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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: September 27, 2019

SUBJECT: First Draft of Report #39, Weapon Offenses and Related Provisions.

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #39, Weapon Offenses and Related Provisions.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 7-2502.01. POSSESSION OF AN UNREGISTERED FIREARM, DESTRUCTIVE DEVICE, OR AMMUNITION

The offense of Possession of an Unregistered Firearm, Destructive Device, or Ammunition is broken down into two degrees.[2] The first degree offense applies to possession of an unregistered

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

[2] RCC § 7-2502.0l (a) and (b) divides the two degrees as follows:

(a) First Degree. A person commits first degree possession of an unregistered firearm, destructive device, or ammunition when that person knowingly possesses:
  (1) A firearm without, in fact, being the holder of a registration certificate issued under D.C. Code § 7-2502.07 for that firearm; or
  (2) A destructive device.

(b) Second Degree. A person commits second degree possession of an unregistered firearm, destructive device, or ammunition when that person knowingly possesses:
  (1) Ammunition without, in fact, being the holder of a registration certificate

firearm and destructive device and the second degree offense applies to both the possession of ammunition by someone who is does not have a firearm registration certificate (UA) and for restricted pistol bullets. Under current law the penalty for a UA (and one restricted pistol bullet[3]) is a fine of not more than $1,000 or imprisonment for not more than 1 year, or both. Current law also criminalizes transferring firearms to children. Recognizing the dangerousness associated with a person possessing multiple restricted pistol bullets this offense currently possesses a much higher penalty. A person convicted of knowingly possessing restricted pistol bullets in violation of § 7-2506.01(3) may be sentenced "to imprisonment for a term not to exceed 10 years and shall be sentenced to imprisonment for a mandatory-minimum term of not less than 1 year and shall not be released from prison or granted probation or suspension of sentence prior to serving the mandatory-minimum sentence, and, in addition, may be fined an amount not to exceed $10,000."

There is no reason why a 10 year offense should be reduced to a second degree offense when the first degree offense currently only carries a maximum penalty of one year in prison. OAG, therefore, recommends that the offense of Possession of an Unregistered Firearm, Destructive Device, or Ammunition be broken down into three degrees. The first degree being possession of restricted pistol bullets.[4] The second degree being possessing a firearm without, in fact, being the holder of a registration certificate, and the third degree being possessing ammunition without, in fact, being the holder of a registration certificate.

RCC § 7-2502.01 (c) lists exclusions from liability under possession of an unregistered firearm, destructive device, or ammunition. Subparagraph (c)(5) states "A person shall not be subject to prosecution under this section for possession of an unregistered firearm, destructive device, or ammunition when voluntarily surrendering the object." Although the commentary, on page 9, notes that "[t]he person must comply with the requirements of a District or federal voluntary surrender statute or rule", this limitation is not included in an otherwise non-ambiguous provision. In order to improve the clarity of this provision and to avoid needless litigation, OAG recommends that this limitation be added to the provision. Subparagraph (c)(5) should be redrafted to say, "A person shall not be subject to prosecution under this section for possession of an unregistered firearm, destructive device, or ammunition when voluntarily surrendering the object pursuant to District or federal law."

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issued under D.C. Code§ 7-2502.07 for a firearm of the same caliber; or

(2) One or more restricted pistol bullets.

[3] A restricted pistol bullet is any bullet designed for use in a pistol that, when fired from a pistol with a barrel of 5 inches or less in length, is capable of penetrating commercially available body armor with a penetration resistance equal to or greater than that of 18 layers of Kevlar. See D.C. Code§ 7-2501.01(13a).

[4] The First Degree offense could read "A person commits first degree Possession of an Unregistered Firearm, Destructive Device, or Ammunition when that person:

(1) Commits third degree Possession of an Unregistered Firearm, Destructive Device, or Ammunition; and

(2) the ammunition is, in fact, a restricted pistol bullet.

RCC § 7-2502.0l (e) creates a jury right for a defendant charged with a violation of this section or an inchoate violation of this section. OAG is withholding any objections to this provision until after the penalty provisions, which will be established under paragraph (f), are determined. We do note, however, that on page 11 of the commentary the Report notes that under current District law, first offense attempted unregistered firearm and unlawful possession of ammunition are not jury demandable. Notwithstanding that the commentary goes on to say, "In contrast, the RCC's provision of a right to a jury for attempted is consistent with the District having recognized a heightened need to provide jury trials to defendants accused of crimes that may involve the exercise of civil liberties. Firearms are bearable arms protected by the Second Amendment to the United States Constitution. This change improves the consistency and proportionality of the revised code" [footnotes omitted]. OAG notes that giving a jury trial right when it is not constitutionally required does not improve the consistency and proportionality of the revised code. Rather, depending on the penalty which is established, this paragraph would give a jury right when a person is charged with the attempt version of this offense and would not give a jury right to a person who is charged with a different offense that has the same incarceration exposure.

RCC § 7-2502.15. POSSESSION OF A STUN GUN.

RCC § 7-2502.15(a)(2) makes it a crime to knowingly possess a stun gun:

> In a location that:
>
> (A) Is a building, or part thereof, occupied by the District of Columbia;
> (B) Is a building, or part thereof, occupied by a preschool, a primary or secondary school, public youth center, or a children's day care center; or ...

While OAG believes that it is clear from the text of this provision that an offense takes place when a person brings a stun gun into any portion of a building when a part of the building is occupied by the District, a preschool, a primary or secondary school, public youth center, or a children's day care center, we suggest that the commentary provide examples which demonstrate the provision's scope. We want to avoid questions about how large or distinctive the part of the building must be. The commentary should give an example like the following, "A person commits this offense when the person knowingly takes a stun gun into the restaurant portion of a building that is located on the first floor of a building that has a charter school that is located on the rest of the first floor, as well as on the second and third floors."

