restrict the person's liberty in order to maintain the labor, services, or performance of a commercial sex act by that person.[v]

While OAG agrees that benefiting from human trafficking, whether of sex or labor and services, should be a serious felony, it is the confiscation of the person's passport and other government identification that keeps the trafficked person in a position where they can be victimized. The penalty for knowingly destroying or concealing government identification should be punished commensurate with benefiting from human trafficking. Therefore, OAG recommends that Misuse of Documents in Furtherance of Human Trafficking should be redrafted to have two degrees; first degree for destroying or concealing documents of persons who are sex trafficked and second degree for persons who are trafficked for labor or services. OAG further recommends that the penalty for each degree of these offenses be the same as the corresponding penalties for Benefiting from Human Trafficking.

- The ranking of Burglary

RCC § 22E-2701, Burglary, is divided into three degrees. The difference between the degrees is that First Degree Burglary involves knowingly entering a dwelling with intent to commit bodily injury, a sexual act, a sexual contact, confinement, loss of property, or damage to property;

Second Degree Burglary is committed by knowingly entering a dwelling or a building, that is not open to the public, with intent to commit bodily injury, a sexual act, a sexual contact, confinement, loss of property, or damage to property; and Third Degree Burglary is committed by knowingly entering a building or business yard with intent to commit bodily injury, a sexual act, a sexual contact, confinement, loss of property, or damage to property.[vi] The Commission recommends that First Degree Burglary be penalized as a class 8 felony (5 years/4 years), Second Degree Burglary be penalized as a class 9 felony (3 years/2 years), and Third Degree Burglary be penalized as a class 8 felony A misdemeanor (1 year/1 year). This penalty scheme would be a radical departure from the current law for these offenses.

D.C. Code § 22-801 sets out the elements and penalty for burglary.[vii] The offense has two degrees. The penalty for a person who enters an occupied dwelling with intent to commit any criminal offense "shall be punished by imprisonment for not less than 5 years nor more than 30 years. The penalty for a person who enters any dwelling or building, whether occupied or not "shall be punished by imprisonment for not less than 2 years nor more than 15 years." The ranking of First Degree Burglary under the RCC, which is comparable to the current First Degree Burglary, would reduce the penalty to the "soft minimum" of the current penalty for this offense. Given the potential for harm to a victim that occurs when a person burglarizes an occupied dwelling or building or the potential of harm to property, whether the dwelling is occupied or not, OAG recommends that the penalties for Burglary be increased.

- The ranking of Unlawful Creation or Possession of a Recording

The offense of Unlawful Creation or Possession of a Recording, RCC § 22E-2105, is ranked as a class B misdemeanor with a penalty of 6 months/6 months. The Report recommends that this offense not be jury demandable. OAG recommends that this offense be reclassified as a Class C misdemeanor with a penalty of 3 months/10 days and that it remain a non-jury demandable offense.

- The ranking of Unlawful Labeling of a Recording

The offense of Unlawful Labeling of a Recording, RCC § 22E-2207, is ranked as a class B misdemeanor with a penalty of 6 months/6 months. The Report recommends that this offense not be jury demandable. OAG recommends that this offense be reclassified as a Class C misdemeanor with a penalty of 3 months/10 days and that it remain a non-jury demandable offense.

- The ranking of Alteration of Bicycle Identification Number

The offense of Alteration of Bicycle Identification Number, RCC § 22E-2404, is ranked as a class C misdemeanor with a penalty of 3 months/10 days. The Report recommends that this offense not be jury demandable. OAG recommends that this offense be reclassified as a Class D misdemeanor with a penalty of 1month/10 days and that it remain a non-jury demandable offense.

- The ranking of Disorderly Conduct

The offense of Disorderly Conduct, RCC § 22E-4201, is ranked as a class C misdemeanor with a penalty of 3 months/10 days. The Report recommends that this offense not be jury demandable. OAG recommends that this offense be reclassified as a Class D misdemeanor with a penalty of 1 month/10 days and that it remain a non-jury demandable offense.

