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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: April 29, 2019

SUBJECT: First Draft of Report #36, Cumulative Update to RCC Chapters 3, 7 and the Special Part.[1]

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #36 - Cumulative Update to RCC Chapters 3, 7 and the Special Part.[2]

COMMENTS ON THE DRAFT REPORT

RCC § 214. MERGER OF RELATED DEFENSE.[3]

[1] This Memorandum covers a review of the statutory language and commentary on Subtitle I (General Part) provisions in Chapters 2 (specifically, Merger of Related Offenses) and 3 of the report. The Memorandum concerning the statutory language and commentary on the remaining sections are due on July 8, 2019.

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

[3] OAG recommends a slight rewording of RCC § 214(e)(2). While OAG appreciates that the Commission accepted its suggestion to amend the provision to read, "The judgment appealed from has been decided", see App. D2, OAG believes that there is a better formulation of this concept. An appellate court does not technically decide a judgment; it decides an appeal. Given the lead-in language in section (e), OAG suggests that this phrase be tweaked to read, "The appeal of the conviction has been decided."

RCC § 214 provides the merger rules. Paragraph (d) provides for the "Rule of Priority." It states:

> When two or more convictions for different offenses arising from the same course of conduct merge, the offense that remains shall be: (1) The offense with the highest statutory maximum among the offenses in question; or
> (2) If the offenses have the same statutory maximum, any offense that the court deems appropriate.

The proposed language in subsection (d)(1) does not say whether "statutory maximum" refers to maximum prison sentence or maximum fine. This may not be a concern if the two consistently correlate (as when the Council follows the Fine Proportionality Act[4]), but may create a problem in any context where one offense has a higher maximum fine (especially with any punitive fine multipliers) but a lower maximum prison sentence than another. To address this issue, OAG has two suggestions. First that in subsection (d)(1) the term "statutory maximum" be amended to read "statutory maximum sentence." To address the issue regarding how judges should merge offenses where there is a higher maximum penalty, but a lower maximum fine in one offense and a lower maximum penalty but a much higher maximum fine in the other offense, OAG suggests that the Commission amend section (b) to broaden its application. Section (b) now states:

> *General Merger Rules Inapplicable Where Legislative Intent Is Clear*. The merger rules set forth in subsection (a) are inapplicable whenever the legislature clearly expresses an intent to authorize multiple convictions for different offenses arising from the same course of conduct.

OAG suggests that the language be amended to read:

> *General Merger Rules Inapplicable Where Legislative Intent Is Clear.* The merger rules set forth in subsections (a) and (d) are inapplicable whenever the legislature clearly expresses an intent to authorize multiple convictions for different offenses arising from the same course of conduct or establish a different rule of priority.

Subsection (d)(2) establishes a rule for judges to follow when the charges have the same statutory maximum penalty. OAG generally agrees that, if the offenses have the same statutory maximum penalty, the judge should be able to sentence the person to any offense that the court deems appropriate. However, for some offenses the Council has enacted mandatory minimum sentences. While subsection (d)(1) would require that a judge not sentence a person for a mandatory minimum sentence when that conviction merges with an offense that has a higher overall maximum penalty, (d)(2) would seem to permit a judge to ignore a mandatory minimum sentence when that offense merges with an offense that has the same statutory maximum penalty. To address this issue, OAG suggests that subsection (d)(2) be amended to state:

[4] See the "Criminal Fine Proportionality Amendment Act of 2012", codified at D.C. Code §§ 22-3571.01 and 22-3571.02.

(2) If the offenses have the same statutory maximum penalty, the offense with a mandatory minimum sentence. If there is no mandatory minimum sentence, whichever offense the court deems appropriate.[5]

RCC § 22E-301. CRIMINAL ATTEMPT.