In addition, because the effects of a stun gun may be more enhanced when used on a child,[5] RCC § 7-2502.15(a)(2)(B) should be amended to ensure that stun guns are not brought near places that children frequent. People should not be permitted to bring stun guns onto school

[5] According to a TASER pamphlet, "Cardiac capture may be more likely in children and thin adults because the heart is usually closer to the CEW-delivered discharge (the dart-to-heart distance)." See https://prismic-io.s3.amazonaws.com/tasr%2Fa8e6e721-590b-459b-a741-cd0e6401c340_law-enforcement-warnings.pdf.

yards or the areas around youth and day care centers. These facilities use the grounds around their buildings as extensions of those facilities so that children can get outdoor play and exercise. Therefore, OAG proposes that rather than only making it an offence to bring a stun gun into a building or part thereof, where a school, youth center, or daycare center is located, that stun guns should not be permitted closer than the property line of such locations.[6]

RCC § 7-2507.02. UNLAWFUL STORAGE OF A FIREARM

RCC § 7-2507.02 (a) states:

(a) An actor commits unlawful storage of a firearm when that actor:
  (1) Knowingly possesses a firearm registered under D.C. Code§ 7-2502.07:
    (A) On premises under the actor's control; and
    (B) In a location that is neither:
      (i) A securely locked container or another location that a reasonable person would believe to be secure; nor
      (ii) Conveniently accessible and within reach of the actor; and
  (2) Is negligent as to the fact that:
    (A) A person under 18 years of age is able to access the firearm without the permission of the person's parent or guardian; or
    (B) A person prohibited from possessing a firearm under District law is able to access the firearm.

The offense makes it clear that firearms should not be stored in such a way that access can be obtained by children and other persons who are prohibited from possessing them. The reason behind this offense is clear — public safety. Given that the harm that society is trying to avoid is the danger that may happen when these people have access to firearms, it is unclear why the offense should be limited to people who legally possess a registered firearm. For example, it is just as dangerous for an 8 year old to gain access to a registered firearm as to an unregistered one. Similarly, it is just as dangerous for a person who is the subject of an Extreme Risk Protection Order to gain access to a registered firearm as an unregistered one. In both situations the potential for harm to the person and to others is the same. Therefore, OAG recommends that the language in RCC § 7-2507.02 (a)(l)(A) pertaining to the registration of a firearm be stricken so that that subparagraph (A) states, "Knowingly possesses a firearm."

As stated in the RCC provision quoted above, paragraph (a)(l)(A) limits this offense to premises that are under the actor's control. It is unclear why the proposal contains such a broad limitation. While OAG does not oppose putting reasonable limitations on the locations for which the offense of unlawful storage of a firearm applies, we do believe that a person should not be able to purposely store a firearm at another location knowing that

[6] Because OAG recognizes that stun guns are not as lethal as firearms and other destructive devices, we are not recommending that stun guns be banned 300 feet from these facilities as would be required for a firearm under RCC § 22E-4102 (a)(2)(C)(i)."

persons who are prohibited from possessing the firearm may gain access. It is just as dangerous - if not more so - for a person to leave a firearm in a brown paper bag in his girlfriend's closet, knowing that she has children who live with her, as it is to leave the same firearm in the person's own closet, knowing that he has children who live with him. OAG proposes that rather than put a blanket requirement that the offense only apply to premises under the actor's control, that the Commission, instead, list the specific locations that are exempted.

RCC § 22E-4101. POSSESSION OF A PROHIBITED WEAPON OR ACCESSORY

RCC § 22E-4101(e)(1) states, "(1) A person shall not be subject to prosecution under this section for possession of prohibited weapon or accessory when voluntarily surrendering the object." While the commentary, on page 58, clarifies that "The person must comply with the requirements of a District or federal voluntary surrender statute or rule", that limitation is not in the text of an otherwise unambiguous provision. To avoid the needless litigation, OAG recommends that the text of the provision be amended to include the limitation stated in the commentary. We, therefore, propose that RCC *§* 22E- 4101(e) (1) be redrafted to say, "A person shall not be subject to prosecution under this section for possession of prohibited weapon or accessory when voluntarily surrendering the object in compliance with the requirements of a District or federal law."

RCC § 22E-4102. CARRYING A DANGEROUS WEAPON

RCC § 22E-4102 (a)(2)(C)(i) requires that the dangerous weapon be carried "Within 300 feet of a school, college, university, public swimming pool, public playground, public youth center, public library, or children's day care center." In the commentary, on page 66, it states, "The 300-foot distance is calculated from the property line, not from the edge of a building." To avoid litigation concerning the meaning of the provision, OAG suggests that the provision, itself, reference the property line. This provision should read, "Within 300 feet of the property line of a school, college, university, public swimming pool, public playground, public youth center, public library, or children's day care center."[7]

Subparagraph (d)(l) has the same exclusions from liability as RCC § 22E-4101(e)(l) and for the same reasons we propose that paragraph (d)(l) be redrafted to say, "A person shall not be subject to prosecution under this section for possession of prohibited weapon or accessory when voluntarily surrendering the object in compliance with the requirements of a District

[7] In OAG's Memorandum concerning the First Draft of Report #37, Controlled Substance and Related Offenses, we suggested that the proposed enhancement for trafficking of a controlled substance be changed to from 100 feet to 300 feet from specified locations to make the distance in that provision consistent with the provision in RCC § 22E-4102 (a)(2)(i), above. We believe that using the same distance for an enhancement for trafficking in controlled substances as is used to establish first degree carrying a dangerous weapon will avoid confusion by citizens as to which distance applies.

or federal law."[8]

RCC § 22E-4105. POSSESSION OF A FIREARM BY AN UNAUTHORIZED PERSON

An element of the second degree version of this offense, found in subparagraph (b)(2)(A)(i), is that the person has a prior conviction for what is, in fact, "[a) District offense that is currently punishable by imprisonment for a term exceeding 1 year, or a comparable offense in another jurisdiction, within the last 10 years." [emphasis added] OAG proposes that the commentary provide an example that demonstrates how to interpret the word "currently." For example, a person is convicted of a comparable offense in Maryland. At the time that the person was convicted the offense carried a penalty that exceeded 1 year in both jurisdictions. However, prior to the time that the person committed the offense for which they are being charged, the penalty for that offense in the District had been reduced to a 6 month offense. In this example, the prior conviction would not count. In addition, For clarity, OAG suggests that the commentary state that "a comparable offense in another jurisdiction", includes a conviction for a federal offense, as well as an offense that occurred in another state.