WHAT OFFENSES SHOULD BE JURY DEMANDABLE

OAG supports the RCC retaining the statutory expansion of the Constitutional right to a jury trial to offenses classified as Class A or B misdemeanors - those offenses that carry a maximum penalty of six months or one year. We do not believe, however, that a jury right should attach to offenses that are classified as Class C, D, or E misdemeanors - those offenses that carry a maximum penalty of three months incarceration or less. Applying that principal to the offenses listed on pages 5 and 6, of 6, of the second addendum to Report #41, we propose that all class B misdemeanors, those carrying a penalty of 6 months/6 months be made jury demandable. All class C misdemeanors, those with a penalty of 3 months/3 months, class D misdemeanors, those with a penalty of 3 months/1 month, and all class E misdemeanors, those with no incarceration option would, therefore, not be jury demandable. We do not support the Report's recommendation that certain completed and inchoate offenses that carry incarceration exposure of under 6 months be made jury demandable. A corollary to the Commission's directive, under D.C. Code § 3–152 (6) that the Commission "Adjust penalties, fines, and the gradation of offenses to provide for proportionate penalties" is that defendants who are facing the same amount of time incarcerated should have the same rights to a jury trial.

---

[i] The offense of Nonconsensual Sexual Conduct, RCC § 22E-1307, is defined, in relevant part, as follows:

> (a) *First Degree*. An actor commits first degree nonconsensual sexual conduct when that actor recklessly causes the complainant to engage in or submit to a sexual act without the complainant's effective consent.
> (b) *Second Degree*. An actor commits second degree nonconsensual sexual contact when that actor recklessly causes the complainant to engage in or submit to sexual contact without the complainant's effective consent.

[ii] The offense of Arranging for Sexual Conduct with a Minor, RCC § 22E-1306, is defined, in relevant part, as follows:

> (a) *Offense*. An actor commits arranging for sexual conduct with a minor when that actor:
> (1) Knowingly arranges for a sexual act or sexual contact between:
> (A) The actor and the complainant; or
> (B) A third person and the complainant; and

(2) The actor and any third person, in fact, are at least 18 years of age and at least 4 years older than the complainant; and
    (A) The actor is reckless as to the fact that the complainant is under 16 years of age; or
    (B) The actor:
        (i) Is reckless as to the fact that the complainant is under 18 years of age; and
        (ii) Knows that the actor is in a position of trust with or authority over the complainant; or
(3) The actor and any third person, in fact, are at least 18 years of age and at least 4 years older than the purported age of the complainant; and the complainant:
    (A) In fact, is a law enforcement officer who purports to be a person under 16 years of age; and
    (B) The actor is reckless as to the fact that the complainant purports to be a person under 16 years of age.

[iii] The offense of Check Fraud, RCC § 22E-2203, is defined, in relevant part, as follows:

(a) *First Degree.* A person commits first degree check fraud when that person:
    (1) Knowingly obtains or pays for property by using a check;
    (2) With intent that the check not be honored in full upon presentation to the bank or depository institution drawn upon; and
    (3) The amount of loss to the check holder is, in fact, $5,000 or more.
(b) *Second Degree*. A person commits second degree check when that person:
    (1) Knowingly pays for property by using a check;
    (2) With intent that the check not be honored in full upon presentation to the bank or depository institution drawn upon; and
    (3) The amount of loss to the check holder is, in fact, any amount.
(c) *Penalties*.
    (1) First degree check fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
    (2) Second degree check fraud is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(d) *Definitions*. The terms "intent" and "knowingly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "check" and "property" have the meanings specified in RCC § 22E-701; and the term "person" has the meaning specified in RCC § 22E-2002.

[iv] The offense of Benefiting from Human Trafficking, RCC § 22E-1606, is defined, in relevant part, as follows:

(a) *First Degree.* An actor commits first degree benefiting from human trafficking when that actor:
    (1) Knowingly obtains any financial benefit or property;
    (2) By participating in a group of 2 or more persons;

(3) Reckless as to the fact that the group is engaging in conduct that, in fact: constitutes forced commercial sex under RCC § 22E-1604, trafficking in commercial sex under RCC § 22E-1606, or sex trafficking of minors under RCC § 22E-1605.

(b) *Second Degree.* An actor commits second degree benefiting from human trafficking when that actor:

(1) Knowingly obtains any financial benefit or property;

(2) By participation in a group of 2 or more persons;

(3) Reckless as to the fact that the group is engaging in conduct that, in fact: constitutes Forced Labor or Services under RCC § 22E-1603 or Trafficking in Labor or Services under RCC § 22E-1605.