RCC § 301 (e) contains the "Other Definitions" cross reference section. OAG has raised with the Commission its concerns with the "Other Definitions" sections that appear in some offense definitions and how a litigator or court should interpret a word or phrase that has been defined in the RCC but which has been left out of the "Other Definitions" cross reference in the provision that is being interpreted. OAG maintains that these cross-references should be struck where ever they appear. Section 301 (e) illustrates why. This section cross-applies already-applicable definitions of "intent" and "result element," but it doesn't cross-apply the definition of "conduct" even though this section uses that word. Nor does it cross-apply any definition related to "culpability," even though the report specifically notes that the RCC 201 definition of "culpability" (or, more accurately, "culpability requirement") matters insofar as culpability folds in voluntariness and other considerations as well as a culpable mental state. If the Commission is not going to accept OAG's suggestion to delete all "Other Definitions" cross references, then OAG suggests that the Commission add a section to Subtitle I, Chapter 1 that states that the "Other Definitions" cross references are meant to aid the public's understanding of the code and that no legal significance should be placed on the inclusion or exclusion of a cross reference in a particular provision.

RCC § 22E-303. CRIMINAL CONSPIRACY.

RCC § 303 (a) is entitled "Definition of Conspiracy." It now states:

(a) *Definition of Conspiracy*. A person is guilty of a conspiracy to commit an offense when, acting with the culpability required by that offense, the person and at least one other person:

(1) Purposely *agree* to engage in or aid the planning or commission of conduct which, if carried out, will constitute that offense or an attempt to commit that offense; and

(2) One of the parties to the *conspiracy* engages in an overt act in furtherance of the *conspiracy*. [emphasis added]

OAG is concerned about the clarity of this section. As written, RCC § 303 (a) is circular in that it that uses the term "conspiracy", in two places in subsection (a)(2), in the "Definition of Conspiracy." It thus assumes a prior understanding of the term being defined. While the current version of RCC § 303 (a)(2), states, "One of the parties to the conspiracy engages in an overt act in furtherance of the conspiracy" The previous version of RCC § 303 (a)(2), stated, "One of the parties to the agreement engages in an overt act in furtherance of the agreement." The reference to an "agreement" in the former version not only did not suffer from being a circular definition, but,

[5] In its suggestion OAG proposed changing the phrase," any offense that the court deems appropriate" to "whichever offense the court deems appropriate" This was suggested for stylistic reasons.

because subsection (a)(1) refers to the person and at least one other person "Purposely agree[ing]…", the use of the word "agreement" in (a)(2), flowed more clearly from (a)(1). OAG, therefore, recommends that the Commission use the previous version of RCC § 303 (a)(2).

RCC § 303 (b)(1) says conspirators must "[i]ntend to cause any result element required by that offense." However, one does not cause a result element; one causes a result. OAG recommends that the phrase be redrafted to read, "[i]ntend to cause any result required by that offense."[6]

[6] The previous version of RCC § 303 (b)(1) stated, "intend to bring about and results." OAG agrees that current version's addition of the phrase "required by that offense" is warranted.

Memorandum

Jessie K. Liu
United States Attorney
District of Columbia

Subject: Comments to D.C. Criminal Code Reform Commission for First Draft of Report #36, Cumulative Update to RCC Chapter 2 (§ 22E-214) and Chapter 3	Date: May 20, 2019

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

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

The U.S. Attorney's Office for the District of Columbia (USAO) and other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the CCRC's First Draft of Report #36, Cumulative Update to RCC Chapter 2 (§ 22E-214) and Chapter 3. USAO reviewed this document and makes the recommendations noted below.[1]

Comments on the Draft Report

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

1. USAO recommends the removal of subsection (a)(4).

Subsection 22E-214(a)(4) currently provides: "One offense reasonably accounts for the other offense given the harm or wrong, culpability, and penalty proscribed by each."

Subsection (a)(4) seems to be a catchall designed to permit (or require) judges to merge offenses whenever it seems fair to them to do so under the circumstances. But such an open-ended provision is vague and subjective, and thus contrary to the RCC's overarching goal of stating the law clearly (*see* Commentary at 34 ("the District's law of merger . . . suffers from a marked lack of clarity and consistency")), rather than relying upon common law (*see* Commentary at 6 (citing authorities favorably referring to the process of determining when this provision applies as "developing a common law of offense interrelationships")). This subsection would likely exacerbate, rather than remedy, the historically "uneven treatment" of merger issues that § 214 seeks to address (Commentary at 1 n.1). And the provision's ambiguity would likely confer a windfall upon defendants, who would surely invoke the Rule of Lenity in seeking its broad application.

