Memorandum

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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.")