[v] The offense of Misuse of Documents in Furtherance of Human Trafficking, RCC § 22E-1607, is defined, in relevant part, as follows:

(a) *Offense.* An actor commits misuse of documents in furtherance of human trafficking when that actor:

(1) Knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported government identification document, including a passport or other immigration document of another person;

(2) With intent to restrict the person's liberty to move or travel in order to maintain the labor, services, or performance of a commercial sex act by that person.

[vi] The offense of Burglary, RCC § 22E-2701, is defined, in relevant part, as follows:

(a) *First Degree*. An actor commits first degree burglary when that actor:

(1) Reckless as to the fact that a person who is not a participant in the burglary is inside or is entering with the actor;

(2) Knowingly and fully enters or surreptitiously remains in a dwelling, or part thereof;

(3) Without a privilege or license to do so under civil law;

(4) With intent to commit inside 1 or more District crimes involving bodily injury, a sexual act, a sexual contact, confinement, loss of property, or damage to property.

(b) *Second Degree*. An actor commits second degree burglary when that actor:

(1) Knowingly and fully enters or surreptitiously remains in:

(A) A dwelling, or part thereof, without a privilege or license to do so under civil law; or

(B) A building, or part thereof, without a privilege or license to do so under civil law:

(i) That is not open to the general public at the time of the offense;

(ii) Reckless as to the fact that a person who is not a participant in the burglary is inside and directly perceives the actor or is entering with the actor;

(2) With intent to commit inside 1 or more District crimes involving bodily injury, a sexual act, a sexual contact, confinement, loss of property, or damage to property.

(c) *Third Degree*. An actor commits third degree burglary when that actor:
(1) Knowingly and fully enters or surreptitiously remains in:
(A) A building or business yard, or part thereof, without a privilege or license to do so under civil law;
(B) That is not open to the general public at the time of the offense;
(2) Without a privilege or license to do so under civil law;
(3) With intent to commit inside 1 or more District crimes involving bodily injury, a sexual act, a sexual contact, confinement, loss of property, or damage to property.

[vii] D.C. Code § 22-801 defines Burglary as follows:

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

(b) Except as provided in subsection (a) of this section, whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be guilty of burglary in the second degree. Burglary in the second degree shall be punished by imprisonment for not less than 2 years nor more than 15 years.

M E M O R A N D U M

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service
Date:	November 15, 2019
Re:	Comments on First Draft of Report No. 41 Ordinal Ranking of Maximum Imprisonment Penalties

The Public Defender Service makes the following comments on Report # 41, Ordinal Ranking of Maximum Imprisonment Penalties.

1) In Report #41, the Criminal Code Reform Commission set the statutory maximum for class B misdemeanors at six months but provided that most of these offenses will not be jury demandable.[1] Since the right to trial by jury attaches for all individuals under the Constitution when the statutory maximum is more than six months[2] and under D.C. Code § 16-705 when the statutory maximum is six months or more, presumably, the CCRC would make offenses non-jury demandable by making them punishable by a maximum term of 180 days or less rather than six months.

   PDS believes that all offenses that permit a maximum punishment that includes incarceration should be jury demandable.[3] In comments to the CCRC's First Draft of Report No. 5, Recommendations for Chapter 8 of the Revised Criminal Code, Offense Classes & Penalties, PDS proposed a default rule of jury demandability regardless of whether the Council set the statutory maximum for an offense at six months or 180 days. Since those recommendations and comments by PDS, the case for jury demandability has been made all the more compelling by the

[1] As stated in Report #41, the CCRC made recommendations as to jury demandability in order to decrease variables moving forward but the CCRC has yet aligned statutory maxima to conform with the determination of jury demandability.

[2] *Baldwin v. New York*, 399 U.S. 66 (1970).

[3] On June 16, 2017, PDS submitted comments for First Draft of Report No. 5, Recommendations for Chapter 8 of the Revised Criminal Code, Offense Classes & Penalties. In those comments, PDS proposed a default rule that class B misdemeanors would be jury demandable unless otherwise provided by law. Under PDS's proposal, the default of jury demandability would apply regardless of whether the maximum penalty for the offense was set at six months or 180 days. As contemplated by PDS in the June 16, 2017 comments, a defendant charged with a class B misdemeanor would be entitled to a jury trial unless the legislature specifically provided otherwise.

en banc decision of the D.C. Court of Appeals in *Bado v. United States*.[4] In *Bado* the Court of Appeals held that a defendant facing a charge that carries incarceration of 180 days and the penalty of deportation has a right to a jury trial.[5]