Subparagraph (b)(2)(C) states:

> Is, in fact, subject to a court order that:
> (i) Requires the actor to relinquish possession of any firearms or ammunition, or to not own, possess, purchase, receive, or attempt to purchase or receive a firearm or ammunition while the order is in effect;
> (ii) Restrains the person from assaulting, harassing, stalking, or threatening the petitioner or any other person named in the order, and:
> (I) Was issued after a hearing of which the person received actual notice, and at which the person had an opportunity to participate; or
> (II) Remained in effect after the person failed to appear for a hearing of which the person received actual notice.

In the commentary it states, "Subparagraph (b)(2)(C) criminalizes gun ownership by any person who has been ordered to not possess a firearm. Subparagraph (b)(2)(C) uses the term "in fact" to specify that there is no culpable mental state required as to whether the person is subject to an order to not possess any firearms. A person is strictly liable as to the order being of the variety described in sub-subparagraphs (b)(2)(C)(i) or (b)(2)(C)(ii).” [internal footnotes omitted] However, RCC § 22E-207 (a) states "Any culpable mental state specified in an offense applies to all subsequent result elements and circumstance elements until another culpable mental state is specified, with the exception of any result element or circumstance element for which the person is strictly liable under RCC § 22E- 207(b). OAG is concerned that when applying RCC § 22E-207(b) to RCC § 22E- 4105(b)(2)(C) a court will only apply the "in fact" mental state to the existence of a court order, and not to the type of order that is separately listed. To resolve this issue , the Commission can either modify the language in RCC § 22E-207 (a) to accommodate this situation or amend subparagraph

[8] This comment applies equally to the exclusion from liability found in RCC § 22E-4I05(c), pertaining to possession of a firearm by an unauthorized person.

(b)(2)(C). One way that the Commission could amend this provision is to state:

> Is, in fact, subject to a court order that:
> (i) In fact, requires the actor to relinquish possession of any firearms or ammunition, or to not own, possess, purchase, receive, or attempt to purchase or receive a firearm or ammunition while the order is in effect; and
> (ii) In fact, restrains the person from assaulting, harassing, stalking, or threatening the petitioner or any other person named in the order, and:
> (I) Was, in fact, issued after a hearing of which the person received actual notice, and at which the person had an opportunity to participate; or
> (II) In fact, remained in effect after the person failed to appear for a hearing of which the person received actual notice.

RCC § 22E-4106. NEGLIGENT DISCHARGE OF FIREARM

RCC § 22E-4106 makes it an offense to negligently discharge a firearm unless certain conditions are met. As the commentary notes, on page 103, this provision does not apply to air rifles or torpedoes. The commentary then states "Discharging an air rifle outside a building is punished as carrying an air or spring gun. Releasing a torpedo-or any other restricted explosive-is punished as possession of a prohibited weapon or accessory." [internal footnotes omitted]. The reason that it is an offense to negligently discharge a firearm is because of the damage that can occur from the projectile hitting someone or something. People who carry firearms, whether legally or not, must be careful not to negligently discharge their weapons. An air rifle is "a rifle whose projectile (such as a bb or pellet) is propelled by compressed air or carbon dioxide."[9] Pellets and BBs can cause injuries to persons or property either by direct hits or from the ammunition bouncing off of other surfaces. According to the BMJ,[10] "injuries from air weapons can be serious and even fatal." Given the harm that can be caused by an air rifle, it should be an offense to negligently discharge that weapon. It is disproportionate to make it an offense to discharge a firearm, but not an air rifle. It is equally disproportionate to treat the mere possession of an air rifle the same as the negligent discharge of that weapon. In addition, the commentary does not explain what offense would occur, if any, for the negligent discharge of an air rifle inside a building. Given the foregoing, OAG recommends that that this offense be retitled "Negligent Discharge of Firearm, Air Rifle, and Torpedo" and that the offense currently described in this provision be designated as the first degree of the offense and that the second degree of the offense apply to air rifles and torpedoes.
In the commentary, on page 107, it states:

> Third, the revised alteration of a firearm identification mark statute is prosecutable only by the Office of the United States Attorney for the District of Columbia ("USAO"). Current D.C. Code§ 22-4512 (Alteration of identifying marks of weapons prohibited) is prosecutable by USAO. However, current D.C. Code§ 7-2505.03(d) (Microstamping) is prosecutable by the

[9] See Merriam Webster's definition at https://www.merriam-webster.com/dictionaiy/air%20rifle.
[10] The BMJ is a weekly peer-reviewed medical journal. It is one of the world's oldest general medical journals.

> Office of the Attorney General for the District of Columbia. In contrast, the revised statute includes only a single gradation of a single offense prosecutable by USAO.

OAG does not agree that the revised statute would necessarily be prosecutable by USAO. It is our position that, given that OAG prosecutes gun offences that are regulatory in nature, that a determination of which agency will prosecute this offense can only be made after the penalty provision is drafted.[11]

RCC § 22E-4113. SALE OF FIREARM WITHOUT A LICENSE

RCC § 22E-4113 (a) states:

> An actor commits unlawful sale of a firearm without a license when that actor knowingly:
> (1) As a retail dealer:
> (A) Sells, exposes for sale, or possesses with intent to sell, a firearm; and
> (B) Is not licensed under RCC § 22E-4114 to engage in such activity; or
> (2) As a wholesale dealer, sells, or has in the actor's possession with intent to sell, a firearm to any person other than a firearms dealer.

While the definition's section found in paragraph (e) says that the term "firearms dealer", as used in paragraph (a)(2), has the meaning specified in RCC § 22E-701, neither the phrase "retail dealer" nor "wholesale dealer" are defined terms,. Similarly, the term "sell" is not defined in the provision. The commentary, on page 121, does say, however, that "'Sells' is an undefined term, intended to include any exchanging of pistol for monetary remuneration." It is unclear why the term "sells" should be limited to monetary remuneration as opposed to anything of value. For example, a wholesale dealer who trades a firearm for a few grams of cocaine to a someone other than a firearms dealer would not appear to fall within the scope of this provision. To avoid this outcome, OAG recommends that the commentary be redrafted to say, "'Sells' is an undefined term, intended to include any exchange of a firearm for anything of value."