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

The RCC (Commentary at 6 n.21) justifies (a)(4) by reference to similar practices in other jurisdictions, but then assures the reader that (a)(4) "is likely narrower" than those approaches, "all of which appear to rest upon consideration of the specific facts presented at trial." Accordingly, those practices do not support (a)(4) at all, in that they are based on a rationale that the RCC disavows. This difference, as well the fact that, unlike (a)(1)–(3), (a)(4) "goes beyond" current D.C. case law (Commentary at 35), creates even more uncertainty as to (a)(4)'s application. Although the Commentary (at 7 n.24) offers examples, it seems overbroad to confer general discretion upon (or perhaps require) trial judges to merge whatever offenses they deem "reasonably account[]" for each other. If the goal is to require merger for certain combinations of offenses even where they would not merge under the *Blockburger* elements test, it would be more direct, and avoid needless uncertainty, to simply identify those mergers in the substantive offense statutes themselves. For example, as to the carjacking example at Commentary 6 n. 24, it would be far clearer to say in the carjacking statute that carjacking merges with aggravated theft when based on the same course of conduct, rather than enact a general provision that would engender decades of piecemeal litigation to develop a "common law" of merger regarding (1) when offenses "reasonably account" for each other, and (2) what can and cannot be considered, and to what degree, in making that determination.

2. <u>USAO recommends that, in subsection (e)(2), the words "has been decided" be replaced with the words "becomes final."</u>

   With USAO's changes, § 22E-214(e) would provide:

   "(e) *Final Judgment of Liability.* A person may be found guilty of two or more offenses that merge under this section; however, no person may be subject to a conviction for more than one of those offenses after:
   (1) The time for appeal has expired; or
   (2) The judgment appealed from becomes final."

Replacing "has been decided" with "becomes final" would more accurately define what we believe is the RCC's intended time when the appeal has ended. First, the "judgment" is by the trial court, and is the subject (not the result) of the appeal, so it already "has been decided." And as to the direct appeal, "has been decided" is unclear as to, e.g., whether it refers to when (1) the DCCA issues its opinion; (2) when the time for seeking further review has ended; (3) when any further review has ended, or (4) when the mandate issues. Presumably, subsection (e) is meant to allow multiple convictions to stand while the direct appeal plays out to its conclusion. "Becomes final" would convey that the intended deadline is the end of the direct appeal.

II. <u>RCC § 22E-301—Criminal Attempt</u>

1. <u>USAO recommends that, in subsection (a)(1), the word "Planning" be replaced by the words "With the intent," and that subsection (a)(2) be removed.</u>

   With USAO's changes, § 22E-301(a) would provide:

   "(a) *Definition of Attempt*. A person is guilty of an attempt to commit an offense when:

(1) With the intent to engage in conduct constituting that offense;
(2) The person engages in conduct that: . . .”

There are three reasons that USAO believes this change is appropriate.

First, a person’s “plan” or “planning” is not required by the controlling case law on attempt. *See, e.g.*, *Hailstock v. United States*, 85 A.3d 1277, 1281 (D.C. 2014) (elements of attempt are that defendant (1) intended to commit the crime and (2) committed an overt act towards completion of the crime that (3) came within dangerous proximity or completing the crime); *Nkop v. United States*, 945 A.2d 617, 620 (D.C. 2008) (same); *Corbin v. United States*, 120 A.3d 588, 602 n.20 (D.C. 2015) (elements of attempt are that defendant (1) intended to commit the crime, (2) did some act towards its commission, and (3) failed to consummate its commission); *Frye v. United States*, 926 A.2d 1085, 1095 (D.C. 2005) (same); *Stepney v. United States*, 443 A.2d 555, 557 (D.C. 1982) (same); *Marganella v. United States*, 268 A.2d 803, 804 (D.C. 1970) (same). Notably, while the Committee Report states that the “planning requirement is the foundation of attempt liability,” the CCRC’s explanation for including a separate “planning” element does not include any citation to case law, asserting that it is “largely implicit in the other elements of a criminal attempt.” *See* First Draft of Report #36 (hereinafter “Report”) at 48 and n.2, n.4. Indeed, the Model Penal Code includes the concept of planning in a far different context: “(c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct *planned to culminate in his commission of the crime*.”). *See* Model Penal Code Section 5.01. Requiring the *defendant* to have “planned” before taking action is very different than the Model Penal Code’s inclusion of the concept and should be removed. Rather, the focus should be on the defendant’s “intent” to engage in conduct constituting that offense.