The holding in *Bado* creates a series of complications for jury demandability moving forward. For example, where the statutory maximum is set at 180 days and there is not a statutory or constitutional right to a trial by jury, a defendant must disclose to the court and prosecutors that he is not a U.S. citizen in order to receive the protection of a jury trial. Forcing non-citizens to declare their immigration status in an adversarial forum in order to receive the benefit of a fair adjudication by their peers violates the District's commitment to being a sanctuary city and protecting immigrant communities.[6] At a time when individuals who have been nearly life-long residents of the District can be deported to a country that they do not remember, the CCRC should not force non-citizens to choose between disclosure of immigration status and the fundamental right to a trial by jury.

Further, as noted by Chief Judge Eric Washington in his concurrence in *Bado*, providing the right to a trial by jury to non-citizen defendants and denying that same right to citizens "creates a disparity between the jury trial rights of citizens and non-citizens that lay persons might not readily understand… The failure to [address this dispartity] could undermine the public's trust and confidence in our courts to resolve criminal cases fairly."[7] Citizens and non-citizens alike face a long list of collateral consequences from criminal convictions including loss of employment, housing, and sex offender registration. Providing a universal right to a jury trial ensures that all District residents are judged by the community before being stripped of their freedom and saddled with lifelong collateral consequences in education, housing, and employment.

The primary aim of depriving individuals of their right to a trial by jury appears to be efficiency. Concerns about court efficiency drove the Council's passage of the Misdemeanor Streamlining Act.[8] In addressing the merits of efficiency, Chief Judge Washington wrote in *Bado*:

"[T]he Council could reconsider its decision to value judicial economy above the right to a jury trial. Restoring the right to a jury trial in misdemeanor cases could have the salutary effect of elevating the public's trust and confidence that the government is more concerned with courts protecting individual rights and freedoms than in ensuring that courts are as efficient as possible in bringing defendants to trial. This may be an important message to send at this time because many communities, especially communities of color, are openly questioning whether courts are truly independent or are merely the end game in the exercise of police powers by the state. Those perceptions are fueled not only by reports that police officers are not being held responsible in

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

[5] *Id*. at 1251-52.

[6] See, e.g. Sanctuary Values Emergency Declaration of 2019, PR23-0501, effective October 8, 2019.

[7] *Bado*, 186 A.3d at 1262.

[8] Omnibus Criminal Justice Reform Act of 1994, D.C. Law § 10–151, 41 D.C. Reg. 2608 (effective Aug. 20, 1994).

the courts for police involved shootings of unarmed suspects but is likely also promoted by unwise decisions, like the one that authorized the placement of two large monuments to law enforcement on the plaza adjacent to the entrance to the highest court of the District of Columbia."[9]

Numerous other jurisdictions have provided a right to trial by jury when the defendant faces any possible incarceration. For example, California provides a right to trial by jury for misdemeanor and felony offenses.[10] Colorado guarantees the right of jury trial to all individuals accused of an offense other than a noncriminal traffic infraction, municipal or county ordinance.[11] In Illinois, every person accused of an offense shall have the right to a trial by jury unless the offense is an ordinance violation punishable by fine only.[12] Maine requires jury trials for all criminal prosecutions except decriminalized traffic offenses.[13]

According to the Supreme Court, the right to a jury trial provides the defendant "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[14] Like other jurisdictions, the CCRC should recommend that a defendant is entitled to a jury trial for all offenses that carry the possibility of any term of incarceration.

2. In Report #41, the RCC placed the offense of first degree robbery in class 5. First degree robbery is defined as fifth degree robbery where in the course of committing the robbery, the defendant recklessly causes serious bodily injury by displaying or using what, in fact, is a dangerous weapon or recklessly causes serious bodily injury to a protected person. By placing first degree robbery in class 5, the offense is ranked the same as voluntary manslaughter, first degree arson, and sex trafficking of minors. While armed robbery that results in bodily injury is a serious offense, it should not be considered on the same order of magnitude as voluntary manslaughter, first degree arson, and the sex trafficking of minors. First degree arson is defined as knowingly causing a fire or explosion that damages or destroys a building, reckless to the fact that a person is present in the building, and the fire or explosion causes death or serious bodily injury. Voluntary manslaughter includes recklessly, with extreme indifference to human life, causing the death of another.