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

RCC § 22E-4114 (b)(3) states:

> No firearm shall be sold if the purchaser is:
> (A) Not of sound mind;

[11] See D.C. Code§ 23-101 and *In re Prosecution of Hall,* 31 A.3d 453 (2011).

(B) Prohibited from possessing a firearm by RCC § 22E-4105; or
(C) Under 21 years of age, unless the purchaser is personally known to the seller or presents clear evidence of the purchaser's identity.

This provision appears to be an attempt to incorporate the current law found in D.C. Code § 22- 4510 (a)(3). That subparagraph states:

> No pistol shall be sold: (A) if the seller has reasonable cause to believe that the purchaser is not of sound mind or is forbidden by§ 22-4503 to possess a pistol [now "firearm"] or is under the age of 21 years; and (B) unless the purchaser is personally known to the seller or shall present clear evidence of his or her identity...[12]

Based upon both the logic of the current regulatory scheme and the punctuation of D.C. Code § 22-4510 (a)(3), OAG believes that the part of RCC § 22E-4114 (b)(3)(C) that states, "unless the purchaser is personally known to the seller or presents clear evidence of the purchaser's identity" should apply to RCC § 22E-4114 (b)(3)(A) and (B), as well. As drafted, RCC § 22E-4114 (b)(3) would not prohibit the anonymous sale of a pistol to an adult who appears to be of sound mind. It would only require that a purchaser who is under 21 years of age present evidence of his or her identity when that youth is not known to the seller. Putting aside the question about how the seller of a pistol would know if a stranger is 21 or over without seeing identification, the District has an interest in knowing who has purchased a pistol within its borders. There is nothing in the D.C. Code or DCMR that contemplates anonymous pistol sales.

The analysis that a person who is under 21 is prohibited from possessing a firearm is consistent with D.C. Code § 7-2509.02 (a) which states "(a) A person who submits an application pursuant to§ 22-4506 shall certify and demonstrate to the satisfaction of the Chief that he or she ... (1) Is at least 21 years of age... " (D.C. Code § 22-4506 is entitled, "Issue of a license to carry a pistol" and it authorizes the Chief of police to issue a license to such person to carry a concealed pistol in the District.)

Based on the foregoing, OAG recommends that RCC § 22E-4114(b) be redrafted to state all purchasers who are not personally known to the seller shall present clear evidence of his or her

[12] Note that there is a semicolon at the end of D.C. Code § 22-4510 (a)(3)(A). A semicolon is "A punctuation mark(;) indicating a pause, typically between two main clauses, that is more pronounced than that indicated by a comma. See https://www.lexico.com/en/definition/semicolon. The first main clause of D.C. Code § 22-4510 (a)(3), proceeding the semicolon, is designated as subparagraph (A). That clause bars the sale of a pistol to persons whom the seller "has reasonable cause to believe that the purchaser is not of sound mind or is forbidden by § 22-4503 to possess a pistol [now "firearm"] or is under the age of 21 years." The second main clause of D.C. Code § 22-4510 (a)(3), following the semicolon, is designated as subparagraph (B). That clause, following the lead in language of D.C. Code § 22-4510 (a)(3) reads "No pistol shall be sold... unless the purchaser is personally known to the seller or shall present clear evidence of his or her identity... "

identity and that no firearm shall be sold if the purchaser is not of sound mind, is otherwise prohibited from possessing a firearm, or is under 21 years of age.

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

RCC § 22E-4117(d) provides that "A person claiming a dangerous article shall be entitled to its possession only if certain conditions are met. The first two conditions are that:

> (1) Such person shows, on satisfactory evidence, that such person is the owner of the dangerous article or is the accredited representative of the owner, and that the ownership is lawful; [and]
> (2) Such person shows on satisfactory evidence that at the time the dangerous article was taken into possession by a police officer or a designated civilian employee of the Metropolitan Police Department, it was not unlawfully owned and was not unlawfully possessed or carried by the claimant or with his or her knowledge or consent.

Both of these conditions use the phrase "satisfactory evidence." This phrase was taken from D.C. Code § 22-4517(d). It is unclear whether this phrase refers to the type of evidence that may be used or if it is an evidentiary standard. OAG could not find any legislative history or case law that shines light on this issue. After reviewing the text, however, OAG is not sure that the phrase is needed. We, therefore, suggest that either the phrase be defined or it be deleted from both subsections.

RCC § 7-2507.02. UNLAWFUL STORAGE OF A FIREARM.

While OAG agrees with the intent of RCC § 7-2507.02 (a)(l)(B), we believe that this provision can be restructured to make it clearer. The current language of subparagraph (B) is:

> In a location that is neither:
> (i) A securely locked container or another location that a reasonable person would believe to be secure; nor
> (ii) Conveniently accessible and within reach of the actor.

The ambiguity is whether the word "neither" refers to (B) (i) only (i.e.," a securely locked container" or "another location that a reasonable person would believe to be secure") or whether the word "neither" refers to (B)(i) and (ii) ("A securely locked container or another location that a reasonable person would believe to be secure" and which is "Conveniently accessible and within reach of the actor.") To avoid a possible misinterpretation, we propose that it be amended to say:

> (B) In a location that is:
> (i) Not a securely locked container or another location that a reasonable person would believe to be secure; and

(ii) Not conveniently accessible and within reach of the actor.

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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: September 27, 2019

SUBJECT: First Draft of Report #40, Self-Defense Sprays.

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #40, Self-Defense Sprays.[1]

COMMENTS ON THE DRAFT REPORT

While OAG does not oppose the Commission's recommendation to repeal D.C. Code §§ 7-2502.12 (Definition of self-defense sprays) and 7-2502.13 (Possession of self-defense sprays), we believe that the Commission should recommend a conforming amendment to D.C. Code § 7–2501.01 (7)(C) that clarifies when the use of lacrimators are not considered destructive devices.

The possession of certain destructive devices are illegal.[2] Pursuant to D.C. Code § 7–2501.01 (7)(C), the definition of a destructive device includes lacrimators. That subparagraph states that one of the types of destructive devices is "Any device containing tear gas or a chemically similar lacrimator or sternutator by whatever name known." To ensure that self-defense sprays are not considered destructive devices, OAG recommends that subparagraph (C) be amended to state, "Any device containing tear gas or a chemically similar lacrimator or sternutator by whatever name known, other than a commercial product that is sold as a self-

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.
[2] See the Commission's First Draft of Report #39 - Weapon Offenses and Related Provisions.

defense spray and which is propelled from an aerosol container that is labeled with or accompanied by clearly written instructions as to is use."[3]

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

MEMORANDUM

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

To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service
Date:	September 27, 2019
Re:	Comments on First Draft of Report No. 39 Weapons Offenses and Related Provisions

The Public Defender Service makes the following comments on Report #39, Weapons Offenses and Related Provisions.