Second, inclusion of a separate element requiring the *defendant* to have engaged in “planning” implies that the person must have thought through or contemplated his or her actions before acting. The online Merriam-Webster dictionary defines “plan” as “to arrange the parts of,” “to devise or project the realization or achievement of,” or “to have in mind.” *See* https://www.merriam-webster.com/dictionary/plan. With regard to the first two definitions, the word “planning” appears to imply something akin to the current “premeditation” and “deliberation” requirement of first-degree murder. *See Porter v. United States*, 826 A.2d 398, 405 (D.C. 2003) (noting premeditation requires proof that the defendant gave thought before acting to the idea of taking a human life and reached a definite decision to kill). Given that an attempted crime does not always require proof of premeditation or deliberation, inclusion of an extra element that that *defendant* must have “planned” to engage in conduct constituting the completed crime represents a substantial change to the current law governing attempt, and improperly implies that some sort of design or devising of the means to accomplish the criminal objective is required.[2]

[2] The CCRC notes that the planning requirement is different from the culpability requirement because an actor could be committed to a course of conduct that would cause a prohibited result without being culpable at all. Report at 48 n.4. However, the explanation the CCRC gives is that of a demolition operator who is demolishing a building that may or may not have a person inside of it. In this example, it appears that the important element is the culpability of the demolition worker in terms of the result elements of the offense of murder as opposed to whether he is committed to his course of conduct. The CCRC acknowledges this, noting the demolition operator’s liability for attempted murder is determined by whether he or she knows a person lives in the building. How committed he or she is to the course of conduct appears superfluous and already included in the other culpability requirements.

Third, the proposed provision in (a)(2) adds an additional culpability requirement that does not exist in current law. If the "intent" language recommended by USAO is adopted, there is no need to have an additional mens rea requirement by requiring that the person "have the culpability required by that offense."

2. USAO recommends that, in subsection (a)(3), the words "completing" and "completion" be replaced with the words "committing" and "commission."

With USAO's changes, § 22E-301(a)(3) would provide:

"(3) The person engages in conduct that:
(A)
(i) Comes dangerously close to committing that offense; or
(ii) Would have come dangerously close to committing that offense if the situation was as the person perceived it; and
(B) Is reasonably adapted to commission of that offense."

Subsection 22E-301(a)(3) refers to conduct that comes "dangerously close to completing" an offense and is "reasonably adapted to completion" of an offense. The USAO recommends, for clarity, that the words "completing" and "completion" be changed back to "committing" and "commission." This change makes the language less confusing for offenses such as robbery, that continue until the "taking away" or "asportation" of the stolen property is complete. The current comments to the jury instructions for Attempt also reflect this view that "committing" is clearer in this context than "completing." *See* Criminal Jury Instructions for the District of Columbia, No. 7.101 cmt. (5th ed. Rev. 2018) ("In addition, the Committee changed 'completing the crime' to 'committing the crime.' The Committee thought 'dangerously close to completing the crime' could be confusing to a jury if the offense, such as robbery, requires multiple steps to complete, such as taking and asportation.").

3. USAO recommends removing subsection (b).

For many of the same reasons as discussed with respect to subsection (a), subsection (b) is both confusing and adds an additional culpability requirement that does not exist in current law. This language is duplicative of the intent language included in subsection (a)(1), which under USAO's proposal, requires that the defendant act "With the intent to engage in conduct constituting that offense." This intent language is an accurate statement of the law, and USAO believes that it is most appropriate to codify the existing attempt law than to add in this additional language.