PDS recommends moving first degree robbery to group 6 and moving each degree of robbery down one offense group, thereby making fifth degree robbery a one year misdemeanor. Moving robbery in this respect would increase the proportionality between offenses.

---

[9] *Bado,* 186 A.3d at 1264.

[10] California Constitution Article 1 § 16.

[11] Colorado Revised Statutes Title 16 Criminal Proceedings § 16-10-101 Jury trials.

[12] Illinois Compiled Statutes 5/103-6.

[13] Maine Constitution Article 1 § 6.

[14] *Duncan v. Louisiana*, 391 U.S. 145, 155–156 (1968).

Memorandum

Jessie K. Liu
United States Attorney
District of Columbia

Subject: Comments to D.C. Criminal Code Reform Commission for First Draft of Report #41	Date: November 15, 2019

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

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

The U.S. Attorney's Office for the District of Columbia (USAO) and other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the CCRC's First Draft of Report #41. USAO reviewed this document and makes the recommendations noted below.[1]

Comments on Draft Report #41

1. USAO recommends keeping jury demandability requirements for misdemeanors consistent with current law.

The RCC has proposed making many misdemeanor offenses jury demandable that are not jury demandable under current law. USAO recommends remaining consistent with current law with respect to jury demandability. Under the RCC's proposal, the following offenses would be jury demandable: 6th degree assault (including attempts), all degrees of threats (including attempts), 2nd degree menacing (including attempts), all degrees of offensive physical contact (including attempts), all degrees of trespass (including attempts), stalking (including attempts), sexually suggestive conduct with a minor (including attempts), 1st and 2nd degree nonconsensual sexual conduct (including attempts), 3rd degree criminal neglect of a minor (including attempts), 3rd degree criminal abuse of a minor (likely including attempts), rioting (including attempts), failure to disperse, and possession of an unregistered firearm or ammunition (including attempts).

Creating new rights to demand a jury in misdemeanor cases will strain both prosecutorial and court resources. Jury trials take longer to try than bench trials, and must be scheduled further in advance than bench trials. Thus, creating additional misdemeanor jury trials will require more judges, more jurors (which would result in D.C. residents being called for jury duty more frequently), and additional prosecutorial resources. It may also result in delayed justice for victims, as victims will need to wait longer for cases to resolve at trial.

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

According to the D.C. Superior Court data gathered by the CCRC, between 2009 and 2019, there were 3,865 charges of simple assault and 1,312 charges of threats to do bodily harm. Even if just those offenses were deemed jury demandable, that would be a tremendous increase in the number of jury demandable cases.

Further, making these misdemeanor offenses automatically jury demandable runs counter to the D.C. Council's history of making these offenses non-jury demandable. The Omnibus Criminal Justice Reform Amendment Act of 1994, D.C. Law 10-151 (eff. Aug. 20, 1994) had the stated purpose of "reduc[ing] the length of sentence for various crimes to make them non-jury demandable." Council for the District of Columbia, Committee on the Judiciary, Report on Bill 10-98, at 3 (Jan. 26, 1994). The Committee Report further states: "Both the Superior Court and the U.S. Attorney support this change to allow for efficiencies in the judicial process. While there would be no actual monetary savings, this change will relieve pressure on current misdemeanor calendars, allow for more cases to be heard by hearing commissioners, and allow more felony trials to be scheduled at an earlier date." Committee Report at 4.

Fred B. Ugast, then-Chief Judge of the D.C. Superior Court, stated the following regarding these misdemeanor streamlining provisions:

> "Last year, the Council passed an amendment to D.C. Code § 16-705(b)(1) providing for the right to a trial by jury in criminal cases where the maximum penalty exceeds 180 days incarceration or a fine of $1000 (up from 90 days and $300). Because the vast majority of charged misdemeanors currently have maximum penalties of one year, the amendment has not significantly reduced the number of jury trials in misdemeanor cases. Bill [10]-268 and Title V of Bill 10-98 would reduce the maximum penalty of most commonly charged misdemeanors from one year to 180 days and to a fine that does not exceed $1000, thereby eliminating the defendant's entitlement to a trial by jury.
>
> "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 accepts USAO's recommendation, then USAO believes it is appropriate for enhanced 2nd degree homicide to have a statutory maximum of life imprisonment (Class 1), and 2nd degree homicide to have a statutory maximum of 40 years (Class 3).