1) RCC § 7-2502.01(c)(4), possession of an unregistered firearm, destructive device, or ammunition provides that "a person shall not be subject to prosecution under subsection (b) of this section for possession of one or more empty cartridge cases or shells." Empty cartridge cases or shells may be kept as memorabilia or craft items. For instance, various American flags that incorporate cartridge cases are available for sale on the internet.[1] Cartridge cases themselves present no public safety concern because they cannot be immediately reused in firearms.

   Similarly, spent bullets do not present a public safety concern because they cannot be readily reused in a firearm. Reuse would require crafting the bullet into prohibited ammunition through a process that involves melting down the bullet and refilling a casing with primer. While spent bullets do not present a public safety concern, they do have uses as jewelry and for crafts.[2] PDS recommends adding the following language to RCC § 7-2502.01(c)(4) in order to exempt the possession of spent bullets from criminal liability.

   > A person shall not be subject to prosecution under subsection (b) of this section for possession of one or more empty cartridge cases or shells, or one or more spent bullets.

2) RCC § 7-2502.17(b)(1)(A), carrying an air or spring gun, excludes from liability possession of a spring or air gun that occurs "as part of a lawful theatrical performance or athletic contest." PDS

[1] See: https://www.range365.com/art-empty-shell/ or for various jewelry made from casings: https://bulletdesigns.com/

[2] For earrings created from spent bullets see: https://www.etsy.com/listing/581360543/30pcs-rose-gold-bullet-studs-spikes?ref=related-2 and https://bulletdesigns.com/

recommends expanding this exemption. Air guns and blowguns may also be used in cultural and educational presentations. For instance, Cherokee and other southeastern Indian tribes made extensive use of blowguns.[3] Blowguns have been used by tribes across the Amazon region. Further, individuals who possess blowguns in relation to an education, cultural, or athletic performance should be exempt from liability not only during the performance, but also during possession that occurs in relation to the performance. For example, an individual should be exempt from liability when he walks to the National Museum of the American Indian while carrying a blowgun for an educational presentation. PDS therefore recommends the following modification to RCC § 7-2502.17(b)(1)(A):

Notwithstanding subsection (a):

(1) A person shall not be subject to prosecution under the section if the conduct occurs during or is related to:

(A) ~~as part of~~ a lawful theatrical performance, educational or cultural presentation or athletic contest.

3. RCC § 7-2502.15, possession of a stun gun, criminalizes the possession of a stun gun by a person under age 18 or in a list of locations including a "public youth center." As noted in PDS's comments on CCRC Report #36, PDS recommends replacing the term "public youth center" with "public recreation center." The term "youth center" does not have a specific meaning within the District while recreation centers are well known and easily identifiable with signs that state "recreation center."

[3] See: http://www.cherokeeheritage.org/attractions/blowguns/

Memorandum

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United States Attorney
District of Columbia

Subject: Comments to D.C. Criminal Code Reform Commission for First Draft of Reports #39 and #40	Date: September 30, 2019

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

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

The U.S. Attorney's Office for the District of Columbia (USAO) and other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the CCRC's First Draft of Reports #39 and #40. USAO reviewed these documents and makes the recommendations noted below.[1]

Comments on Draft Reports #39 and #40

I. General Comments.

A. USAO recommends that the "voluntary surrender" provisions be expressly categorized as an affirmative defense in the RCC, and that the burden and standard of proof be included in the plain language of the statute.

In several provisions, the RCC provides that a person shall not be subject to prosecution for an otherwise prohibited item when voluntarily surrendering the object. *See* RCC § 7-2502.01(c)(5); RCC § 22E-4101(c)(1); RCC § 22E-4102(d)(1); RCC § 22E-4105(c)(1). The Commentary implies that this is an affirmative defense, indicating that the "Commission's recommendations for general defenses, including an innocent or momentary possession defense, are forthcoming." (Commentary at 9 & n.28.) The plain language of the statute, however, implies that this could be an element of the offense that the prosecution must disprove beyond a reasonable doubt. The current jury instructions expressly include voluntary surrender as an affirmative defense, D.C. Crim. Jur. Instr. 6.501(C), and USAO believes that this defense should be labeled accordingly in the RCC. Further, USAO believes that the burden and standard of proof should be set out in the plain language of the statute, in addition to the fact that the surrender must conform with District and federal law. The Commentary provides: "Under D.C. Code § 7-2507.05, for example, the accused must show not only an absence of criminal purpose but also that the possession was excused and justified as stemming from effort to aid and enhance social policy underlying law enforcement. The accused must also show an intent to

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

abandon and an act or omission by which such intention is put into effect. Proof of that intent, must be clear and unequivocal. A firearm must be unloaded and securely wrapped in package at time of surrender." (Commentary at 91.) USAO believes that the defendant's burden of proof should be included in the plain language of the statute to avoid potential future confusion.

2. USAO recommends that the statutory text clarify whether or not the exclusions listed in various provisions are affirmative defenses, the party that must prove or disprove the defense, and the applicable burden of proof.

Several provisions in the RCC set out "exclusions from liability." *See* RCC § 7-2502.01(c); RCC § 7-2502.17(b); RCC § 22E-4101(c); RCC § 22E-4102(d); RCC § 22E-4105; RCC § 22E-4118. USAO recommends that, for each exclusion, the RCC clarify which exclusion is an affirmative defense, the party that must prove or disprove the defense, and the applicable burden of proof. For example, the Commentary states that, for RCC § 7-2502.01(c)(3), "[w]here the government presents a *prima facie* case of possession of ammunition without the necessary firearm registration, the defendant has the burden of proving this exclusion from liability by a preponderance of the evidence." (Commentary at 9.) USAO recommends putting this affirmative defense language into the plain language of the statute, so that litigating parties will not need to look at the commentary to assess the applicable burden of proof. Clarifying this in the plain language of the statute will avoid potential future confusion.