4. USAO opposes eliminating separate liability for "assault with intent to commit" offenses.

USAO opposes repealing the "assault with intent" ("AWI") class of crimes, contrary to the CCRC's suggestion. The CCRC states in the commentary to the Assault provision that, "liability for the conduct criminalized by the current AWI [assault with intent to commit] offenses is provided through application of the general attempt statute in RCC § 22E-301 to the completed

offenses." Commentary to Assault Provisions at 69. The attempt statute, however, does not provide liability for all of the situations in which AWI liability attaches, and AWI liability is a frequent theory of liability where attempt liability would not exist. For example, if a person were to attack someone while saying they wanted to have sex with them, they could be found guilty of assault with intent to commit sexual assault. If no clothing were removed or there were no other steps taken in furtherance of the sexual assault, the defendant may not have come "dangerously close" to committing the crime of sexual assault, but his conduct would merit criminalization as AWI sexual assault. Without the possibility of AWI liability, this crime could only be prosecuted as a simple assault and threat, which does not represent the full nature of the conduct. Further, under current law, AWI an offense is sometimes punished more severely than an attempt to commit that same offense.

5. USAO cannot comment on the changes to punishment absent further information.

USAO agrees with the general principle that punishment for attempts be proportionate to the punishment for the underlying crimes. Without further information on the punishments of the various offenses, USAO cannot currently take a position on this section.

Finally, USAO notes that crimes that include attempt in their definition continue not to allow for the existence of a separate attempt crime, and that USAO can take no position at this time as to the implications of that without knowing which crimes will continue to include attempt in their definition. *See* Report at 58-59, 59 n.33 (noting some crimes such as prison escape and forcible gang participation include attempts in their statutory language).

III. RCC § 22E-302—Solicitation

1. USAO recommends that, in subsection (a), the words "acting with the culpability required by that offense" be removed.

With USAO's changes, § 22E-302(a) would provide:

"(a) *Definition of Solicitation*. A person is guilty of solicitation to commit an offense when the person . . ."

The proposed provision adds an additional culpability requirement that does not exist in current law. The current jury instructions for Solicitation of a Crime of Violence provide the following elements: "(1) [Defendant] solicited [another person] to commit the [crime of violence]; and (2) [Defendant] did so voluntarily, on purpose, and not by mistake or accident. 'Solicit' means to request, command, or attempt to persuade. It is not necessary that the [crime of violence] actually occur in order to find the [defendant] guilty of solicitation." *See* Criminal Jury Instructions for the District of Columbia, No. 4.500 (5th ed. Rev. 2018). Adding this additional element is both confusing and not an accurate statement of the current law. Further, applying this additional requirement to various offenses could lead to problematic results. For example, if a defendant were charged with solicitation to commit first-degree murder, first-degree murder requires premeditation and deliberation. The government need not prove premeditation *to solicit the murder* for the defendant to be guilty of solicitation to commit first-degree murder. Rather, the solicitation

itself could be used to help prove that the murder was committed with premeditation and deliberation.

2. USAO recommends that, in subsection (a)(1), the word "specific" be removed.

With USAO's changes, § 22E-302(a)(1) would provide:

> "(1) Purposely commands, requests, or tries to persuade another person to engage in or aid the planning or commission of conduct, which, if carried out, will constitute that offense or an attempt to commit that offense . . ."

As used here, the word "specific" implies that the defendant must specify how the offense will be carried out to be found guilty of solicitation. For example, if a defendant instructed another person to murder a complainant, the defendant need not tell the other person whether it should specifically be by firearm, by knife, or by another specified means to be found guilty of solicitation of murder. Rather, it is and should be sufficient to be liable for solicitation that the defendant instructs another person to carry out any conduct that would result in a murder.

3. USAO recommends removing subsection (b).

For many of the same reasons as discussed with respect to subsection (a), subsection (b) is both confusing and adds an additional culpability requirement that does not exist in current law. Because the conduct solicited must, in fact, constitute a completed or attempted offense, there is a level of intent implied into the solicitation itself, rendering this language superfluous.

