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

Public Safety Division

MEMORANDUM

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

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: April 29, 2020

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

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #50, Cumulative Update to the Revised Criminal Code Other than Chapter 6.[1]

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

COMMENTS ON THE DRAFT REPORT

RCC § 22E-102. RULES OF INTERPRETATION

Paragraph (a) states:

> *Generally*. To interpret a statutory provision of this title, the plain meaning of that provision shall be examined first. If necessary to determine legislative intent, the structure, purpose, and history of the provision also may be examined.

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

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

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

RCC § 22E-303. CRIMINAL CONSPIRACY

Paragraph (d) states:

> *Jurisdiction when object of conspiracy is to engage in conduct outside the District.* When the object of a conspiracy formed inside the District is to engage in conduct outside the District, the conspiracy is a violation of this section only if:
> (1) The conduct would constitute a criminal offense under the statutory laws of the District if performed in the District; and
> (2) The conduct would constitute a criminal offense under:
> (A) The statutory laws of the other jurisdiction if performed in that jurisdiction; or
> (B) The statutory laws of the District even if performed outside the District.

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

RCC § 22E-701. GENERALLY APPLICABLE DEFINITIONS

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

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

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

[2] RCC § 22E-701 states, "'Services' includes…Labor, whether professional or nonprofessional…"

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

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

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

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

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

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

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

“Community-based organization”
(A) Means an organization that provides services, including medical care, counseling, homeless services, or drug treatment, to individuals and communities impacted by drug use; and
(B) Includes any organization currently participating in the Needle Exchange Program with the Department of Human Services under § 48-1103.01.[3]

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

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

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

OAG recommends reformulating this definition to read as follows:

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

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

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

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

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

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

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

RCC § 22E-1101. MURDER

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

RCC § 22E-1301. SEXUAL ASSAULT

This offense now reads:

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

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

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

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

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

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

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

(1) *Effective Consent Defense*. In addition to any defenses otherwise applicable to the actor's conduct under District law, the complainant's effective consent to the actor's conduct or the actor's reasonable belief that the complainant gave effective consent to the conduct charged to constitute the offense is an affirmative defense to prosecution under this section, provided that:
    (A) The conduct does not inflict significant bodily injury or serious bodily injury, or involve the use of a dangerous weapon; and
    (B) At the time of the conduct, none of the following is true:
        (i) The complainant is under 16 years of age and the actor is at least 4 years older than the complainant; or
        (ii) The complainant is under 18 years of age and the actor is in a position of trust with or authority over the complainant, at least 18 years of age, and at least 4 years older than the complainant.

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

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

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

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

(B) The actor is at least 4 years older than a complainant who is under 16 years of age; or

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

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

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

RCC § 22E-1307. NONCONSENSUAL SEXUAL CONDUCT

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

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

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

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

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

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

RCC § 22E-1309. DUTY TO REPORT A SEX CRIME INVOLVING A PERSON UNDER 16 YEARS OF AGE; AND RCC § 22E-1310. CIVIL INFRACTION FOR FAILURE TO REPORT A SEX CRIME INVOLVING A PERSON UNDER 16 YEARS OF AGE.

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

RCC § 22E-1312. INCEST

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

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

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

RCC § 22E-1611. CIVIL ACTION

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

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

RCC § 22E-1801. STALKING

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

RCC § 22E-1803. VOYEURISM

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

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[11] See RCC § 22E-1801 (b)(1).

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

RCC § 22E-2205. IDENTITY THEFT

The Commentary for this offense notes:

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

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

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

RCC § 22E-2206. IDENTITY THEFT CIVIL PROVISIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RCC § 22E-2501. ARSON

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

RCC § 22E-2503. CRIMINAL DAMAGE TO PROPERTY

Paragraph (e) states:

> *Fifth degree.* A person commits fifth degree criminal damage to property when that person:
> (1) Recklessly damages or destroys property;
> (2) Knowing that it is the property of another;
> (3) Without the effective consent of an owner; and
> (4) In fact, there is damage to the property.

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

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

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

> *Second degree.* A person commits second degree escape from an institution or officer when that person:
> (1) In fact, is in the lawful custody of a law enforcement officer of the District of Columbia or of the United States; and
> (2) Knowingly, without the effective consent of the law enforcement officer, leaves custody.