3. USAO recommends clarifying prosecutorial authority to remain consistent with current law.

Several provisions of the RCC provide that the Attorney General "shall" prosecute violations of this section. *See, e.g.*, RCC § 7-2502.01(d); RCC § 7-2502.17(c) ("The Attorney General shall prosecute violations of this section."). D.C. Code § 23-101 governs prosecutorial authority in current law. D.C. Code § 23-101 contains an exception, however, that is not in the CCRC, providing that the Attorney General for the District of Columbia shall prosecute certain offenses "*except as otherwise provided* in such ordinance, regulation, or statute, or in this section." D.C. Code § 23-101(a) (emphasis added). USAO believes it is appropriate to clarify in the RCC that this exception remains in place. For example, § 23-101(d) provides: "An indictment or information brought in the name of the United States may include, in addition to offenses prosecutable by the United States, offenses prosecutable by the District of Columbia, and such prosecution may be conducted either solely by the Corporation Counsel [Attorney General for the District of Columbia] or his assistants or solely by the United States attorney or his assistants if the other prosecuting authority consents." USAO recommends that the CCRC clarify that prosecutorial authority will remain consistent with current law.

II. RCC Title 7; Chapter 25.

A. RCC § 7-2502.01. Possession of an Unregistered Firearm, Destructive Device, or Ammunition.

1. USAO opposes the provision mandating a jury trial in subsection (e) for a completed or attempt to commit this offense.

As the Commentary recognizes, under current District law, attempted possession of an unregistered firearm and attempted unlawful possession of ammunition are not jury demandable offenses. (Commentary at 11.) USAO frequently charges these two attempt provisions as bench trials. The Commentary cites to potential civil liberties concerns related to this charge. (Commentary at 11.) Notably, however, the Commentary does not cite to any case law from the D.C. Court of Appeals regarding the constitutionality of this charge, and it is unclear why this provision raises more potential constitutional concerns than, for example, Carrying a Pistol in an Unlawful Manner, RCC § 7-2509.06, which does not have a similar jury trial mandate. USAO recommends tracking current law, which does not contain a similar provision, and removing this provision.

2. USAO recommends creating separate offenses for what are currently First Degree and Second Degree Possession of an Unregistered Firearm, Destructive Device, or Ammunition.

Under the RCC, the first degree gradation of this offense prohibits possession of a firearm without a registration certificate and a destructive device, and the second degree gradation prohibits possession of ammunition without a registration certificate and restricted pistol bullets. Under current law, these are covered by different offenses, and it seems more appropriate to keep them as separate offenses than to separate them by gradation, as they relate to different conduct, instead of varying levels of the same conduct.

3. USAO recommends removing subsection (c)(1).

Subsection (c)(1) provides that "[a] person shall not be subject to prosecution under subsection (a) of this section for possession of a firearm frame, receiver, muffler, or silencer." None of those items, however, are prohibited by subsection (a), so it is unclear how a person could be subject to liability under subsection (a) for any of those items. Rather, it would be possession of the firearm itself that would lead to liability. If the CCRC keeps this provision, USAO recommends adding the word "solely" to clarify that possession of any of those items does not preclude liability for possession of a firearm without a registration certificate. With that change, subsection (c)(1) would provide:

> "(1) A person shall not be subject to prosecution under subsection (a) of this section solely for possession of a firearm frame, receiver, muffler, or silencer."

4. USAO recommends incorporating the additional requirements of subsections (c)(2)(B)(i)–(ii) into subsection (c)(2)(A).

With USAO's changes, subsection (c)(2) would provide:

"(A) Participating in a lawful recreational firearm-related activity inside the District; or ~~(B)~~ Traveling to or from a lawful recreational firearm-related activity outside the District; and

(i) Upon demand of a law enforcement officer exhibits proof that:
(I) The person is traveling to or from a lawful recreational firearm-related activity outside the District; and
(II) The person's possession or control of the firearm is lawful in the person's jurisdiction of residence; and
(ii) The firearm is transported in accordance with the requirements specified in RCC § 22E-4109."

Subsections (c)(2)(B)(i)–(ii) contain additional requirements for a person traveling to or from a lawful recreational firearm-related activity outside the District. Subsection (c)(2)(A) relates to a person participating in a lawful recreational firearm-related activity inside the District. Given the similarity of these two provisions, and the societal interests they both seek to protect, USAO believes that it is appropriate to have the same additional requirements in both provisions. A person carrying a firearm to an event in the District should be subject to the same requirements as a person carrying a firearm to an event outside the District.

III. RCC Title 22E; Chapter 7. Definitions.

A. RCC § 22E-701. Definitions.

1. USAO recommends that the definition of "Dangerous weapon" expressly include both stationary and non-stationary objects.

In the RCC, the definition of "Dangerous weapon" exempts a "stationary object." In support of this proposal, the Commentary cites to *Edwards v. United States*, 583 A.2d 661 (D.C. 1990). (Commentary at 41 & n.204.) *Edwards*, however, does not stand for the proposition that a stationary object *per se* cannot be a dangerous object. *Edwards*, instead, holds the following: "The question before us is not whether [the complainant] could be injured as seriously by having her head slammed against a stationary toilet bowl as she could if she were bludgeoned with a detached one; she obviously could. *We have no doubt that the legislature has the authority to punish the conduct revealed in this record as severely as an assault with any hard object, should it elect to do so.* What we must decide, however, is not whether the legislature could or ought to treat the two situations interchangeably, but whether it has done so. Given the applicable principles of statutory construction described at pages 663–664, supra, we conclude that it has not." 583 A.2d at 667–68 (emphasis added). The *Edwards* court, therefore, was engaging in statutory construction, and the CCRC can make a legislative proposal to the contrary. The RCC should provide, instead, that a stationary object can be a dangerous weapon when "in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a

person." The *Edwards* court, notably, stated that "[m]orally, running a victim into a spike is as culpable as stabbing him with a dagger." 583 A.2d at 667. The CCRC should recognize the moral equivalence of injuring someone with a stationary or non-stationary object, and expressly recognize that, in the definition of "Dangerous weapon," "any object" can include objects that are both stationary and non-stationary.