Further, USAO recommends creating a statutory maximum of life imprisonment for enhanced 1st degree sexual assault, 1st degree sexual abuse of a minor (both enhanced and unenhanced), and enhanced 2nd degree sexual abuse of a minor. Enhanced 1st degree sexual assault could include particularly gruesome or horrific facts, such as a home invasion followed by a brutal armed rape, committed by a serial rapist, against a young child that resulted in serious injuries. A maximum of life imprisonment would allow a judge to use his/her discretion to impose an appropriate sentence after accounting for the conduct at issue, the defendant's criminal history, and any other information that may be relevant.

USAO recommends including 1st degree sexual abuse of a minor (both enhanced and unenhanced) and enhanced 2nd degree sexual abuse of a minor to track current law. 1st degree sexual abuse of a minor is, in effect, an enhanced version of the current 1st degree child sexual abuse statute, in that it includes the enhancement for a victim under 12 years old in its elements. 2nd degree sexual abuse of a minor tracks the current 1st degree child sexual abuse statute where the victim is 12 years old or older. Thus, both enhanced 1st and 2nd degree sexual abuse of a minor would be comparable to the current 1st degree child sexual abuse statute with aggravating circumstances, which has a statutory maximum of life imprisonment. Particularly if the RCC does not permit the possibility of the sex offense penalty enhancements with this provision, the statutory maximum must include the conduct that would otherwise be captured by those enhancements. This would include the existence of a significant relationship, such as the victim being abused by a biological parent or grandparent, the presence of multiple assailants, etc. Frequently, child sexual abuse is not forced, and would not qualify as a forced sexual assault, because the perpetrator uses various forms of grooming to induce the victim's submission to the sexual acts, and to ensure that the victim remains silent about the abuse to allow the abuse to continue for a prolonged period of time. Non-forced abuse could result in the victim becoming pregnant, contracting a sexually transmitted disease, suffering significant emotional distress including suicidal thoughts and actions, or various other serious consequences. Non-forced sexual abuse of children can be just as brutal as forced sexual assault, and the statutory maximum should account for that.

USAO therefore recommends ranking enhanced 1st degree homicide, enhanced 2nd degree homicide, enhanced 1st degree sexual assault, 1st degree sexual abuse of a minor, and enhanced 2nd degree sexual abuse of a minor as Class 1 felonies, and that Class 1 felonies have a maximum penalty of life imprisonment.

3. <u>USAO recommends increasing the proposed penalties for Manslaughter.</u>

Under current law, Manslaughter is subject to a 30-year statutory maximum. D.C. Code § 22-2015. The D.C. Code does not distinguish between Voluntary and Involuntary Manslaughter. Voluntary Manslaughter is categorized as a Group 4 offense in the D.C.

Sentencing Guidelines, and Involuntary Manslaughter is categorized as a Group 5 offense in the D.C. Sentencing Guidelines. Voluntary Manslaughter while armed is categorized as a Group 3 offense in the D.C. Sentencing Guidelines, and Involuntary Manslaughter while armed is categorized as a Group 5 offense in the D.C. Sentencing Guidelines. The RCC has proposed that Voluntary Manslaughter be a Class 5 offense with a 20-year statutory maximum, and that Involuntary Manslaughter be a Class 7 offense with a 10-year statutory maximum.[5] The RCC has proposed that Enhanced Voluntary Manslaughter be a Class 4 offense, and Enhanced Involuntary Manslaughter be a Class 6 offense.

Although USAO does not object to a lower statutory maximum for Involuntary Manslaughter than for Voluntary Manslaughter, USAO believes that the statutory maximum for each offense should be increased. Consistent with current law, Voluntary Manslaughter should be subject to a 30-year statutory maximum (Class 4), and Involuntary Manslaughter should be subject to a 20-year statutory maximum (Class 5). The enhanced versions of Voluntary and Involuntary Manslaughter should be Class 3 and Class 4, respectively. Although the RCC has permitted higher punishments for enhanced versions of these offenses, the reality is that these enhancements will rarely be used. Most charges of manslaughter involve cases with imperfect self-defense claims. In such cases, the offender's knowledge of the victim's status as a protected person may be difficult to assess, or to prove. Thus, USAO will not be able to charge the enhancement. Although there could be cases where the enhancement is appropriate, USAO does not want the enhancements to, in effect, diminish the value of the unenhanced offense by creating a lower maximum for the unenhanced version of the offense.