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

RCC § 22E-3403. CORRECTIONAL FACILITY CONTRABAND

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

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

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

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

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

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

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

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

Paragraph (d) states:

> A person claiming a dangerous article shall be entitled to its possession only if:
> (1) The claimant shows, on satisfactory evidence, that the person is the owner of the dangerous article or is the accredited representative of the owner, and that the ownership is lawful;
> (2) The claimant shows, on satisfactory evidence, that at the time the dangerous article was taken into possession by a police officer or a designated civilian employee of the Metropolitan Police Department, it was not unlawfully owned and was not unlawfully possessed or carried by the claimant or with their knowledge or consent; and

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

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

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

(1) The claimant shows, on satisfactory evidence, that the ownership is lawful and:

i. the person is the owner of the dangerous article or

ii. is the accredited representative of the owner and has a power of attorney from the owner;

(2) The claimant shows, on satisfactory evidence, that at the time the dangerous article was taken into possession by a police officer or a designated civilian employee of the Metropolitan Police Department, it was not unlawfully owned and was not unlawfully possessed or carried by the claimant or with their knowledge or consent; and

(3) The receipt of possession by the claimant does not cause the article to be a nuisance.

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

RCC § 22E-4202. PUBLIC NUISANCE

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

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

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

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

RCC § 22E-4205. BREACH OF HOME PRIVACY

Paragraph (a) of this offense states:

> *Offense.* An actor commits breach of home privacy when that actor:
> (1) Knowingly and surreptitiously observes inside a dwelling, by any means; and
> (2) In fact, an occupant of the dwelling would have a reasonable expectation of privacy.

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

RCC § 22E-4206. INDECENT EXPOSURE

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

RCC § 7-2502.15. POSSESSION OF A STUN GUN

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

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

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

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

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

Paragraph (g) provides for "dismissal of proceedings."[18] Subparagraph (g)(1) states, in relevant part:

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

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

> If the Court grants the motion to seal:
> (1) (A) The Court shall order the prosecutor, any law enforcement agency, and any pretrial, corrections, or community supervision agency to remove from their publicly available records all references that identify the movant as having been arrested, prosecuted, or convicted.
>
> (B) The prosecutor's office and agencies shall be entitled to retain any and all records relating to the movant's arrest and conviction in a nonpublic file.
>
> (C) The prosecutor, any law enforcement agency, and any pretrial, corrections, or community supervision agency office shall file a certification with the Court within 90 days that, to the best of its knowledge and belief, all references that identify the movant as having been arrested, prosecuted, or convicted have been removed from its publicly available records.
>
> (2) (A) The Court shall order the Clerk to remove or eliminate all publicly available Court records that identify the movant as having been arrested, prosecuted, or convicted.
>
> (B) The Clerk shall be entitled to retain any and all records relating to the movant's arrest, related court proceedings, or conviction in a nonpublic file.

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

> (3) (A) In a case involving co-defendants in which the Court orders the movant's records sealed, the Court may order that only those records, or portions thereof, relating solely to the movant be redacted.
>
> (B) The Court need not order the redaction of references to the movant that appear in a transcript of court proceedings involving co-defendants.
>
> (4) The Court shall not order the redaction of the movant's name from any published opinion of the trial or appellate courts that refer to the movant.
>
> (5) Unless otherwise ordered by the Court, the Clerk and any other agency shall reply in response to inquiries from the public concerning the existence of records which have been sealed pursuant to this chapter that no records are available.

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

Subparagraph (g)(2) states:

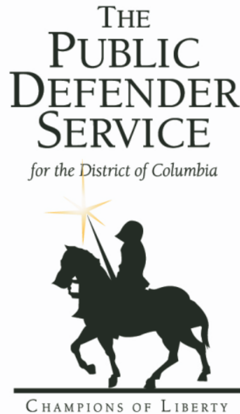
> Upon the dismissal of such person and discharge of the proceedings against <u>him</u> under paragraph (1) of this subsection, such person may apply to the court for an order to expunge from all official records (other than the nonpublic records to be retained under paragraph (1) of this subsection)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

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

RCC § 48-904.10. POSSESSION OF DRUG MANUFACTURING PARAPHERNALIA

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

MEMORANDUM



To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Laura E. Hankins, General Counsel
Date:	May 1, 2020
Re:	Comments on First Draft of Report No. 50, Cumulative Update to the Revised Criminal Code Other than Chapter 6

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

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

   PDS recommends that the RCC clarify the drive-by shooting aggravating circumstance and remove random shooting as an aggravating circumstance. PDS recommends defining "drive-by shooting" as a "shooting committed from a vehicle that is being driven at the time of the shooting." The chief harm that the enhancement apparently seeks to address is the indiscriminate shooting of individuals from a moving vehicle and the resulting danger posed to all individuals in the vicinity. Shooting from a parked vehicle that is turned on but not being driven[1] could fall within the scope of the current version of the enhancement while presenting no additional danger beyond that posed by an individual who is on foot and shooting from the sidewalk.