4. USAO recommends that, in subsection (c), the word "plans" be replaced by the word "intends."

With USAO's changes, § 22E-302(c) would provide:

> "(c) *Uncommunicated Solicitation.* It is immaterial under subsection (a) that the intended recipient of the defendant's command, request, or efforts at persuasion fails to receive the message provided that the defendant does everything he or she intends to do to transmit the message to the intended recipient."

USAO believes that the word "plans" suffers from the problems set forth above in the Attempt comments, and that "intent" is a better descriptor of the required mental state.

5. USAO cannot comment on the changes to punishment absent further information.

USAO agrees with the general principle that punishment for solicitation be proportionate to the punishment for the underlying crimes. Without further information on the punishments of the various offenses, USAO cannot currently take a position on this section.

6. USAO recommends that, throughout these provisions, the word "defendant" be changed to the word "actor."

The change of the word "defendant" to "actor" is not meant to be substantive, and is meant to align the language in these sections with the language used throughout the RCC.

IV. RCC § 22E-303—Criminal Conspiracy

1. USAO recommends that, in subsection (a), the words "acting with the culpability required by that offense" be removed.

   With USAO's changes, §22E-303(a) would provide:

   "(a) *Definition of Conspiracy*. A person is guilty of solicitation to commit an offense when the person and at least one other person . . ."

As discussed above in the Solicitation section, the proposed provision adds an additional culpability requirement that does not exist in current law. The focus of conspirator liability is on the culpability involved in the *agreement* to commit the offense, not necessarily the culpability to commit the offense itself. Further, the requisite *mens rea* for Conspiracy is set forth in (a)(1), which requires "purpose." To provide an additional *mens rea* requirement by referring to the culpability required by the underlying offense makes the statute more confusing. The current jury instructions for Conspiracy provide a summary of the elements of Conspiracy: "For any defendant to be convicted of the crime of conspiracy, the government must prove two [three] things beyond a reasonable doubt: first, that [during (the charged time period)] there was an agreement to [describe object of conspiracy]; [and] second, that [name of defendant] intentionally joined in that agreement; [and third, that one of the people involved in the conspiracy did one of the overt acts charged]." *See* Criminal Jury Instructions for the District of Columbia, No. 7.102 (5th ed. Rev. 2018). This definition is consistent with the case law. *See, e.g.*, *Long v. United States*, 169 A.3d 369, 377 (D.C. 2017) ("Criminal conspiracy has three elements that the government must prove: "1) an agreement between two or more people to commit a criminal offense; 2) knowing and voluntary participation in the agreement by the defendant with the intent to commit a criminal objective; and 3) commission in furtherance of the conspiracy of at least one overt act by a co-conspirator during the conspiracy."). Further, applying this additional requirement to various offenses can lead to problematic results. For example, similar to the example above for Solicitation, if a defendant were charged with conspiracy to commit first-degree murder, first-degree murder requires premeditation and deliberation. The government need not prove premeditation *to engage in the agreement* for the defendant to be guilty of conspiracy to commit first-degree murder. Rather, the existence of the agreement could be used to help prove that the murder was committed with premeditation and deliberation. Moreover, a conspiracy is frequently charged with more than one object (for example, both obstruction of justice and murder). Given that those offenses have different *mens rea* requirements, it would be confusing as to what the words "acting with the culpability by that offense" would require the government to prove.

2. USAO recommends removing subsection (b).

For many of the same reasons as discussed above with respect to subsection (a), subsection (b) is both confusing and adds an additional culpability requirement that does not exist in current

law. To be guilty of a conspiracy, the defendant and another person need not necessarily intend to cause any result elements or intend for any circumstance elements required by that offense; rather, they must simply intend to enter into the agreement to commit the charged offense. It is implicit that, by intending to enter into an agreement to commit the charged offense, they desire the offense to take place, but this subsection makes the conspiracy language more confusing than if the Conspiracy section were to simply track the legal elements set forth above.

3. USAO recommends that, in the heading of subsection (d), the words "object of conspiracy is" be changed to the words "object of conspiracy is to engage in conduct."