4. <u>USAO recommends increasing the proposed penalties for Burglary.</u>

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

The RCC has proposed numerous gradations of Trafficking of a Controlled Substance and Trafficking of a Counterfeit Substance. Although USAO does not oppose multiple gradations, USAO recommends that all gradations be felonies. As drafted, 4th Degree Trafficking of a Controlled Substance includes trafficking of any controlled substance listed in Schedule I, II, or III, that is not specifically listed as one of the eight controlled substances prohibited by 1st, 2nd, or 3rd Degree Trafficking. 5th Degree Trafficking of a Controlled Substance includes trafficking of any controlled substance. Trafficking of any controlled substance, regardless of the type of substance, should constitute a felony offense.

10. <u>USAO recommends increasing the proposed penalties for Robbery.</u>

4th Degree Robbery is the equivalent of the current offense of Armed Robbery without injury, and 5th Degree Robbery is the equivalent of the current offense of Robbery. The RCC has proposed that 4th Degree Robbery be a Class 8 felony, with a statutory maximum of 10 years' incarceration, and that 5th Degree Robbery be a Class 9 felony, with a statutory maximum of 5 years' incarceration. Under current law, Robbery is a subject to a statutory maximum of 15' years' imprisonment, and Armed Robbery is subject to a statutory maximum of 30 years' imprisonment. D.C. Code §§ 22-2801; 22-4502. Under the RCC's proposal, the most serious gradation of Robbery—1st Degree Robbery—is a Class 5 offense, subject only to a statutory maximum of 20 years' incarceration. USAO recommends that 1st Degree Robbery be a Class 4 offense, 2nd Degree Robbery be a Class 5 offense, 3rd Degree Robbery be a Class 6 offense, 4th Degree Robbery be a Class 7 offense, and 5th Degree Robbery be a Class 8 offense.

Further, in its July 8, 2019 comments on Report #36 (at 30–31), USAO opposed subsuming the offense of Carjacking within the offense of Robbery. The RCC has proposed that 3rd Degree Robbery—which includes the equivalent of the current offense of Armed Carjacking—be a Class 7 felony subject to a statutory maximum of 10 years' incarceration. The RCC has proposed that 4th Degree Robbery—which includes the equivalent of the current offense of Carjacking—be a Class 8 felony, with a statutory maximum of 5 years' incarceration. These statutory maxima are lower than the current mandatory minima for these offenses. *See* D.C. Code § 22-2803. Under current law, the statutory maximum for Carjacking is 21 years' incarceration, and the statutory maximum for Armed Carjacking is 40 years' incarceration, but may only exceed 30 years' incarceration if certain aggravating factors are present. D.C. Code §§ 22-2803; 24-403.01(b-2). Likewise, Armed Carjacking is a Group 3 offense under the D.C. Sentencing Guidelines, and Carjacking is a Group 4 offense under the D.C. Sentencing Guidelines. Carjacking is a serious offense, and the statutory maximum should reflect that. USAO recommends that, if USAO's recommendations are accepted, and Carjacking is a stand-alone offense in the RCC, that Carjacking be a Group 5 offense, and Armed Carjacking be a Group 4 offense.

11. USAO recommends increasing the proposed penalties for 1st Degree Menacing.

The RCC has categorized 1st Degree Menacing as a Class 9 felony, with a statutory maximum of 3 years' incarceration. This offense is the equivalent of the current offense of Assault with a Dangerous Weapon, where the weapon is never fired. That offense is subject to a statutory maximum of 10 years' incarceration. D.C. Code § 22-402. USAO believes that the offense of 1st Degree Menacing should be penalized more severely, as either a Class 7 felony or a Class 8 felony. In the public opinion survey conducted by the CCRC, respondents ranked "threatening to kill someone face-to-face, which displaying a gun," at a mean score of 7.6 Advisory Group Memo #27, at 2. This demonstrates that, even where the gun is not fired, public opinion supports attaching a greater penalty to this offense.

12. USAO recommends increasing the proposed penalties for Enhanced Stalking.

Under current law, Stalking is a misdemeanor subject to a 12-month statutory maximum if there are no aggravating circumstances present, a 5-year statutory maximum if there are certain aggravators present, and a 10-year statutory maximum if the defendant has 2 or more prior convictions for stalking. D.C. Code § 22-3134. USAO does not object to the RCC's categorization of Stalking as a Class A misdemeanor subject to a 1-year statutory maximum. For the reasons described above, however, with respect to jury demandability, USAO recommends that Attempted Stalking not be jury demandable. With respect to Enhanced Stalking, USAO recommends that Enhanced Stalking be categorized as a Class 8 felony subject to a 5-year statutory maximum. Stalking is serious behavior that can be linked to lethal behavior. The penalty enhancements in the RCC, including the violation of a no contact order or a previous conviction for stalking, are particularly serious and should be punished accordingly.