2. USAO recommends clarifying the definition of "possession."

In Report #36, "possession" was defined as: "(A) Hold or carry on one's person; or (B) Have the ability and desire to exercise control over." RCC § 22E-701. In Report #39, the Commentary provides: "Evidence of knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession." (Commentary at 7.) Knowledge of an item's location is not required to demonstrate constructive possession. For example, if a person cannot find an object for a moment, but is clear that the object belongs to the person and to no one else, then that person is deemed to constructively possess that object. Evidence of knowledge of the location is a relevant consideration, but is not a requirement. USAO recommends clarifying the commentary to reflect this.

IV. RCC Title 22E; Chapter 41. Weapons.

A. RCC § 22E-4101. Possession of a Prohibited Weapon or Accessory.

1. USAO recommends, in subsection (a)(2), changing the requisite *mens rea* from recklessness to strict liability.

The items listed in subsection (a)(2) are very dangerous, and there is no legitimate reason for anyone to possess them in the District (unless that person falls into the exception criteria in RCC § 22E-4118). If someone were to possess, for example, a machine gun, that person should be required to know that the item they possess is a machine gun. Further, it is unclear how the government would prove that a defendant was reckless as to the nature of the weapon, aside from showing that the item clearly is a machine gun or other object. With USAO's recommendation, there would still be a requirement that the possession be knowing, so the overall *mens rea* for this offense would require knowledge.

2. USAO recommends that the Commentary clarify the current prosecutorial authority.

The Commentary states: "Under current law, possession of an extended clip is criminalized in Title 7's firearm regulations chapter and is prosecuted by the Office of the Attorney General for the District of Columbia." (Commentary at 59.) This offense, however, is actually currently prosecuted by USAO. This is not a substantive change, and does not affect the statute.

B. RCC § 22E-4103. Possession of a Dangerous Weapon with Intent to Commit Crime.

1. USAO opposes the new provision disallowing a prosecution for an attempt to commit this offense.

RCC § 22E-4103(c) provides that "[i]t is not an offense to attempt to commit the offense described in this section." This is a change from current law. The Commentary, however, does not provide a rationale for this change, and it is unclear why this change was proposed. If, for example, an actor engaged in the prohibited conduct with a weapon that the actor believed to be a dangerous weapon, but was not in fact a dangerous weapon, that would constitute an attempt to commit this offense. Thus, an attempt to commit this charge is legally appropriate. USAO opposes this new provision and recommends removing it from this section.

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

1. USAO opposes creating different gradation for possession of a firearm and possession of an imitation firearm.

The RCC proposes that First Degree Possession of a Dangerous Weapon During a Crime applies when a person possesses a firearm, and Second Degree applies when a person possesses an imitation firearm or dangerous weapon. There is no reason to have separate gradations for a firearm and imitation firearm. If a firearm is not recovered, it is impossible to tell if it is a real firearm or an imitation firearm. Imitation firearms are intended to look like real firearms, and often cannot be distinguished without test-firing them, or otherwise checking them for operability. Thus, if a defendant holds up a gun to a victim and flees the scene with the gun, and the gun is not recovered (which is a common situation), it will, practically, be impossible to prove whether that gun was real or imitation. A defendant should not be subject to a more favorable gradation simply because the defendant flees the scene and officers are not able to recover the gun.

2. USAO opposes eliminating offense categorized as dangerous crimes under current law as predicates for this offense.

By including all offenses against persons under Subtitle II as predicate offenses, the RCC in some ways expands the categories in which liability can attach, which the USAO believes is appropriate. But by eliminating offenses categorized under current law as dangerous crimes from the category of predicate crimes, the RCC eliminates other crimes. Aside from the elimination of drug crimes, the Commentary does not discuss the rationale for eliminating other types of dangerous crimes as predicate offenses. For example, under current law, arson is a "dangerous crime" under D.C. Code § 23-1331(3), so is a predicate offense for the crime of Possession of a Firearm During a Crime of Violence or Dangerous Crime under D.C. Code § 4504(b). It is unclear why arson is excluded as a predicate offense. Arson is a very serious offense that can often result in substantial injury to a person or to property, so should be included as an additional offense listed in subsections (a)(2) and (b)(2).

Further, as the Commentary acknowledges (Commentary at 82 & n.517), certain types of conduct currently penalized as Robbery would not be included in Subtitle II of the Title 22 of the RCC. USAO believes that the type of conduct currently penalized as Robbery should remain a predicate for this offense, so recommends including Theft as an additional offense listed in subsections (a)(2) and (b)(2).

3. USAO recommends removing the words "in furtherance of and."

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

"(2) ~~In furtherance of and~~ while committing what, in fact, is . . ."

The requirement that a firearm, imitation firearm, or dangerous weapon be used "in furtherance of and while" committing a crime is a change from current law, which requires only that a person possess a firearm "while" committing a crime. This change is not warranted. A defendant creates an increased risk of danger by introducing a weapon to an offense. Even if a defendant does not use or display the firearm or other dangerous weapon, there is an additional level of risk created when a defendant has a weapon readily available. A firearm could inadvertently discharge, and another person could suffer injury as a result of that weapon. Of course, the presence of a firearm also increases the chances of the intentional use of the weapon at some point during the offense, and subsequent resultant injury. This is true even when the weapon is not used "in furtherance" of the underlying offense.

4. USAO opposes the new provision disallowing a prosecution for an attempt to commit this offense.

USAO relies on the same reasoning set forth above regarding RCC § 22E-4103(c).[2]

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

1. USAO recommends, in subsection (b)(2)(A), removing the requirement that the conviction be for a "comparable offense in another jurisdiction."

With USAO's changes, subsection (b)(2)(A) would provide:

"(A) Has a prior conviction for what is, in fact:

(i) A District offense or offense in another jurisdiction that is currently punishable by imprisonment for a term exceeding 1 year~~, or a comparable offense in another jurisdiction~~ . . ."

Current law requires that the offender "[h]as been convicted in any court of a crime punishable by imprisonment for a term exceeding one year." D.C. Code § 22-4503(a)(1).