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

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

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

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

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

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

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

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

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

PDS recommends the following amendment:

> (e) *Affirmative defenses.* It is an affirmative defense to liability under this section that, in fact:
> (1) The actor has the complainant's effective consent to the actor's conduct, or the actor reasonably believes that the actor has the complainant's effective consent to the actor's conduct;
> ~~(2) The actor's conduct does not inflict significant bodily injury or serious bodily injury, or involve the use of a dangerous weapon;~~
> (3) The actor is not at least 4 years older than a complainant who is under 16 years of age; and
> ~~(4) The actor is not in a position of trust with or authority over the complainant, is not at least 18 years of age, and is not at least 4 years older than the complainant who is under 18 years of age~~

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

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

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

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

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

(B) Such reasonable belief is based on an oral or written statement about the complainant's age made to the actor:

(i) by the complainant; or

(ii)(I) by another person;

(II) the actor reasonably believed the complainant knew the statement had been made to the actor; and

(III) the complainant did not object to or correct the statement.

[3] Report #50, Appendix D1 at page 173.

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

5. RCC § 22E-1306, Arranging for Sexual Conduct with a Minor. With the most recent revision of the offense, the Commission made the offense so broad that it criminalizes responsible parenting. For example, a parent ("a person with responsibility under civil law for the health, welfare, or supervision of the complainant") knowingly gives effective consent for her 17-year-old daughter to engage in or submit to a sexual act or contact with the teenager's boyfriend when she hands her daughter a package of condoms and lectures her about safe sex. PDS proposes the following instead:

   (a) An actor commits arranging for sexual conduct with a minor when that actor:

      (1) Knowingly:

         (A) As a person with a responsibility under civil law for the health, welfare, or supervision of the complainant;

         (B) Gives effective consent for the complainant to engage in or submit to a sexual act or sexual contact with or for the arousal or gratification of another person;[5]

      (2) The actor and the other person, in fact, are at least 18 years of age and at least 4 years older than the complainant; and

      (3)(A) The actor was reckless as to the fact that the complainant is under 16 years of age; or

[4] Emphasis added.

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

(B) The actor:

(i) Was reckless as to the fact that complainant is under 18 years of age; and

(ii) Knows that the other person is in a position of trust with or authority over the complainant.

6. RCC § 22E-1602, Forced Commercial Sex. In Report #50, CCRC changed the language of the first element of the forced commercial sex offense from "knowingly causes the complainant to engage in a commercial sex act with another person" to "knowingly causes the complainant to engage in a commercial sex act other than with the actor."[6] CCRC explained that it intended the change to be clarificatory because the prior language could be interpreted to exclude masturbation. PDS does not object to rewriting the offense so there is no risk of confusion that that it covers masturbation. To be clear, masturbation is already either a "sexual act" or a "sexual contact" as those terms are currently defined. To the extent the prior phrasing of the forced commercial sex act was unclear or confusing, it was the preposition "with" that created the issue; whether it can be said that compelling a person to masturbate for someone else's gratification is engaging in a sexual act or sexual contact *with* that other person. The problem with the "person other than the actor" phrasing is that it allows the actor to be held liable for forced commercial sex for conduct involving only the actor and the complainant if masturbation is included. The idea that the commercial sex act must involve another person is lost. According to Polaris, an organization dedicated to ending sex and labor trafficking in North America, "Sex trafficking is the crime of using force, fraud or coercion to induce another individual *to sell* sex."[7] To both be clear that masturbation is covered conduct and to be clear that the offense is the forced *selling* of sex, PDS proposes rewriting the first element of § 22E-1602 as follows: "Knowingly causes the complainant to engage in a commercial sex act with or for the gratification or arousal another person."

7. RCC § 22E-4103, Possession of a Dangerous Weapon with Intent to Commit Crime. PDS objects to the elimination of the provision that excluded liability for an attempt to commit this offense. CCRC made the change on the recommendation of the USAO which posited a hypothetical where the actor engaged in the prohibited conduct with what the actor believed was a dangerous weapon, but which was not, in fact, a "dangerous weapon."[8] Allowing liability for that situation can be achieved other than by deleting the "no attempt offense" subsection and PDS strongly recommends that CCRC do so. Allowing attempt liability generally for this offense creates a double inchoate crime. Possession of a dangerous weapon *with intent to commit a crime* is already an inchoate crime. The harm being discouraged by this offense is the commission of a crime against a person using a dangerous weapon. To discourage the harm of the completed armed crime, the offenses punishes the risk of that harm that is created when the actor possesses a dangerous weapon with the intent to commit a crime against a person. To allow

[6] See Report #50, App. A at page 79.