13. USAO recommends increasing the proposed penalties for Criminal Neglect of a Minor and Criminal Neglect of a Vulnerable Adult.

The RCC has proposing ranking 1st, 2nd, and 3rd Degree Criminal Neglect of a Minor and Criminal Neglect of a Vulnerable Adult as Class 8, 9, and A offenses, respectively. Under current law, with respect to children, this conduct is included within both 1st and 2nd Degree Cruelty to Children. 1st Degree Cruelty to Children includes conduct that "creates a grave risk of bodily injury to a child, and thereby causes bodily injury." D.C. Code § 22-1101(a). Both 1st and 2nd Degree Criminal Neglect of a Minor have a higher standard than this, in that they require that the defendant create a "substantial risk that the complainant would experience serious bodily injury or death" or create "a substantial risk that the complainant would experience significant bodily injury," although they does not require any bodily injury. RCC § 22E-1502(a)–(b). Given the overlap of these provisions, USAO believes it is appropriate for the statutory maximum for both 1st and 2nd Degree Criminal Neglect of a Minor to be the same as the current penalty for 1st Degree Cruelty to Children—15 years' incarceration (Class 6). *See* D.C. Code § 22-1101(c)(1). USAO is also concerned that the provision in 3rd Degree Criminal Neglect of a Minor regarding knowingly abandoning a child be appropriately punished. *See* RCC § 22E-1502(c)(2)(A). Under current law, that offense is subject to a statutory maximum of 10 years' incarceration as 2nd Degree Cruelty to Children. D.C. Code § 22-1101(b), (c)(2). USAO accordingly recommends that both 1st Degree and 2nd Degree Criminal Neglect of a Minor be categorized as Group 6 offenses, and that 3rd Degree be categorized as a Group 7 offense. USAO recommends that the penalties for Criminal Neglect of a Vulnerable Adult track the penalties for Criminal Neglect of a Minor.

14. USAO recommends decreasing the monetary thresholds in each gradation for Theft, Fraud, Identity Theft, and Extortion.

USAO does not oppose the highest gradation of these offense being a Class 7 offense, but the monetary thresholds for each gradation are so high that the top gradations will likely only be used very rarely, if ever. USAO proposes eliminating the top gradation of $500,000, and creating only four gradations. USAO also proposes that car theft be punished more severely than currently proposed. Therefore, USAO proposes creating the following thresholds for these offenses:

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

15. USAO recommends increasing the proposed punishment for Unauthorized Use of a Motor Vehicle.

Under current law, Unauthorized Use of a Motor Vehicle ("UUV") is a felony subject to a 5-year statutory maximum, and a 10-year statutory maximum if the defendant caused the motor vehicle to be taken, used, or operated during the court of or to facilitate a crime of violence. D.C. Code § 22-3215(d). The RCC has proposed making this offense a Class A misdemeanor with a

1-year statutory maximum. This offense should be a Class 8 felony. This ranking is consistent with the placement of UUV as a Group 8 offense in the D.C. Sentencing Guidelines. Making this offense a misdemeanor will substantially decrease deterrence for auto theft. Although there is a separate punishment for auto theft under the theft statute, RCC § 22E-2101(c), it can be difficult, in practice, to prove that a person stole a car, even when the person did, in fact, steal a car. Likewise, when a person, in fact, commits a carjacking, it may be difficult to prove that the person committed the carjacking. Thus, UUV may be the only offense available for prosecution of a person who either carjacked a car or stole a car.

16. USAO recommends that all gradations of Escape be felonies.

As USAO stated in its July 8, 2019 comments on Report #36 (at p. 84), USAO recommends that all gradations of Escape be felony offenses, including where a defendant escapes from a halfway house. This is especially true where the underlying offense for which a defendant was sent to a halfway house is itself a felony. If escape from a halfway house is a misdemeanor, especially a Class C misdemeanor as recommended, there will be very minimal deterrent effect to keep a defendant from leaving a halfway house.