[2] USAO also wants to clarify that the RCC is only intending to limit liability for Attempted Possession of a Dangerous Weapon During a Crime, and is not intending to limit liability for Possession of a Dangerous Weapon During a Crime in connection with an Attempted Offense, such as Attempted Robbery or Attempted Homicide. USAO understands the RCC's intent to be only to bar the former.

Changing this provision will lead to extensive litigation to ascertain what constitutes a comparable offense in another jurisdiction. This will be time-consuming, difficult to prove, and eliminate the certainty inherent in current law. Under current law, an offender knows that if he or she has been found guilty of an offense in any jurisdiction that is punishable by imprisonment for a term exceeding 1 year, they are subject to liability for possessing a firearm in the District. Under the RCC's proposal, there will be less certainty as to the requirements for this offense. Moreover, it is unclear whether this would be a question of law for a judge or a question of fact for a jury to consider.

2. USAO recommends removing the restriction on which intrafamily offenses qualify as predicate offenses under subsection (b)(2)(A)(iii).

   With USAO's changes, subsection (b)(2)(A)(iii) would provide:

   "(iii) An intrafamily offense, as defined in D.C. Code § 16-1001(8), ~~that requires as an element confinement, nonconsensual sexual conduct, bodily injury, or threats,~~ or a comparable offense in another jurisdiction within the last 5 years."

By limiting the predicate offenses to ones that involve, among other things, bodily injury, the RCC substantially limits the offenses that are eligible as predicate offenses. Particularly in the domestic violence context, the government may be unable to prove beyond a reasonable doubt that an offense resulted in bodily injury, even where, in fact, the offense resulted in bodily injury. This could include, for example, a situation where an eyewitness observes the entire assault, but cannot see whether the complainant had any visible injuries or suffered any physical pain. If the complainant is uncooperative, the government may rely exclusively on the eyewitness testimony to prove that the assaultive conduct took place. The effect of this bodily injury requirement helps to insulate a domestic abuser from greater liability on the underlying offense, and now will insulate a domestic abuser from liability for possessing a firearm. Possession of a firearm is particularly dangerous in the domestic violence context, and liability for possession of a firearm by a person previously convicted of a domestic violence offense should not be limited in this context. Current law appropriately has no such limitation, *see* D.C. Code § 22-4503(a)(6), and USAO recommends tracking current law in this respect. At a very minimum, to align with the District's firearm registration requirements set forth in the Commentary (at 93), the statute must include predicate offenses that involve "the use or attempted use of physical force, or the threatened use of a deadly weapon," which would include the RCC's offenses of attempted assault and menacing.

3. USAO recommends eliminating the requirement that the defendant "know" that they have a prior conviction or open warrant.

The Commentary provides that "the revised offense requires that the accused know that they have a prior conviction or open warrant." (Commentary at 95.) A defendant, however, may know that they committed an offense and have not been apprehended for it, or may know that they were in some kind of trouble with the law, but not be aware that there is, in fact, an open warrant. The requirement that a defendant "know" about this limits the eligible conduct too far.

4. USAO recommends removing subsection (e)(3)(C).

Subsection (e)(3)(C) provides that a "prior conviction" does not include "[a] conviction that is subject to a conditional plea agreement." A conviction subject to a conditional plea agreement, however, is no different for this purpose from a conviction following trial; it merely allows the possibility of appellate review on a certain issue. It would be inappropriate to exclude a conviction following trial from the definition of "prior conviction" merely due to the possibility of appellate reversal. Likewise, it is inappropriate to exclude a conditional plea agreement merely due to the possibility of appellate reversal. Rather, if a conviction is, in fact, reversed on appeal, then that conviction would no longer be a "prior conviction."

5. USAO recommends removing the 10-year limitation for prior felony convictions in subsection (b)(2)(A)(i).

Under current law, there is no such limitation. D.C. Code § 22-4503(a)(1). In support of this change, the Commentary cites to potential Second Amendment concerns. (Commentary at 92.) It is unclear, however, how any time limit could cure any constitutional issue. The Commentary notes that some courts permit a curtailing of Second Amendment rights based on a prior conviction only if the conviction indicates a propensity for violence, and that some courts hold that a person is unvirtuous for Second Amendment protection by committing any serious crime. (Commentary at 92–93.) The nature and seriousness of the crime, however, is the same, regardless of how much time has passed since the conviction. Moreover, by calculating the 10 years from the date of conviction, instead of from the date of release from incarceration or termination of supervision, a person who receives a 10-year sentence of incarceration under this provision could be permitted to possess a gun immediately upon release from incarceration, even while still on supervision for this offense. USAO accordingly recommends removing this 10-year limitation.

E. RCC § 22E-4118. Exclusions from Liability for Weapon Offenses.

A. USAO recommends that some of the exclusions from liability in subsection (b) be limited to those persons "on duty" to track current law.

Subsection (b)(2) and (b)(7) are appropriately limited to persons in that category who are "on duty." USAO recommends that the statute track other "on duty" requirements in current law. For example, consistent with D.C. Code § 22-4504(a)(3), USAO recommends that the exclusion in subsection (b)(1) be limited to "on-duty" members. Likewise, USAO recommends that subsection (b)(6) be limited to those persons who are "on duty," consistent with the requirement in D.C. Code § 22-4505(a)(1) that those persons only be allowed to carry a firearm "while engaged in the performance of their official duties." There is no reason for these persons to be exempt from certain possessory offenses while off-duty.

F. RCC § 22E-4119. Limitation on Convictions for Multiple Related Weapons Offenses.

A. USAO opposes this limitation, and recommends removal of RCC § 22E-4119 in its entirety.

USAO particularly opposes subsection (b). As the Commentary notes, there is no corresponding provision in current District law. (Commentary at 144.) There is necessarily a greater risk of harm introduced to a situation when a firearm is involved. As discussed above, the risk of both accidental and intentional discharge of a firearm increases when a firearm is present, which is a harm that the offense of Possession of a Dangerous Weapon During a Crime recognizes and seeks to deter. There is a difference, for example, between being armed with a knife during a crime and possessing a firearm during a crime of violence. Moreover, it is unclear why subsection (b)(3) includes any offense that includes as an element, of *any* gradation, that the person displayed or used a dangerous weapon. At a minimum, the person should have been convicted of the while armed provision of that offense; it should not just be a potential gradation of that offense.