   With USAO's changes, § 22E-303(d) would provide:

   "(d) *Jurisdiction When Object of Conspiracy is to Engage in Conduct Located Outside the District of Columbia.* When the object of a conspiracy formed within the District of Columbia is to engage in conduct outside the District of Columbia . . . ."

This change is not intended to be substantive, but to clarify the language used in this heading. The proposed edit also aligns the language of the heading of the subsection with the language in the subsection.

4. USAO cannot comment on the changes to punishment absent further information.

USAO agrees with the general principle that punishment for conspiracy be proportionate to the punishment for the underlying crimes. Without further information on the punishments of the various offenses, USAO cannot currently take a position on this section.

V. RCC § 22E-304—Exceptions to General Inchoate Liability

1. USAO recommends that, in subsection (a)(1), the word "victim" be changed to the words "intended victim."

   With USAO's changes, § 22E-303(a)(1) would provide:

   "(1) The person is an intended victim of the target offense . . ."

USAO agrees with the general principle that certain victims should not be deemed guilty of conspiracy or solicitation. For example, a child should not be deemed guilty of child sexual abuse, even if that child was a willing participant in the conduct that led to the adult's criminal liability. However, there are instances where individuals who could be considered a victim should be deemed guilty of conspiracy or solicitation. For example, if Person A and Person B conspired to shoot Person C, and Person B was shot in the process and sustained injuries, Person B should not be freed from liability for conspiracy under the principle that he could be considered a "victim," where Person C was the only intended victim. Likewise, if Person D paid Person E to kill Person F, and Person D sustained injuries while Person E was shooting Person F, Person D should not be freed from liability for solicitation under the principle that he could be considered a "victim,"

where Person F was the only intended victim. USAO believes that eliminating liability only for an "intended victim" would remedy these situations and clarify the law.

2. USAO recommends that, in subsection (a)(2), the words, "The offense, as defined by statute, is of such a nature as to necessarily require the participation of two people for its commission." replace the words, "The person's criminal objective is inevitably incident to commission of the target offense as defined by statute."

   With USAO's changes, § 22E-304(a)(2) would provide:

   "(2) The offense, as defined by statute, is of such a nature as to necessarily require the participation of two people for its commission."

USAO believes that the current wording of (a)(2) is confusing, so is providing an alternate proposal. This is intended to be a clarification, not a substantive modification. USAO also believes that this is a more accurate statement of Wharton's Rule, as set forth in the comments to the current jury instructions. *See* Criminal Jury Instructions for the District of Columbia Comments, No. 7.102 (5th ed. Rev. 2018) ("Under Wharton's Rule, an agreement by two people to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two people for its commission.").

VI. RCC § 22E-305—Renunciation Defense to Attempt, Conspiracy, and Solicitation

1. USAO recommends removing § 22E-305 in its entirety.

USAO believes that this section does not accurately reflect the state of the law. Completion of the target offense is never required for the offenses of attempt, conspiracy, and solicitation. If the target offense is not completed, the defendant should not be held directly liable or liable under a theory of accomplice liability for the *completed act*. However the fact that the offense was not completed does not affect his already completed culpability for attempt, conspiracy, and solicitation. For example, if a defendant solicits another person to commit murder, and then, just before the murder, the defendant instructs the other person not to commit the murder, the defendant should still be liable for solicitation to commit murder. He should *not* be guilty of the underlying charge of murder, which he could have been directly charged with had the murder been completed, but his renunciation of the underlying offense does not affect the solicitation, which had already been completed.

If the CCRC is inclined to codify a defense in this section, USAO recommends that the RCC codify a withdrawal defense. Under the withdrawal defense, however, a defendant cannot rely on a withdrawal defense to attempt to escape liability for participation in a conspiracy once an overt act has been committed. See *United States v. Sarault*, 840 F.2d 1479, 1487 (9th Cir. 1988), *United States v. Herron*, 825 F.2d 50, 59 (5th Cir. 1987) (withdrawal after entering into the agreement and the commission of at least one overt act does not prevent conspiracy conviction); *United States v. Gornto*, 792 F.2d 1028, 1033 (11th Cir 1986) (withdrawal from conspiracy is impossible once an overt act is committed because the crime is then complete).