[7] https://polarisproject.org/human-trafficking/ (emphasis added).

[8] See Report #50, App. D at page 371.

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

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

> An actor commits possession of a dangerous weapon with intent to commit crime when that actor:
>
> (1) Knowingly possesses
>
> (A) A dangerous weapon; or
>
> (B) An object with intent that the object be a dangerous weapon;
>
> (2) With intent to use the dangerous weapon or object to commit a criminal harm …

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

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

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

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

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

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

[10] D.C. Code § 16-803(c)(1).

Memorandum

Timothy J. Shea
United States Attorney
District of Columbia

Subject: Comments to D.C. Criminal Code Reform Commission for First Draft of Report #50	Date: May 1, 2020

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

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

The U.S. Attorney's Office for the District of Columbia (USAO) and other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the CCRC's First Draft of Report #50. USAO reviewed this document and makes the recommendations noted below.[1]

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

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

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

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

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

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

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

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

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

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

RCC § 22E-215. De Minimis Defense.

1. USAO recommends deleting § 22E-215.

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

RCC § 22E-701. Generally Applicable Definitions.

1. USAO recommends that the CCRC rephrase the definition of "debt bondage."

With USAO's changes, the definition of "debt bondage" would provide:

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

~~(A) The value of the labor, services, or commercial sex acts, as reasonably assessed, is not applied toward the liquidation of the debt;~~

~~(B) The length and nature of the labor, services, or commercial sex acts are not respectively limited and defined; or~~

(C) ~~The amount of the debt does not reasonably reflect the value of the items or services for which the debt was incurred~~."

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

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

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

   With USAO's changes, the definition of "labor" would provide:

   " 'Labor' means work that has economic or financial value~~, other than a commercial sex act~~."

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

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

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

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

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

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

RCC § 22E-1101. Murder[2]

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

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

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

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

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

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

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

Felony Murders Involving Sexual Assault

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

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

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

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

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

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

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

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

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

Felony Murders Involving Child Abuse

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

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

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

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

Felony Murders Involving Kidnapping

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

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

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

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

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

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

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

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

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

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

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

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

Felony Murders Involving Arson

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

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

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

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

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

<u>*Felony Murders Involving Robberies*</u>

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

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

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

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

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

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

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

The Strong Contrast with Second Degree Murders Under Existing Law

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

Second degree murder convictions can result from:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RCC § 22E-1201. Robbery.

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

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

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

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

Chapter 13. Sexual Assault and Related Provisions.

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

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

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

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

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

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

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

The CCRC notes that "[t]he USAO recommendations significantly expand the scope of the current D.C. Code sexual abuse aggravators, which do not contain an aggravator for only one prior conviction and require crimes be committed 'against' 2 or more victims." (App. D1 at 166–67.) It is unclear, however, how the USAO recommendations would expand current law. Current law provides that the sexual offense repeat offender enhancement applies when "[t]he defendant is or has been found guilty of committing sex offenses against 2 or more victims, whether in the same or other proceedings by a court of the District of Columbia, any state, or the United States or its territories." D.C. Code § 22-3020(a)(5). For this enhancement to apply, the defendant must have been found guilty of committing at least one offense involving at least one victim in the current case; if there is no finding of guilt on the underlying offense, there could be no finding of guilt on the enhancement. At the time of a finding of guilt in the current case, the defendant therefore "is" guilty of committing a sex offense in the current case. If the defendant has one prior conviction for a sex offense, the defendant "has been" found guilty of a sex offense in a prior case. Thus, at the time of a finding of guilt in the current case, the defendant "is or has been" found guilty of committing sex offenses against 2 or more victims. Moreover, if there are two victims in a single case, then, if the defendant is found guilty of committing offenses against both victims, the defendant "is guilty" of committing sex offenses against 2 or more victims. The

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

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

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

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

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

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

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

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

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

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

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

<u>RCC § 22E-1401. Kidnapping.</u>

1. <u>USAO recommends, in §§ 22E-1401(a)(1) and (b)(1) (Kidnapping) and §§ 22E-1402(a)(1) and (b)(1) (Criminal Restraint), removing the words "substantially."</u>

   With USAO's changes, these subsections would provide:

   "Knowingly ~~and substantially~~ confines or moves the complainant;"

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

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

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

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

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

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

   The Commentary to kidnapping provides, in relevant part:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RCC § 22E-2701. Burglary.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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